The Fourth PART
OF
Modern Reports,
BEING A
COLLECTION
OF SEVERAL
SPECIAL CASES
Argued and Adjudged
IN THE
COURT
OF
King and Queen's Bench:

In the 2d, 3d, 4th, 5th, and 6th Years of the Reigns of King *William* and Queen *Mary*, and 7th Year of King *William*, and Judgments thereupon; with ſeveral of the Pleadings at large; being carefully examined by the Records.

AND ALSO

The *Number-Rolls* of moſt of the other CASES.

The Second Edition, carefully reviſed, with the Addition of a great Number of References never before printed.

Collected by a Learned Hand.

In the *SAVOY*:
Printed by E. NUTT, R. NUTT and R. GOSLING, (Aſſigns of *E. Sayer* Eſq;) for Tho. Ward in the *Inner-Temple Lane*, 1722.

THE

PREFACE.

BEFORE I give an Account of the following Caſes, I ſhall mention ſomething of *Reports* in general.

We have no printed Caſes of the ancient Proceedings either in the Sheriffs Torn, or in the County-Courts; the Reaſon whereof may be, becauſe Juſtice was then adminiſtred in a Summary Way, and *de plano*.

Neither have we any for above one hundred Years after the Courts of Law were ſettled in *Weſtminſter-Hall*; which was about the later End of King *John*.

But in the Reign of *Ed.* 3. when the Profeſſors of the Law (as my Lord *Coke* obſerves) were excellently Learned, and when Serjeants drew their own Pleadings, then (as he farther mentions) Jangling and Queſtions did ariſe, and Exceptions were taken more to Form than Matter. It was then our Book-Caſes began, and have been continued ever ſince.

And it is neceſſary it ſhould be ſo, becauſe the Opinions of Lawyers are generally guided by thoſe of their Predeceſſors, in which they ſeem to imitate the ancient *Prætors*, who eſtabliſhed their Judgments, not ſo much upon their own Reaſon, as upon the written Laws of the Empire.

'Tis true, it was the Complaint of that Learned Perſon before-mentioned, that he liv'd in a ſcribbling Age, and that *Quotidie plus, quotidie pejus ſcribunt*; yet he wrote on.

And ſo has the Collector of theſe Caſes, who for ſeveral Years attended that Court in which they were adjudged, and has not only compared them with the Records, but was aſſiſted in the Special Pleadings by a very able Clerk, who was particularly concerned in them.

Some, and but a few of them, are reported by others, and recommended by a great Name in the Title-Page, which is a certain Advantage to the Bookſeller, whether 'tis ſo to the Reader or not; but 'tis the Benefit of the Reader which is chiefly intended by theſe Papers.

The Quotations in the Margin have been carefully examined with the Books, and out of the great Number of Authorities which are uſually cited at the Bar, none are here inſerted but ſuch as ſeem pertinent to the Caſe in Queſtion.

And that nothing might be wanting to this Work, a much more than uſual Care has been had in the Correction of it; and the nice Examination of the Rolls, however troubleſome and expenſive, has been perform'd perhaps beyond what has been done in moſt Books of this Nature. So that it may well be hoped that thoſe few Miſtakes, which poſſibly have eſcap'd the Preſs, may eaſily be corrected; as well as thoſe of the Author, which he believes not to be any where material; but has not the Vanity to think himſelf not obnoxious to Errors, as all Mankind muſt always be.

Vale.

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DE

Term. Sancti Hill.

Anno 2 Gulielmi & Mariæ Regis & Reginæ Angliæ, &c. 1690.

Symonds *verſus* Cudmore.

AN Ejectment was brought for one Meſſuage, one Curtilage and Garden, in the Pariſh of St. Paul in the City of Exon, on the Demiſe of Nicholas Martin, &c. 1 Salk. 338. 2 Salk. 619. 1 Shower 370.

Upon Not guilty pleaded, the Jury found a ſpecial Verdict; that Sir Nicholas Martin being Tenant for Life, with Remainder in Tail to William his eldeſt Son, and having a Power to make Leaſes for 21 Years, or three Lives, reſerving the antient Rent, did make a Leaſe to Clement Weſtcome for 99 Years, if Richard and Nicholas Weſtcome ſhould ſo long live, reſerving the antient Rent, which was 8 l. 10 s. per Annum.

Sir Nicholas Martin died leaving Iſſue William Martin his eldeſt Son and Heir, who being then ſeiſed of the Remainder in Tail; and alſo of the Reverſion in Fee expectant upon the Determination of that Eſtate, did by Indenture releaſe the ſaid Rent, and before the Determination of the aforeſaid Leaſe made by his Father, did demiſe the Premiſes to Elizabeth Weſtcome for 99 Years, if George and William Weſtcome ſhould ſo long live, to commence after the Determination of the firſt Leaſe.

Willlam Martin died leaving Iſſue Nicholas Martin his eldeſt Son and Heir, who being the Iſſue in Tail, levied a Fine to the Uſe of himſelf, and his Heirs.

Afterwards the firſt Leaſe determined, then Nicholas Martin entred, and made a Leaſe to the Plaintiff Symonds, upon whom Cudmore the Defendant, being the Aſſignee of the ſecond Leaſe, entred; and, Whether his Entry was lawful? was the Queſtion.

Thoſe who argued for the Plaintiff would have the Eſtate-tail in being; and that tho' it might be barred by the Fine, yet it was not extinct; therefore they would not have the Leaſe void, but voidable by the Iſſue in Tail, and that the Cognizee of the Fine might avoid it as the Iſſue in Tail might have done if the Fine had not been levied.

They argued that at the Common Law all Eſtates of Inheritance were in Fee; and before the Statute De Donis, the Donee had a Fee-ſimple conditional, and might have barred his Iſſue.

13 E.1.cap.1. That by the Statute De Donis, &c. called Weſtm. the 2d, the Common Law was altered, which Statute was made for the benefit of the Iſſue by reſtraining the Tenant in Tail, either before or after Iſſue born, to bar or change the Eſtate.

'Tis true, if he had made a Feoffment with Livery, it would work a Diſcontinuance of the Tail, becauſe he had an Eſtate of Inheritance, and in ſuch Caſe the Iſſue in Tail 4H.7.cap.24. must have brought his real Action: But now by ſubſe- 32 H. 8. cap. quent Statutes, Power is given to Tenant in Tail to 34. bar his Iſſue by Fine.

If this Leaſe ſhould not be voidable, then it would be good as long as any of the Iſſue in Tail are living, but that cannot be, becauſe 'tis not for the Benefit of ſuch Iſſue 1 Inſt. 23. b. that it ſhould be ſo; and for this Reaſon the Books are ve- 44 E. 3. 21. ry plain, that Alienations made for their Benefit and not 46 E.3. 4. to their Prejudice, are binding.

Admitting it therefore to be voidable by the Iſſue in Tail, then the Cognizee in the Fine muſt have the ſame Power to avoid it as the Iſſue in Tail had before the Fine levied: and to prove this, they relied on my Ld. Coke's Comment 1 Inſt.46.b. on Littleton; that if Tenant in Tail makes a Leaſe for forty Years, reſerving Rent, to commence 10 Years after, and dies, then the Iſſue in Tail enters and makes a Feoffment to B. the 10 Years expire, and the Leſſee enters, and B. accepts the Rent, and waves the Poſſeſſion of the Land; this makes the executory Leaſe good, becauſe he ſhall have the ſame Election as the Iſſue in Tail had, either to make it ſo or avoid it.

Object. It may be objected in this Caſe, that the Leaſe made by the Tenant in Tail, never commenced till after the Fine levied by the Iſſue; and therefore it could not ariſe out of the Eſtate Tail, becauſe it was extinguiſhed by the Fine, and that if it ariſe out of any thing, it muſt be out of the Reverſion in Fee.

Anſw.

Anſw. Which Opinion may receive this Anſwer; That the Eſtate-tail was not extinguiſhed by this Fine, becauſe the Law will ſuppoſe an Exiſtence of it in the Cognizee to prevent a Wrong; and therefore where ſuch an Eſtate is intermixed with a Fee, it ſhall have a Being againſt this wrongful and tortious Leaſe.

In Errington's Caſe there ſeems to be an Opinion againſt this, the Caſe was this: R. and Katherine his Wife were Tenants in Special Tail, Reverſion in Fee to R. who died; the Iſſue in Tail, who had alſo the Reverſion in Fee in the Life-time of K. his Mother, made a Leaſe for 40 Years to J. S. to commence after the Death of K. his Mother, and dies, the Reverſion deſcended to Jane, who in the Life-time of K. levied a Fine; the Mother died: The Cognizee of the Fine ſhall not avoid this Leaſe, becauſe he who made it was inheritable to the Eſtate-Tail, and likewiſe to the Reverſion in Fee, and ſo it iſſues out of both; for being actually ſeiſed of the Fee-ſimple he charged the Reverſion, and the Leaſe is good againſt him by way of Eſtoppel, and by way of Intereſt alſo out of the Reverſion, and the Eſtate-Tail is not only barred, but extinct by the Fine.

But there was no Judgment given in that Caſe; my Ld. Coke was there of a contrary Opinion to Juſtice Flemming: And in Capell's Caſe, which was adjudged in the 23d Year of the Queen, and publiſhed in his firſt Book of Reports, there is a contrary Reſolution; it was this: The Remainder-Man in Tail granted a Rent-charge, and the Tenant in Tail ſuffered a Common Recovery, and having alienedthe Eſtate died without Iſſue, the Grantee diſtreined for Rent, and the Alienee replevied; and it was held that the Title was in him, becauſe the Common Recovery ſuffered by the Tenant in Tail did bind all the Remainders, and all Leaſes made by them.

Econtra. Thoſe who argued for the Defendant ſaid, That the Leaſe for Years was not to be avoided by the Iſſue in Tail, becauſe it ariſeth even out of the Eſtate-tail, and likewiſe out of the Reverſion; and therefore it muſt be a good Leaſe, tho' the Tail might be barred by the Fine; for it was made by William Martin when he was Tenant in Tail, and for that Reaſon 'tis not void againſt his Iſſue; but the Iſſue having levied a Fine the Eſtate-tail is then extinct, ſo that the Cognizee cannot come in Privity of it being a meer Stranger, and therefore ſhall not avoid this Leaſe.

2 Cro. 688. Bridg. 27. id. 1 Roll. Abr. 843. id. Hob. 258.

Cro. Eliz. 253. Roll. Rep. idem. 19.

If Tenant for Life and Remainder in Tail join in a Lease to A. for Life, Remainder to B. for Life, rendring Rent, the Tenant for Life dieth, and the Remainder-Man accepts the Rent of the first Lessee for Life and dieth, and the Issue in Tail enters, and accepts the Rent likewise, and makes a Feoffment and levieth a Fine to S. who bought the Land, then the first Lessee for Life died; it was held that the Purchaser should never avoid this Lease in Remainder, because it ariseth out of both the Estates of the Tenant for Life, and him in Remainder in Tail, and therefore the Acceptance of the Rent by the Issue in Tail made good both the Estate for Life to A. and also the Remainder to B. for Life.

There is a Case which governs this at Bar, it was adjudged in the Court of Common Pleas in Trinity Term, 3 Caroli, upon a Demurrer in Replevin, and it was shortly thus:

Cro. Car. 103.

The Father was Tenant for Life, Remainder in Tail to his Son, Remainder in Tail to the Father, Remainder in Tail general to the Son, Remainder in Fee to the Father, they both granted a Rent-charge by Deed to the Defendant in Fee, then they joined in levying of a Fine, and declared the Uses to the Father in Fee, who made a Feoffment to the Plaintiff and died, and the Question was, Whether the Estate of the Feoffee should be charged with this Rent? Because it being granted by the Tenant for Life, tho' it was confirmed by the Remainder-man in Tail, 'tis void as to him, and therefore it was said that it must arise only out of the Estate for Life.

But it was held, That because the Tenant for Life had likewise a Remainder to the Estate both in Tail and in Fee, that this Rent issued out of all his Estates, and the Tail being barred by the Fine, the Feoffee must come in under all the Estates of the Feoffor, who must hold it charged with the Rent.

So in this Case the Lease ariseth out of both the Estates of William Martin, and the Issue in Tail shall never avoid it by this Fine.

Judicium.

Afterwards in Hillary Term, 4 & 5 Willielmi & Mariæ, Judgment was given for the Defendant, and that the Cognizee of the Fine could not avoid this Lease made by William Martin.

The Reasons were, because it was an Interest derived out of the Estate-tail, and it charged also the Reversion in Fee; for after the Determination of the first Lease made by Sir Nicholas Martin, his Son who had the Remainder in Tail might have suffered a Recovery and barred the Estate-tail.

Suppoſe this was not a void Leaſe, but voidable by the Iſſue in Tail, yet after the Fine levied by him the Cognizee ſhall never avoid it, becauſe he cannot be in Privity to the Eſtate-tail, for that is extinguiſhed by the Fine, and the Cognizor having thereby diveſted himſelf of that Power which he had to avoid this Leaſe, can never transfer it to the Cognizee.

Now it cannot be a Doubt, Whether the Eſtate-tail is extinguiſhed or not: 'Tis true by the expreſs Words of the Statute of 32 H. 8. 'tis barred; the Words are, That a Fine levied of Lands entailed on the Cogniſor, or any of his Anceſtors, ſhall be a Bar againſt the Perſon and his Anceſtors, claiming by force of ſuch Entail. And it hath been often held upon this Statute, that a Fine levied by a Remainder-man in Tail, during the Eſtate of a Tenant for Life, was an Extinguiſhment of the Entail. 2 Leon. 37.

If it ſhould be otherwiſe, then there would be two Fee-ſimples in one and the ſame Perſon. A qualified Fee determinable upon the Death of Tenant in Tail dying without Iſſue, and an abſolute Fee out of the Reverſion, which cannot be.

As to Acceptance or Refuſal of Rent, 'tis not much material either to affirm or avoid this Leaſe; for unleſs the Iſſue in Tail doth enter, the Leaſe ſhall not be avoided. Dyer 51.

To prove this a Caſe in Dyer was cited, which was, Tenant in Tail before the Statute of Uſes, made a Feoffment in Fee to the Uſe of himſelf and his Heirs, then he and the Feoffees join in a Leaſe for Years rendring Rent, then the Statute was made, and the Tenant in Tail died ſeiſed, afterwards the Iſſue in Tail levied a Fine, and alienes the Land before he made any Entry upon the Leſſee, or accepted the Rent, the Alienee did accept it; but whether he had done ſo or not, he could never avoid the Leaſe, becauſe it was not void by the Death of the Tenant in Tail without the actual Entry of the Iſſue.

To maintain this Judgment, another Caſe was alſo cited, which was; Baron and Feme Tenants in Tail, Remainder to the Husband in Fee; they had Iſſue A. the Husband died, the Iſſue in Tail in the Life-time of his Mother levied a Fine to Sir Geo. Brown and his Heirs, the Mother made a Leaſe for Life, not warranted by the Statute of 32 H. 8. cap. 28. This was a Diſcontinuance, and therefore a Forfeiture, and Sir George might well enter thereupon; for the Fine ſhall not operate by way of Concluſion, and the Mother be ſtill Tenant in Tail; but the Eſtate-tail is barred and extinct as to the Iſſue in Tail. 3 Rep. 50. Cro Eliz. 513. Idem Sir *Geo. Brown*'s Caſe.

And

And for these Reasons and upon these Authorities, William Martin the Tenant in Tail having also the Reversion in Fee, the Lease made by him issues out of both the Estates, and the Issue in Tail hath extinguished the Estate-tail by levying of the Fine, so that the Cognizee must be in of the Reversion in Fee.

Sid. 260. In the Argument of this Case at the Bench, Justice Dolben said, That the Case of Opie and Thomasius was neither well stated or well reported by Mr. Siderfin.

It was thus upon the Roll, Pasch. 15 Car. 2. Rot. 375. A Man seised in Fee, made a Lease for 99 Years, if 3 Persons so long lived; then settled the Reversion upon himself in Tail, with Power to make Leases for 21 Years, and then he made such a Lease and died; the Son who was the Issue in Tail (and not the Father as 'tis reported there) levied a Fine and sold the Reversion; the first Lease determined upon the Death of three Lives: It seemed to the Court that the Cognizee might avoid this second Lease, because it was never in the Election of the Tenant in Tail or of his Issue to avoid it, they having conveyed away their Estates before this second Lease was to commence; for if Tenant in Tail makes a Lease to commence in præsenti, and conveys away his Estate by Fine, the Cognizee must hold it charged with such Lease; but if it be to commence in futuro, 'tis otherwise, because it cannot be avoided before the Commencement.

But he said there was no Judgment given in that Case; there were only three Judges then in Court; Kelynge, who spoke nothing to the Point, and Twysden and Wyndham were divided in Opinion.

Chettle *versus* Lees.

THE Plaintiff obtained a Verdict, and the Judgment was entred with a Misericordia instead of a Capiatur, and now a Motion was made to arrest this Judgment, because it was an Error not amendable by the Statute of 8 H. 6. for that only helps the Mispriſion of Clerks in Entries of the Judgments; but this is the Fault of the Court in giving Judgment; and therefore in an Assumpsit, where Judgment was against the Defendant, the Entry was, that the Plaintiff should recover 100 l. assessed by the Jury, and 5 l. pro misis per Jur' hic de incremento adjudicat', when it should have been per Curiam; this was held not amendable.

8 H. 6. cap. 12.

Cro. Eliz. 497.

8 Rep. *Blackmore's* Case. 162. b.

More placito 501.

So in Debt against an Executor, Capiatur was entred instead of Misericordia, and it was held likewise not amendable.

Econtra. On the other Side it was said, That in former Times the Courts were very strict in amending; but now since there are so many Statutes of Jeofailes, the Judges have thought fit to amend any thing that may help and support a Judgment fairly obtained, the Judgments being their own Judgments.

There have been Amendments allowed in many things more material than this, as in an Ejectment, the Judgment was, Quod querens recuperet dampna & custagia, instead of Quod recuperet terminum. 1 Roll. Abr. 206. Placit. 8.

So if Judgment be for the Defendant upon a Demurrer, and the Entry is that such a Day, prædict. quer. licet solempniter exactus non venit; which is the Entry of a Judgment upon a Non-suit, and not upon a Demurrer; yet this is amendable. Roll. Abr. 205. Placit. 4. 2 Cro. 632.

So where Judgment was against the Plaintiff, and there were several Defendants, the Entry was, that the Plaintiff, nil capiat per breve; and that the Defendants eant inde sine die, was wholly left out, but it was amended. 2. Saund. 289.

Nay, an Amendment hath been even in this very Point; where upon a Writ of Error upon a Judgment in Dower, the Record certified was, That the Defendant was in Misericordia, who being in that Case an Infant and appearing by Guardian, ought not to be amerced; and therefore it was amended, and made Et nihil in misericordia quia infans.

But per Curiam: This is now remedied by the Statute of 16 and 17 Car. 2. cap. 8. which enacts, That Judgment shall not be stayed after Verdict for want of misericordia, or capiatur. Cro. Car. 410. Hob. 127.

Cone *versus* Bowles.

JUdgment was given in the Common Pleas for the Avowant, and Damages and Costs: The Plaintiff in Replevin brought a Writ of Error in this Court, and the Judgment was affirmed. 1 Salk. 205. 1. Shower 13 & 165.

And now a Motion was made that the Avowant might have Costs upon the Statute of 3 H. 7. cap. 19. which enacts, That the Plaintiff shall recover Costs and Damages where the Defendant brings a Writ of Error to delay Execution of the Judgment.

That the Avowant here is in the Nature of a Plaintiff, and hath a Judgment De retorn. habend. given, and is within the Reason of that Statute, because his Execution is delayed by such Writ of Error, as well as the Judgments obtained by Plaintiffs in other Actions, and so consequent-

ly alſo is within the Equity of the Statute of 3 Jac. cap. 8. which appoints Bail to be given in a Writ of Error to proſecute it with Effect, and to pay all Coſts and Damages to be awarded for delaying of Execution.

V. 8 & 9 W. 3.

But the Court allowed no Coſts.

Rex & Regina *verſus* Fezas.

THere was a Libel in the Spiritual Court, Cauſa jactitationis Maritagii; pending that Suit the Woman exhibited an Indictment in this Court againſt all the Witneſſes who might prove the Marriage, and it was for a Conſpiracy by Force and Arms to carry her away againſt her Will, &c.

This Indictment was brought that the Parties might be convicted upon the Oath of the Woman, and ſo diſabled to be Witneſſes in the Eccleſiaſtical Court to prove the Marriage, which by this Means might be avoided.

And therefore Serj. Pemberton moved to ſtay Proceedings upon the Indictment until the Suit in the Spiritual Court was determined.

This was oppoſed by Serj. Tremaine and the King's Counſel, as not practicable to ſtay Proceedings in the King's Cauſe, for any Matter depending in a private Court, eſpecially in this Caſe where the Indictment was for a Force in taking and carrying away of a Woman, and marrying her againſt her Conſent, and ſo a thing collateral to the Suit in the other Court.

Neither was this Suit for Delay, for the Defendant had indicted two of the Witneſſes againſt him for Perjury.

The Court would not ſtay the Proceedings upon the Indictment, but it was tried at the Bar, and the Woman being produced as a Witneſs, it was objected againſt her that ſhe ought not to be allowed to give her Evidence, becauſe there was a Marriage proved in the Spiritual Court; and where the Conſequence of the Evidence will redound to the Benefit of the Witneſs he is always rejected.

Curia, Brown was executed for ſtealing Mrs. Ramſey, and ſhe was allowed to be a Witneſs in that Caſe.

Cro. Car.

And in Fulwood's Caſe upon the Statute of H. 7. the Woman was allowed to be a Witneſs; and ſo ſhe was in this Caſe.

Cudlip *verſus* Rundall.

Trin. 2 Willielmi, *Rot.* 646.

IN an Action upon the Caſe the Plaintiff declared, That on the 20th Day of May, 36 Car. 2. he was poſſeſſed of a Term for Years in an Houſe, and that the ſame Day he let it to the Defendant for ſeven Years by Indenture, by Vertue whereof he entred, and afterwards ſo negligently kept his Fire that his Houſe was burned. 1 Show. 310.

The Defendant pleaded, Non dimiſit per indenturam prædictam modo & forma prout, &c. Upon this they were at Iſſue, and the Jury found a Special Verdict; the Subſtance whereof was,

That the Plaintiff was poſſeſſed of the Houſe, and that by Indenture bearing Date the 25 May, made between him of the one Part, and the Defendant of the other Part, he did demiſe the Tenement to the Defendant and his Aſſigns for ſeven Years: Except and always reſerved out of the ſaid Demiſe and Leaſe to the Plaintiff, his Executors and Adminiſtrators, the Houſe, commonly called, The new Houſe, for the Uſe of the Plaintiff and his Father, and of his and their Family, if he or they pleaſe to dwell therein; but not to be let to any other Perſon; and at all other Times when they do not live there, then to the Uſe of the Defendant and his Aſſigns.

They find that there was a new Houſe and an old Houſe, and that a Fire happened in a Room of the new Houſe, then in the Poſſeſſion of the Defendant, and burnt it down; and if this was a Demiſe modo & forma, then they find for the Plaintiff; if not, then for the Defendant.

Serj. Tremaine made two Points upon this Caſe:

(1.) The firſt was upon the Declaration it ſelf, Whether ſuch an Action would lie by the Leſſee for Years againſt his Under-Leſſee? And he held that it would, becauſe the Plaintiff himſelf is chargeable to his Leſſor by Reaſon of conſequential Damages: 'Tis like the Caſe of a Maſter who may maintain an Action for the beating of his Servant.

'Tis true, the Counteſs of Shrewsbury brought the like Action againſt Tenant at Will; and the Judgment was, Quod querens nil capiat per billam: But the Reaſon of that Judgment was, be- 5 Rep. 13. b.

 cauſe

cauſe at the Common Law there was no Remedy againſt Leſſee for Life, or Leſſee for Years, for voluntary or permiſſive Waſte; for they having an Intereſt in the Land by the Act of the Leſſor, it was accounted his Folly to grant ſuch Eſtates, and not reſtrain the Parties by Covenants from doing any Waſte.

(2.) The ſecond Point was, Whether upon this Iſſue, Non dimiſit modo & forma, there is not a Variance betwæn the Demiſe and the finding by the Jury? And he held it was not.

For the Plaintiff declared, That he was poſſeſſed of a Houſe, and that he let it, &c. which the Defendant denied modo & forma; and the Jury find, that he did let the Houſe except the new Houſe: Now the Words modo & forma are of courſe here, and no Part of the Iſſue, 'tis ſtill a Demiſe of the Houſe, and the legal Intereſt is in the Leſſee, the other had only a Privilege to live in Part of it; and if denied, he had no Remedy but by Action of Covenant, for it will not create ſuch an Intereſt as will maintain an Ejectment.

Co. Lit. 281. b.

2 Cro. 329.

If a Jury find more than they ought, yet Judgment ſhall be given for the Plaintiff: There are many Authorities to this Purpoſe; as in Waſte againſt the Defendant who made a Feoffment to the Uſe of himſelf for Life, Remainder to the Plaintiff and his Heirs; the Defendant pleaded that he was ſeiſed in Fee, and traverſed the making the Feoffment; and the Jury found that he made a Feoffment to the Uſe of himſelf for Life without Impeachment of Waſte; yet the Plaintiff had Judgment, becauſe the Jury had found ſuch an Eſtate as was alledged by him, and tho' they had alſo found that it was diſpunishable of Waſte, it being more than what was in Iſſue, yet the Defendant having taken no Advantage of it in Pleading, the Plaintiff did recover.

Cro. Eliz. 40. Owen 91. idem.

But this Caſe depends upon the Conſtruction of the Words in the Exception, in which, if the ſubſequent Words qualify thoſe which go before, then an Intereſt paſſes to the Defendant.

Now the Exception as it ſtands by its ſelf, ſeems to be againſt the Plaintiff, but the ſubſequent Words make the Sentence plain, that a Liberty only is reſerved for the Plaintiff to uſe the new Houſe.

3 Bulſt. 68. Owen. 64. 1 Cro. 208.

There are ſeveral Caſes which prove that precedent Clauſes may be qualified by Words which come after in the ſame Sentence, as a Demiſe of the Demeſnes of his Manor, in which the Leſſor alſo granted the keeping of the Park: it was held that the Soil of the Park did not paſs, tho' the firſt Words did carry

the whole Eſtate: but the ſubſequent Words ſhew in what Manner he ſhall have it.

Another Reaſon urged for the Plaintiff was, That this Exception is void, becauſe it is contrary to the Demiſe; and to prove this, a Caſe was cited out of Dyer, which was, Baron and Feme had a Leaſe of a Houſe in Fleetſtreet: The Husband made an Under-Leaſe for Part of the Term, excepting the Shops for his own proper Uſe: The Husband dies, the Wife entred and was ouſted, and brought an Ejectment for the Whole. My Ld. Dyer was of Opinion, that the Shops being leaſed generally, and the Exception being only reſtrained to the Uſe of the Husband without ſaying his Executors or Aſſigns, that it was contrary to the Premiſes, and ſo the Exception was void, which he tells us was the Opinion of other Juſtices, tandem. Dyer. 264. Benl. 181. Moor 880. Lane. 69.

'Tis true the ſame Caſe is reported in Benloe, but that Report cannot be true, becauſe it refers to my Ld. Dyer, where 'tis otherwiſe. 'Tis likewiſe reported by my Ld. Anderſon that the Exception was abſolute; but this ſeems to be upon the firſt Argument of that Caſe, for my Ld. Dyer is expreſs that tandem the Judges were of another Opinion. 1 And. 52.

Roe and others, contra.

As to the firſt Point it was argued, that this Action would not lie by a Leſſee for Years againſt his Under-Leſſee, for this Exception made him only Tenant at Will in the New Houſe, which was never demiſed to the Defendant, but totally excepted by expreſs Words. Econtra: ex parte. def. 2Saund. 206. Sid 405. Owen 20. Cro. Eliz. 237.

'Tis an Exception which doth not go to the whole Term demiſed, but 'tis reſtrained to the time when the Plaintiff ſhall reſide there; it imports no more than an Agreement when one doth not uſe the Houſe the other ſhall, and therefore no Intereſt doth paſs: If ſo, it cannot be a Demiſe for 7 Years modo & forma, 'tis only a Leaſe at Will: And for an Authority in point, the Caſe of Hornby and Clifton was cited, which was this: Hornby made a Leaſe of a Houſe to Clifton, except and always reſerved two Chambers, &c. pro ſuo proprio uſu & occupatione. Hornby died, his Wife married again, and the Husband entred into the Chambers excepted, and being turned out, he and his Wife brought an Ejectment, and upon Not guilty pleaded they had Judgment, becauſe the Exception was abſolute, and the Words pro ſuo proprio uſu were held to be vain and immaterial. 1 And. 52.

It was agreed that where an Exception is repugnant to the Premiſes the Grant is void, but 'tis not ſo here.

That the End of an Exception is to take ſomething out of the Grant which would otherwiſe have paſſed, and 'tis always of ſuch Things which are in Being at the Time of the making of the Grant.

Here 'tis Except and always reſerved, &c. Now this Word always is of as great Signification as if the whole Term had been reſerved.

But it muſt be taken either as a Deſcription of the Thing excepted, or a Declaration for what Purpoſe it was excepted.

It cannot be taken in the firſt Senſe, and therefore it muſt be conſtrued as a Declaration to what Uſe it was excepted, and that is by the expreſs Words to the Plaintiff and his Aſſigns.

Beſides, this Houſe was not to be let to any other Perſon whatſoever, which Words would be idle if the Plaintiff had only a perſonal Uſe to himſelf.

The Court making ſome Doubt upon the firſt Argument, whether this was a Tenancy at Will by the ſubſequent Words, one of the Juſtices being of Opinion that the Defendant could not be Tenant at Will, becauſe the Plaintiff muſt have been non-ſuited, if he had not proved a Demiſe for ſeven Years; therefore Time was taken to conſi-
Judicium. der of it, and afterwards in Hillary Term, 4 Will. Judgment was given that the Defendant was Tenant at Will, and no more, that this could not be a Leaſe for ſeven Years, becauſe it was at the Pleaſure of the Leſſor, when and how long the Defendant ſhould enjoy it; and therefore it was held that the New Houſe was abſolutely excepted out of the Demiſe, and it was ſuch an Exception, which was not qualified by the ſubſequent Words, being fully excepted before.

Then as to the Action it was held that he who hath the Inheritance cannot have an Action againſt Tenant at Will, but the Leſſee for Years may: That in this Caſe the Eſtate is not the Queſtion but conſequential Damages; that the finding of the Jury was out of the Iſſue: For if Treſpaſs is brought, and the Defendant ſhould plead Son Franktenement, and the Jury find him Tenant in Common with another, there is a good Cauſe of Action found, but 'tis out of the Iſſue, and will not maintain the Declaration. Judgment was given for the Defendant.

Baugh

Baugh *verſus* Killingworth.

The Plaintiff was indebted to the Defendant for the Rent of a Houſe and Lands in the Country, and coming to London was arreſted by the Defendant by Virtue of a Plaint levied in the Sheriffs Court of London; for which he brought an Action on the Caſe, and declared, Quare cum, (the Defendant) machinans & fraudulenter intendens eundem (the Plaintiff) magnopere prægravare, & minus juſte opprimere 15 Aprilis Anno x. injuſte & malitioſe apud London, &c. eundem (the Plaintiff) prætextu & colore cujuſdam prætenſe querele in Cur' Dni' Regis & Reginæ adtunc tent' coram Johanne Fleet Mil' tunc un' vic. Civit' London in Computatorio ſuo ſcituat' in paroch' & warda præd. intrat. & levat' ad ſectam (the Defendant) ſuper quand. pretenſ. Action. ad magnum prætenſum damnum ipſius (the Defendant) arreſtari & impriſonari cauſavit & procuravit ac præd' (the Plaintiff) in priſona & cuſtod' ibid. ratione arreſtation' præd' per magnum tempus ſcil. per ſpacium ſex dierum detent' fuit pro defectu ſufficien' manucaptor. & ſecuritat. ad pretenſ. Action. præd. pro præd. pretenſ. dampno ubi revera & in facto præd. (the Defendant) tempore arreſtation' & impriſonamenti ipſius (the Plaintiff) ut præfertur vel ad aliquod tempus antea nullam habuit cauſam actionis verſus prefat' (the Plaintiff) infra Juriſdiction' ejuſdem Curiæ ratione quorum quidem injuſte & malitioſe arreſtacon' & impriſonamenti ipſius (the Plaintiff) præd' idem (the Plaintiff) non ſolum in priſona & cuſtodia per totum tempus præd. detent. & de libertate ſua deprivatus fuit ſuper prætenſ. Action. præd. pro damnis præd. verumetiam magnos labores & expenſ. pro relaxation' ſua ab arreſtation. & impriſonament' præd. erogavit ac ſubire & erogare compulſus fuit unde dic. quod deteriorat' eſt & dampnum habet ad valentiam quingentar. librarum & inde produc. ſectam &c.

Upon Iſſue joined they went to a Trial, and the Plaintiff had a Verdict; and now Serj. Tremaine moved in Arreſt of Judgment, That there was no Reaſon (as he alledged) to ground an Action on the Caſe; for tho' the Sheriff's Court had not an original Juriſdiction of the Cauſe, it being for Rent due for a Houſe and Lands in the Country, yet when the Plaintiff was in the City, that Court had a Juriſdiction over his Perſon.

Beſides,

Beſides, he might have pleaded to the Juriſdiction in that Action, which was brought againſt him in the Compter, which he had not done, neither did he alledge in this Declaration that he was held to unreaſonable Bail; for if that had been ſo, there might have been ſome Colour for this Action, but upon the Pleadings there is none.

If a Suit ſhould be commenced, for which there is but a probable Cauſe of Action, yet the Defendant in ſuch Action ſhall not be entitled to another Suit againſt the Plaintiff.

1 Roll. Abr. 102. 2 Cro. 133. So if there be Judgment againſt the Defendant for a Debt and Damages, and before Execution the Money is paid to the Plaintiff, who thereupon releaſes the Defendant, and afterwards takes him in Execution within the Year, yet he ſhall not have an Action for this Vexation, but muſt bring an Audita querela.

So likewiſe if he take him in Execution after the Year, 'tis erroneous, but an Action will not lie, he muſt bring a Writ of Error.

And for theſe Reaſons the Judgment was ſtayed.

Hodge *verſus* Clare.

SCire fac. was brought by John Hodge as Adminiſtrator to Alexander Hodge, during the Abſence of Hannah Hodge, upon a Judgment recovered in this Court, upon which there was a Writ of Error brought in the Exchequer-Chamber, and the Judgment affirmed.

The Defendant demurred to the Scire fac. and for Cauſe ſhewed,

1. It doth not appear that any Judgment was given in the Exchequer-Chamber (upon which this Scire fac. is now brought) to have Execution; for the Words adjudicat. fuer. were left out.

2. 'Tis not averred that Hannah was abſent at the Time of the Adminiſtration committed to John Hodge, and ſo continued.

This Objection was anſwered by the Court that the Party ought to plead it.

3. That the Adminiſtration was void, becauſe of the Incertainty; for having prayed Oyer of the Adminiſtration, which being read in hæc verba, it appeared to be granted durante abſentia, &c. and doth not ſay from what Place the Perſon was abſent.

This was also answered by the Court, That it shall be intended out of the Kingdom.

4. That it must be void, because the Ordinary hath no Power to grant Administration by the Common Law; the Authority which he hath is given to him by particular Statutes..

By the Statute of W. 2. he hath Power to dispose the Estates of Persons dying intestate. 13 Ed. 1. cap. 19.

By the Statute of 13 E. 3. cap. 11. he hath Power to appoint Administrators; and by the Statute of 21 H. 8. cap. 5. that Power of granting Administration, which before was too general, but now restrained to the Wife or next of Kin.

Now if the Ordinary doth exceed the Authority given to him by these Statutes, then this Court will prohibit him.

But such an Administration as this is not warranted by any of these Laws, because 'tis directed to whom the Administration of Intestates Estates shall go; but 'tis not appointed by any of these Statutes, that it shall be granted to any one during the Absence of another, and therefore the Grant of this Administration must be void.

It would be very inconvenient if it should be otherwise in respect of Debtors and Creditors, because this Administration is determinable upon the returning of Hannah Hodge into England, of which all Debtors must take Notice at their Peril; and it would be also very hard upon the Creditors, who having commenced their Actions against such Administrators must then begin again.

But these Objections were not allowed, for all of them may be made as well against an Administrator Durante minore ætate, which is very like this Case; and yet such an Administration is held good, because 'tis in a manner granted to the right Person, who has thereby good Authority to receive the Estate.

DE

Termino Paſchæ,

Anno 3 Gulielmi & Mariæ in B. R. 1691.

Jones *verſus* Beau.

1 Show. 288. AN Indebitatus Aſſumpſit was brought for the Profits of the Office of the Chancellor to the Biſhop of Landaff.

The Defendant pleaded Non aſſumpſit, and this being an Iſſue directed out of Chancery, was tried at the Bar.

The Bill was exhibited in that Court by the now Defendant for the Books belonging to the Office, and to quiet him in the Poſſeſſion thereof.

At the Trial in this Court, the Defendant by Order of the Court of Chancery was to admit of the Receipt of the Profits of the Office to the Value of 5 l. and was alſo to admit the Copy of the Patent under which the Plaintiff at Law did claim, and the Confirmation of the Dean and Chapter.

The Patent was made in the Year 1672. by Francis David then Biſhop of Landaff, by which this Office was granted by him to Dr. Lloyd, and the Plaintiff Jones, and to the Survivor, and that Dr. Lloyd was dead.

So that the Point now tried was, Whether it had been an Uſage in this Dioceſs to grant this Office to two, and it muſt be ſuch an Uſage as was before the making the Statute of 1 Eliz. otherwiſe it will not warrant ſuch a Grant.

The Plaintiff produced four Grants of this Office to two Perſons, of which three were made in the Time of one Biſhop, and the laſt was made in the Year 1620, and no Grant thereof afterwards to two, until this to Dr. Lloyd and the Plaintiff Jones.

Whereupon the Counſel for the Defendant inſiſted, That if the Plaintiff had any Title it was gone by Non-Uſer, for the Chancellor, being a Judicial Officer, the Non-Uſer is a Forfeiture of the Office, it being for the Adminiſtration of Juſtice.

The Biſhop being in Court, offered to be ſworn to give Evidence concerning the Uſage in his Dioceſs, and that he had granted this Office to one, &c.

But this was not allowed; for if the Plaintiff hath a good Title, then the Grant made by the Biſhop is void: And it was compared to a Patron in an Ejectment, who is never permitted to be a Witneſs to maintain the Title of his Clerk.

Then it was objected, That ſince the Plaintiff had produced no Grant to two Perſons, but what was fifty Years after the 1 Eliz. that it would be a very difficult Matter to perſuade the Jury to take it upon their Oaths, that the Office was granted ſo before the making of the Statute.

But Serj. Pemberton anſwered, That theſe Grants were only produced as Evidence that ſuch were made, there being no Records extant relating to this Matter before that Time.

And Juſtice Dolben remembred Ridley's Caſe, concerning the Office of Regiſter of Briſtol, wherein my Ld. Hale was of Opinion, That if it could be ſhewn that ſuch Grants were made ſome Time after 1 Eliz. it would be an Evidence that ſuch were alſo made before the Statute.

The Jury found the Matter ſpecially, and the Point upon the Special Verdict was, Whether the Office of a Chancellor, which hath been uſually granted to two ever ſince the Statute of 1 Eliz. can be granted by Law?

In the Argument of this Caſe it was admitted: That Offices Miniſterial may be granted to two, and ſo may alſo ſome Judicial Offices, which are eſtabliſhed by Act of Parliament; but if ſuch Offices are of Antiquity, then a Grant made to two is void; and therefore if the Office of Prothonotary of the Common Pleas, or thoſe of Chief Juſtice of either Court are granted to two, the Patents are void, becauſe they may differ in Judgment, which would be a Delay to Juſtice; ſo here this Grant may be of publick Injury; for if it be allowed to be good to two, then one may abſolve, and the other may excommunicate.

4 Inſt. 146. 18 E. 4. 7. b. Cro. Car. 258. Jones 263. Winch. Ent. 22.

2. This Grant is void upon the Statute of 1 Eliz. which enacts, That all lawful Grants made by Eccleſiaſtical Perſons of any Office in OLD TIME WONT to be granted, ſhall be good.

Now this cannot be a good Grant, if the Office hath not been uſually granted to two in old Time, which was not found by the Verdict, for there was no Evidence to that Purpoſe.

Ex parte Quer. 11 Rep. Auditor *Curle's* Caſe.

Econtra. It was argued, That the Grant of this Office was good; 'tis like the Grant to two Sheriffs, or of the Auditor's Place of the Court of Wards, when that Court was in being, which was partly a Judicial Office.

'Tis not void at the Common Law, and if ſo, the Statute of 1 Eliz. makes no Alteration as to this Caſe; for that reſtrains Biſhops from making Grants of Lands, Tenements, and Hereditaments, being part of the Poſſeſſions of their Biſhopricks, other than for twenty-one Years or three Lives, from the Time of ſuch Grant, which hath been uſually demiſed, and whereupon the old accuſtomed Rent, or more, ſhall be reſerved.

But a Grant of an ancient Office in ſuch manner as it hath been accuſtomed to be granted is out of that Statute, the Makers whereof did chiefly regard the Revenue of the Succeſſor, that he might have ſufficient to maintain Hoſpitality, and to repair the Dilapidations of the Church, if any ſuch ſhould be, which might not be done, if the Acts of his Predeceſſor ſhould bind him.

Bridg. 29. Cro. Car. 47. 10 Rep. 58.

But this is an ancient Office, and being grantable to two, it cannot be a Diminution of the Revenue of the Succeſſor, and therefore it muſt be exempted out of the Statute.

Curia. Nothing can ſupport this Grant but Uſage, and there being enough found to induce the Court to be of Opinion. That this Office was anciently granted to two before the Statute; therefore they held this Grant good; and Judgment was given for the Plaintiff.

Afterwards the Defendant Beau libelled againſt Dr. Jones in the Spiritual Court for his Ignorance in the Canon and Civil Laws, the Knowledge whereof (as he ſuggeſted) was required in a Chancellor; whereupon Dr. Jones brought a Prohibition as followeth.

DE

Termino Paſch.

Anno 3 Gulielmi & Mariæ Rot. 444. in Banco Regis & Reginæ.

Action for ſuing after a Prohibition.

GUlielmus Epiſcopus Landav. ſum. fuit ad reſpondend. Johan. Jones legum Doctori Vicar. in ſpiritualib' general. & Cur 'conſiſtor' Epiſcopal' Dioceſ. Landav. official. principal' qui tam pro Dno. Rege & Dna. Regina quam pro ſeipſo ſequitur de placito quare ſecut eſt placitum in Cur. Chriſtianitatis contra prohibition. dict' Dni' Reg. & Dne. Reginæ ei prius inde in contrarium direct. & deliberat. & unde idem Johan. Jones qui tam &c. per Joſuam Morris Attorn' ſuum queritur quod cum officium Vicar. in ſpiritual' general. ſive Cancellar. principal. official' Epiſc. Landven. p'd. eſt antiquum officium ac a tempore cujus contrar memoria hominum non exiſtit quandocunq; officium illud acciderit vacuum eſſe predict. Officium conceſſ. & conceſſibile fuit & dari & concedi conſuevit per Epiſcopum Landaven' pro tempore exiſten' alicui perſonæ idon. pro termino vitæ ſuæ ſeu aliquibus duabus perſonis idoneis conjunctim & diviſim pro termino vitarum ſuarum & vitæ alterius diutius viventis ac ſecundum hujuſmodi conceſſionem habit. & gravif. fuit juxta formam & effectum hujuſmodi conceſſion. cumque officium prædict' fuit vacuum ac ſuperinde Franciſcus nuper Epiſcopus Landaven' 7 die Septembris Anno Dni. 1671. apud London prædict. videlicet in paroch. beatæ Mariæ de Arrubus in warda de Cheape per quaſdam literas ſuas patentes ſigillo ſuo Epiſc' ſigillat. per eundem Johannem qui tam &c. hic in Curia prolat. geren. dat. eiſdem die & Anno pro diverſis bonis & legitimis cauſis & conſiderationib. ad animam ſuam in ea parte ſpecialiter moven' dediſſet conceſſiſſet & confirmaſſet pro ſeipſo & ſucceſſoribus ſuis Epiſcopis Landaven. dilecto ſibi in

Granta-ble to two Perſons for life.

Grant of the Office.

The Office of Vicar General, or Chancellor.

Chriſto Richardo Lloyd legum Doctori un' advocator. almæ Curiæ Cantuar. de Arcub' London & præd. Johanni Jones qui tam &c. per nomen Johannis Jones artium magiſtri & Collegii Jeſus Oxon. ſocii & eorum utrique conjunctim & diviſim & eorum alteri diutius viventi (ipſis Richardo Lloyd & Johan. Jones perſonis idoneis ad officium illud hend' exiſten.) prædictum officium vicar. in ſpiritualibus general' & official. principal. in & per totam Civitat. Dioceſ. & juriſdiction. Landaven. præd' & præſiden. Curiæ Epiſcopal. Landaven. præd. ubilibet infra Dioceſ. præd. conſtitut. ſive conſtituend. eoſq; & eorum utrumque conjunctim & diviſim Vicar. in ſpiritualibus general' & Cur. Conſiſtorial. Epiſcopal. Landaven. præd' official' principal' conſtitut. præfecit habend. exercend. tenend. & gaudend. præd' officium & officia ac etiam omnia & ſingula præmiſſa cum ſuis pertinen. quibuſcunq; præfat. Richardo Lloyd & Johanni Jones qui tam &c. conjunctim & eorum utriq; per ſe diviſim & eorum diutius viven. per ſe aut deputat. aut ſurrogat. ſuos ſufficientes quoſcunque ſine impedition. impedimento aut moleſtia ſua vel alicujus ſucceſſorum ſuorum Epiſcopor. Landav. prædict. una cum omnibus & ſingulis feodis vadiis profic. commoditatib. emolumentis & honorariis quibuſcunq; ad officium præd. ſpectan. & pertinen' ac ratione & intuitu præmiſſorum vel eorum aliquorum de jure conſuetudine vel alio quoquo modo debit. & ſolvi conſuet. a tempore confection. literarum paten. præd. pro & duran. termino & terminis vitarum naturalium eorundem Richardi Lloyd & Johannis Jones & eorum utriuſq; diutius viven. quam quidem conceſſion' præfat. Richardo Lloyd & Johanni Jones qui tam &c. in forma præd. fact' & omnia & ſingula in eadem content. poſtea ſcil' primo die Martii An. Dni. 1671. ſupradict' per Decanum & Capitul' Landaven. apud London. prædict. in parochia & warda prædict. per quoddam ſcriptum ſuum confirmationis ſigillo ſuo Capitul' ſigillat. quod idem Johannes qui tam &c. hic in Curia profert geren. dat. eſt eiſdem die & Anno in vita prefat. Franciſ. tunc Landaven. Epiſc' præd. exiſten. ac in vita præfat. Richardi Lloyd modo defunct. ratificaverunt & confirmaver. virtute quarum quidem literarum paten. ac confirmation. inde ſit ut præfertur. fact. prædict. Richardus Lloyd & Johannes Jones qui tam &c. fuer. de officio prædicto cum totis feodis proficuis perquiſit. & pertinen. adinde ſpectan. ſeiſit. ut de libero tenemento pro termino vitarum ſuarum & vitæ eorum alterius diutius

Habendum.

Confirmed by the Dean and Chapter.

diutius viventis & ſic inde ſeiſit. exiſten. idem Richardus Lloyd poſtea ſcilicet decimo die Decembris Anno Domini 1686. apud London præd' in paroch. & warda præd' obiit de tali ſtatu inde ſeiſit. & præd. Johan. Jones ipſum ſupervix. poſt cujus mort. idem Johan' Jones qui tam &c. fuit de officio præd' ſolus ſeiſit. ut de libero tenemento per jus accreſcendi &c. ac ſic officium illud cum omnibus feodis proficuis & pertinen. adinde ſpectan' gaudere & habere debuit & debet virtute conceſſion. & confirmation præd' Cumque omnia & ſingula placita & negotia tangen. & concernen' liberum tenement' ac jus & titulum aliquarum terrarum officiorum & hæreditament. ac validitat. interpret. vigorem vel effectum aliquorum donorum conceſſion. ſive confirmation' infra hoc Regnum Angliæ fact' ac etiam interpretation. Chartarum & conceſſion. ad Dominum Regem & Dominam Reginam nunc & coronam ſuam Regiam & non ad Curiam Chriſtianitatis ullo modo ſpectant & pertinent ac per leges terræ hujus Regni Angliæ in Curia Domini Regis & Dominæ Reginæ de record' coram ipſis Rege & Regina vel Juſtitiariis ſuis Curiarum illarum ac judicibus ſecular. & temporal. & non in Curia Chriſtianitat. nec per jur' ſive cenſuras Eccleſiaſtic' ullo modo triari terminari & diſcuti debeant & ſemper hactenus conſuever & debuer. præd' tamen Gulielmus modo Landaven. Epiſc. præmiſſorum non ignarus & leges hujus Regni Angliæ minime ponderans ac illas violare proponens & machinans præd. Johannem Jones qui tam &c. contra leges & ſtatuta hujus Regni Angliæ indebite prægravare opprimere & fatigare necnon jus ſtatum titul. & intereſſe ipſius Johannis Jones qui tam, &c. in & ad officium præd' evacuare & vim validitatem conceſſion & confirmation' officii præd' in forma prædicta fact' per callidas aſſertiones & allegationes in hac parte fact' in Curia Chriſtianitat' triari & terminari eundemque Johannem Jones qui tam &c. ab executione officii præd' ac feodis & proficuis officio prædict. ſpectan' & pertinen' hend' & percipiend' amoveri deprivari & excludi cauſare necnon dictum Dominum Regem & Dominam Reginam nunc & coronam ſuam Regiam exhæreditare cognitionemque placiti quæ ad ipſos Dominum Regem & Dominam Reginam nunc in hac parte & Coronam ſuam Regiam & non ad Curiam Chriſtianitat. ullo modo ſpectat & pertinet ad aliud examen in curia Chriſtianitat. trahere ipſum Johannem Jones qui tam &c. in Curia Chriſtianitat. coram Georgio Oxenden legum

One of the Grantees died.

The other ſole ſeized.

Traxit in placitum.

gum doctore almæ Curiæ Cantuar. de Arcubus London. official. principal' legitime conſtitut. ſcil. apud London. præd'in paroch.& warda præd' tent. poſt conceſſion' & confirmation. in forma p'd' fact. de ſuper & concernen. validitate ejuſd' conceſſion. & confirmat' ac præd' jus ſtatum & titulum ipſius Johannis Jones qui tam &c. de & in officio præd. traxit in placitum ac verſus ipſum Johannem Jones qui tam &c. ibidem diverſos articulos exhiberi & objeci cauſavit quorum quidem articulorum tenor ſequitur in hæc verba ſcilicet Imprimis Objicimus & articulamus, Againſt you the ſaid Dr. John Jones, That whereas you do execute the Office of Chancellor, and do exerciſe Eccleſiaſtical Juriſdiction, by Virtue thereof within our Dioceſe of Landaff, and whereas the Laws Eccleſiaſtical of this Realm poſitively require and direct, that Nullus ad officium Cancellar. commiſſionar. aut official' admittetur ad juriſdiction. quamlibet exercend. niſi qui in jure Civili & canonico eruditus exiſtat ſitque in praxi & cauſis forenſibus laudabiliter exercitatus, You the ſaid Dr. John Jones do exerciſe the Office of Chancellor and Principal Official and Eccleſiaſtical Juriſdiction in our Dioceſs of Landaff, and are not in jure Civili & canonico eruditus nec in praxi & cauſis forinſecis laudabiliter exercitatus, nor have applied your ſelf to the Study and Practice of the Civil and Canon Laws, as required by the ſaid Eccleſiaſtical Laws; but have wholly applied your ſelf for near twenty Years laſt paſt, and do ſtill to the Study, Practice, and Exerciſe of Phyſick, whereby great Prejudice and Detriment may and doth ariſe to the Publick, Et objicimus & articulamus ut ſupra. Item objicimus & articulamus againſt you the ſaid Dr. John Jones, That you appointed Deputies not skilled in Civil or Canon Law. 3. That he was abſent for the moſt part from Landaff, where the Conſiſtory-Court ought to be kept, and did not provide a Surrogate to be reſident there. 4. That he left his Chancellor's Seal with one Philip Maddox the Regiſter, and ſometimes with his Wife; whereas it ought to be kept by himſelf or Deputy. 5. That he abſolved William Corniſh and his Wife, from a Sentence of Excommunication for a Clandeſtine Marriage, and had taken Money by way of Commutation of Penance. 6. The Eccleſiaſtical Laws require, That a Miniſter who marrieth Perſons clandeſtinely, ſhall be ſuſpended ab officio & beneficio for 3 Years, and a Perſon ſo decreed ſuſpended you in a few Weeks

And exhibited Articles in hæc Verba.

Weeks after abſolved. 7. For menacing the Biſhop's Apparators in ſerving a Summons. 8. For declaring the Biſhop's Servant Excommunicate for ſerving a Monition under the Epiſcopal Seal. 9. For abſolving one whom the Biſhop had excommunicated. 10. That he refuſed an Apparator appointed by the Biſhop to exerciſe his Office by a Deputy, and appointed another in his Room. 11. For reſerving and prohibiting the Regiſter to ſend the Book of Acts and Entries, that the Biſhop might inſpect the Irregularities in ſome Proceedings in the Conſiſtory-Court. 12. For iſſuing out publick Inſtruments in his own Name; Johannes Jones Legum Doctor Reverendi in Chriſto Patris Gulielmi permiſſione divina Landaven Epiſc. Vicarius in ſpiritualibus generalis & official. principalis legitime conſtitut. univerſis & ſingulis Clericis & literatis in & per totam noſtram Landaven. Dioceſ. &c. 13. That licenſing of Curates and Apparators was excepted out of his Patent, yet he hath exerciſed Juriſdiction contrary to the Patent. 14. By licenſing Proctors and Apparators, &c. 15. Who have acted after Monition given to you. 16. That he hath diſplaced Perſons appointed by the Biſhop to act as Apparators and Proctors. 17. That he cited all Schoolmaſters and Curates who acted without Licence to appear before him, and to take Licences, notwithſtanding the reſtraining Clauſe in his Patent, whereby that Power is reſerved to the Biſhop. 18. That he granted a Licence for Evan Rees to marry Mary Tanten, being under the Age of 12 Years, and an Heireſs, without the Conſent of her Tutor or Guardian. 19. That he granted Adminiſtration to one, and afterwards without reboking it, granting a Probate of a nuncupative Will of the ſame Perſon to another as Executor. 20. That he granted Licenſes to Schoolmaſters contrary to his Patent. 21. Item quod dictus Johannes Jones Legum Doctor fuit & eſt Dioceſ. Landaven. Cantuar. Provincie eoq; intuitu ac ratione hujus litis juriſdiction. hujus Curiæ notorie ſubditus & ſubjectus & ponit ut ſupra. Item quod de & ſuper præmiſſis, &c. Item objicimus & articulamus quod præmiſſa omnia & ſingula ſunt vera dictumq; doctorem Johannem Jones propter temeritatis ſuæ exceſſum in premiſſis necnon propter inſufficientiam & ignorantiam ſuam antedict. canonice puniend. ac ab officio ſuo prædicto amovend. fore & debere pronunciamus, &c. Guliel-

mus

mus Landaven. prout per eoſdem articulos in prædicta Curia Chriſtianitatis coram præfat. Georgio Oxenden reſiden. & veram copiam inde in Curia hic prolat. plenius liquet & apparet præd. Gulielmus Landaven. Epiſc. eundem Johannem Jones qui tam, &c. in præd. Cur. Chriſtianitat. coram prædict. Georgio Oxenden occaſione articulorum præd. comparere minus juſte aſtrinxit ac eundem Johannem Jones qui tam, &c. de & in præmiſſis condemnari ac de & ab officio præd. per definitivam dict. Cur. Chriſtianitat. ſententiam deprivari totis ſuis viribus conatur & indies machinatur ac licet breve dictorum Dni. Regis & Dominæ Reginæ de prohibitione præfat. Georgio Oxenden & al. judicibus in hac parte competen. viceſimo die Novembris anno Regni dictor. Dni Regis & Dominæ Reginæ nunc quinto apud London. præd. in parochia & warda præd. in contrar. inde direct. & deliberat. fuit idem tamen Gulielmus Epiſcopus Landaven. placitum prædict. poſt prohibition. Regiam prius in contrar. inde in forma præd. direct. & deliberat. ſcilicet viceſimo primo die Novembris anno Regni dictor. Dni Regis & Dominæ Reginæ nunc quinto ſupradict. apud London. prædict. in paroch. & warda prædict. ulterius proſecut. fuit & in placito illo proceſſit (dicto brevi dict. Dni. Regis & Dnæ. Reginæ de prohibitione prefat. Judicibus in ſpiritualibus prius in contrarium inde in forma prædicta direct. & deliberat. non obſtante) in dict. Dni. Regis & Dominæ Reginæ nunc contemptum & ipſius Johannis Jones qui tam, &c. dampnum prejudicium depauperation. & gravamen manifeſtum ac contra leges hujus Regni Angliæ unde idem Johannes Jones qui tam, &c. dicit quod ipſe deteriorat. eſt & damnum habet ad valentiam centum librarum & inde produc. ſectam. &c.

Et pred. Gulielmus Landaven. Epiſc. per Bezaleel Knight Attorn. ſuum venit & defendit vim & injur. quando, &c. & omnem contemptum & quicquid, &c. & dicit quod ipſe non ſecutus fuit placitum præd. verſus præd. Johannem Jones in Cur. Chriſtianitat. contra prohibitionem dictorum Dni. Regis & Dominæ Reginæ prout idem Johannes Jones qui tam, &c. ſuperius ſuppoſuit & de hoc ponit ſe ſuper patriam & pred. Johannes Jones qui tam, &c. ſimiliter, &c. ſed pro brevi Dni. Regis & Dnæ. Reginæ de Conſultation. quoad placitum præd. ſuper primum articulum in narratione prædict. mentionat. & quoad materiam in eodem content. habend. idem Gulielmus Epiſc. Landaven. dicit quod narratio

The Defendant pleads, That he did not proſecute after the Prohibition and Iſſue thereupon.

Sed pro Conſultatione habend. *he demurs.*

narratio præd. quoad præd. primum articulum & materiam in in eodem primo artic' content. minus ſufficien. in lege exiſtit ad ipſum Gulielmum Landav. Epiſc. ad inde reſpondere compellend. ad quam idem Epiſc. neceſſe non habet nec per legem terræ aliquo modo tenetur reſpondere unde pro defectu ſufficien. narration. in ea parte idem Epiſc. petit judicium de narrarion. præd. quoad pred. primum articulum ac quod breve dictorum Dni. Regis & Dominæ Reginæ de Conſultatione in ea parte quoad eundem primum articulum concedatur, &c. Et pro brevi de Conſultatione quoad reſid. articulorum præd. in narratione prædict. mentionat. habend. idem Epiſcopus ulterius dicit quod per & ſecund. Canones & Leges Eccleſiaſticas in Regno Angliæ uſitat. & approbat' omnia & ſingula offenſæ crimina & materiæ in eiſdem articulis mentionat' ſub periculo quarundum Eccleſiaſticarum Cenſur' prohibit' ſunt & diverſis Eccleſiaſticis cenſuris punibil. exiſtunt necnon per eaſdem leges coram Eccleſiaſticis judicibus in ea parte competentibus & non alibi triari examinari & puniri ſolent & debent quodq; in vel per eoſdem reſid' articul' vel proſecution' eorundem vel alicujus eorum in Curia Chriſtianitatis jus ſive titulus ad vel in officio præd. in narratione pred. mentionat' triari examinari vel in queſtione redigi minime poſſit ſtemq; Epiſcopus ulterius dicit quod ipſe idem Epiſcopus eundem Johannem Jones in Curia Chriſtianitat. præd. videlicet apud London. præd. in parochia & warda præd. proſecutus fuit ſuper eoſdem reſid. articulos ſupradictos in ordine ad canonicam punitionem & Eccleſiaſtica s Cenſuras in ea parte debitas & minime per deprivation. ſeu excluſion. ab officio prædicto pro cauſis in eiſdem articulis reſiduis ſuper eundem Johannem Jones infligend. & adhibend. Et hoc idem Epiſcopus paratus eſt verificare unde petit judicium & breve dictorum Dni. Regis & Dnæ. Reginæ de Conſultatione quoad præd. reſiduum articulorum ſibi in hac parti concedi.

Barth. Shower.

Replication.

Et pred. Johannes qui tam, &c. dic. quod per aliqua per predictum Gulielmum Epiſcopum Landaven. ſuperius placitando allegat. narratio ipſius Johan. qui tam, &c. caſſari minime debet nec Breve dictorum Dni. Regis & Dnæ. Reginæ de Conſultatione quoad primum articulum in narratione præd. mentionat. præfat. Guilielmo Epiſcopo Landaven. concedi debet, &c. quia dicit quod narrario illa quoad præd. pri-

mum articulum materiaq; in eadem content. bona & ſufficiens in lege exiſtunt ad præd. Guilielmum Epiſcopum Landaven. ad narrationem illam (quoad prædictum primum articulum) reſpondere compellend. ac ad breve dictorum Dni. Regis & Dnæ. Reginæ de prohibitione in forma prædicta conceſſa manutenend. quam quidem narration. quoad præd. primum articulum materiamq; in eodem content. idem Johannes qui tam, &c. parat. eſt verificare & probare prout Curia, &c. Et quia præd. Epiſcopus ad narrationem illam quoad præd. primum articulum non reſpondebat' nec ille hucuſq; aliqualiter dedicit idem Johan. qui tam, &c. pet. judicium & dampna ſua præd. ſibi adjudicari, &c. Et idem Johan. Jones ulterius dicit quod præd. Guilielmus Epiſc. Landav. breve dictorum Dni. Reg. & Dnæ. Reginæ. de conſultat. quoad reſid. articulorum in narrat. præd. mentionat. habere non deb. quia dicit quod placitum præd. per ipſum Guilielmum Epiſcop. Landav. (quoad reſid. articulorum in narratione præd. mentionat.) modo & forma præd. ſuperius placitat. materiaq; in eodem content. minus ſufficien. in lege exiſt. ad præd. breve dictor. Dni. Regis & Dnæ. Reginæ de Conſultatione impetrand. ad quod idem Johannes qui tam, &c. neceſſe non habet nec per legem terræ tenetur aliquo modo repondere. Et hoc parat. eſt verificare unde pro defectu ſufficien. Reſponſ. in hac parte idem Johannes qui tam, &c. pet. judicium & dampna ſua pred. ſibi adjudicati, &c. Et pro cauſis Moration. in lege juxta formam ſtatuti in hujuſm. Caſu nuper edit. & provis. idem Johannes qui tam, &c. Cur. demonſtrat & oſtendit quod apparet per Articulos in Narratione præd. mentionat. quod præd. Gulielmus Epiſcopus Landaven. ob offenſ. pred. in ſeparalibus Articulis reſid. Articulor. præd. expreſſ. conat. eundem Johannem Jones qui tam, &c. ab officio præd. deprivari & amovend. fore.

Et prædict. Epiſcopus Landaven. dicit quod placitum præd. per ipſum (quoad reſid. articulor. in narratione præd. mentionat.) in forma præd. materiaq; in eadem content. bonum & ſufficien. in lege exiſtunt ad breve dictor' Dni. Regis & Dnæ. Reginæ de conſultatione concedend. & habend. quod quidem placitum (quoad reſid. articulor' præd.) idem Epiſc. parat. eſt verificare & probare prout Cur. &c. Et quia præd. Johan. Jones qui tam, &c. ad placit. illud non reſpond. nec illud hucuſq; aliqualit. dedicit idem Epiſc. pet. judicium & breve dictor. Dni Reg, & Dnæ. Reginæ de Conſultat. (quoad reſid. articulor. præd.) ſibi in hac parte concedi, &c. ſed quia Cur. &c.

This Case was argued in Michaelmas Term in the sixth Year of this King, and it was shortly thus:

IN a Prohibition the Plaintiff declared, That the Office of Chancellor of the Bishop of Landaff was an antient Office, and that as often as it became void, the Bishop of that See for the Time being used to grant it for one or two Lives, and to the Survivor of them.

That the said Office being void, Francis David late Bishop of Landaff did grant the same to Dr. Lloyd, and to the Plaintiff John Jones, to have and to hold the same to them, and to the Survivor for Life.

That Dr. Lloyd was dead, and the Plaintiff survived; by Reason whereof he was entitled to the said Office.

That the Interpretation of all Grants did belong to the King's Courts, and not to the Spiritual Courts.

That the Defendant had sued the Plaintiff in the Ecclesiastical Court, and had exhibited Articles against him before Dr. Oxenden, that he was ignorant in the Canon and Civil Laws, that he had made Deputies who were unlearned in the said Laws, &c. that the Premises were true, and so prayed that Dr. Jones might be removed from the said Office for his Insufficiency.

That the said Dr. Jones was compelled to appear in the said Court to answer those Articles, and that the Defendant endeavoured to deprive him from that Office by a definitive Sentence in that Court contrary to a Prohibition, &c.

The Bishop pleaded, That he had not prosecuted the Plaintiff in the Spiritual Court against a Prohibition, and demurred upon the first Article, and the Plaintiff joined in the Demurrer. And as to the rest he pleaded, That all the Crimes contained in the other Articles are prohibited by the Canon Law, and ought to be punished by Ecclesiastical Censures, &c.

The Plaintiff demurred;

And it was argued in his Behalf, That a Consultation ought not to be, because it was a Suit meerly for Deprivation; and for that Reason (if there was no other) the Ecclesiastical Court ought to be prohibited.

This Office is a Matter of Freehold, which cannot be determined either by the Canon or Civil Laws; and therefore it hath been held that an Assize will lie for the Office of the Register of the Court of Admiralty, which is a Freehold for Life; for tho' the Proceedings in that

8 Rep. 47. b. Dyer 152. Court are according to the Method and Rules of the Civil Law, yet the Right of that Office is determinable at the Common Law.

2 Roll. Abr. 285. pl. 37. So if a Question should arise concerning the Validity of two Patents by which the Office of Register to a Bishop is granted, this shall not be tried in the Spiritual Court, notwithstanding the Subject-matter is spiritual, because the Office it self being Matter of Freehold, is for that Reason of temporal Cognizance.

3 Leon. placit. 237. In Michaelmas Term 29 Eliz. a Writ issued out of the Court of Admiralty in the Nature of a Scire fac. to repeal Letters Patents by which the Office of Vice-Admiral of two Counties was granted to a particular Person; and because this was triable at the Common Law, the Court gave a Day to shew Cause why a Prohibition should not be awarded.

2 Brownl. 11. 2 Roll. Rep. 306. Cro. Car. 55. Many more Instances might be given of Cases to this Purpose. But in Hillary Term 8 Jacobi, there was a Dispute about the Grant of this very Office to two, viz. to Dr. Trevor and one Griffin; the Doctor released all his Right to Griffin, who died; then the Bishop granted it to Robotham, and Dr. Trevor pretending that he had a Right by Survivorship by Virtue of a former Grant, made a Substitute, who was disturbed by Robotham the new Grantee, whereupon an Inhibition was granted in the Arches; and it was agreed by all the Court, that tho' the Office was spiritual as to the Exercise, yet as to the Right it was temporal, and the Party having a Freehold in it made it determinable at the Common Law.

Latch 228. Noy 91. Cro. Car. 65. Palm. 450. The Case of Dr. Sutton is the single Authority against the Plaintiff. 'Tis reported in several Books. He was Chancellor to the Bishop of Glocester, and Articles were exhibited against him before Ecclesiastical Commissioners; for that by divers Canons no Person ought to be admitted to that Office but such who was learned in the Canon and Civil Laws. He pleaded that he had a Freehold in the Office for Life, and ought to enjoy the same, and so prayed a Prohibition; but it was denied, and the Reason given was, Because the Commissioners might deprive him for Insufficiency.

2 Roll Abr. 286. pl. 39. 'Tis true, the Judges of the Ecclesiastical Courts, and not those of the Common Laws, are the proper Judges of the Abilities of a Chancellor; and therefore they may examine him as Dr. Sutton was examined; but at that Time the High-Commission Court did extend its Power too far in many Cases of Deprivation; for it cannot be denied but Dr. Sutton had a Freehold in that Office. It was

was the Opinion of Juſtice Croke who reported that Caſe, That the Dr. might have an Aſſize to try it if he had any Wrong done, which ſhews he had a Freehold; and if ſo, then admitting the Spiritual Court can try the Sufficiency of a Chancellor; yet if the temporal Courts have alſo in the ſame Caſe a Juriſdiction in reſpect of the Freehold, the Authority of the Eccleſiaſtical Court ſhall be ouſted.

To prove this, Sir Timothy Hutton's Caſe was cited, who obtained a Monition from the Archbiſhop of York to the Biſhop of Cheſter who, as Ordinary, had refuſed the Clerk preſented by Sir Timothy, which Monition was, That the Biſhop of Cheſter would either admit the Perſon, or appear before the Archbiſhop, &c. He did neither, and thereupon the Clerk was inſtituted by the Archbiſhop, and inducted by his Warrant; and afterwards a Suit being commenced before the Delegates, becauſe the Inſtitution was granted in London out of the Dioceſs of York, and by Conſequence the Induction would be void, the Court of Common Pleas was of Opinion to prohibit the Suit; for tho' the Inſtitution was ſpiritual, yet the Induction being a temporal Act, ſhall draw the Trial to the Common Law, otherwiſe the Right of Patronage would be tried in the Eccleſiaſtical Courts, and a Quare Impedit would ſeldom or never be brought. Hob 15.

If the Plaintiff was inſufficient, it might create an original Incapacity ſo as to avoid the Grant; but 'tis not material whether he himſelf is learned or not in the Canon or Civil Laws, becauſe the Office is granted to him to exerciſe by himſelf or Deputy; and no Man will deny, but he may conſtitute a Deputy learned in thoſe Laws; and if he doth make an ignorant one, 'tis a Forfeiture of his Office.

There are ſome other Cauſes by which he might incur a Forfeiture, as Non-attendance, &c. as well as the Inſufficiency, but that is not alledged: 'Tis true, that Inability hath been laid to his Charge, and the Biſhop made a new Grant to try the Title at Law, and there was a Verdict againſt his Grantee, and now he ſeeks for Remedy in the Spiritual Court upon the ſame Pretence which he had at Law; and therefore ought to be prohibited.

Thoſe who argued on the other Side held, That all the Articles exhibited againſt the Plaintiff were of Eccleſiaſtical Cognizance; and therefore the Proceedings there ought not to be ſtopped by the temporal Courts. Econtra.

Mich. 3 Ja. 2 Inſt. 614.

This very thing hath been formerly complained on by Archbiſhop Bancroft, who exhibited Articles to the Lords of the Council of King James the firſt in the Name of the whole Clergy againſt the Judges in Weſtminſter-Hall, for granting Prohibitions to Suits in the Spiritual Courts for Deprivations of Miniſters for Inſufficiency, becauſe thoſe Courts have the proper Judicature of the Learning and Sufficiency of the Perſon; and if Prohibitions ſhould be granted in ſuch Caſes, this Inconvenience would follow, That the Knowledge of a Man in the Canon and Civil Laws muſt be tried by a Jury, which ſeems to be very abſurd.

There is a Difference when a Suit is commenced in theſe Courts for Deprivation, which is a Thing of Eccleſiaſtical Cognizance, and when 'tis begun for a Thing purely temporal: Now in this Caſe the Qualification of the Perſon is the Matter which is firſt enquired into; but all the Authorities cited on the other Side where Prohibitions have been granted, were concerning temporal Things, as Grants, &c. which muſt be tried at Law.

If the King ſhould grant an Office in this Court it will not be denied, but the Judges may remove ſuch an Officer for Inſufficiency, becauſe they are proper Perſons to judge of his Abilities.

No Inſtance can be given where Prohibitions have been granted for Things meerly of Spiritual Cognizance, but always where the Matter was temporal.

'Tis true, the Articles now exhibited, do ſuppoſe the Plaintiff to have a Grant, and to be in Poſſeſſion of the Office; but they further alledge, That he ought not to enjoy it by the Law of the Land, becauſe of his Inſufficiency in the Knowledge of the Canon and Civil Laws: For which Reaſon he is to be cenſured by the Archbiſhop, who is to take Care that all the Canons ſhould be executed, which are not repugnant to the Common Law, and by the 27th Canon made in the Reign of King James, no Man is to execute the Office of a Chancellor, unleſs he is ſkilled in theſe Laws, for he is obliged to act in his Office by them.

1 Mod. 22.

Many Inſtances may be given wherein this Court hath been very tender in granting of Prohibitions even in Caſes where the Perſon concerned hath not been ſubject to the Juriſdiction of the Spiritual Courts; as an Incumbent of a Donative was cited there for marrying without a Licence: Now no Man will ſay that he is ſubject

to the Jurisdiction of the Ordinary, yet the Matter for which he was cited being of ſpiritual Cognizance, a Prohibition was denied.

So likewiſe a Mandamus was denied to the Dean of the Arches by the Court of King's Bench, to reſtore a Perſon to the Office of Proctor, tho' he is an Officer of whom the Common Law doth take Notice, and is likewiſe mentioned in ſeveral Acts of Parliament.

But if a Prohibition ſhould be granted in this Caſe, it ſhould be only quoad the Matter triable at Law: For where a Suit is begun in the Eccleſiaſtical Court for two Things, whereof one is of ſpiritual Cognizance, and the other temporal, and if by the Sentence to be given in ſuch Caſe, the Puniſhments would be ſo intermixed, that it cannot ſtand for one, unleſs for both, there a Prohibition hath been granted; but if it be ſevered, then it ought to go to that Matter which is triable at Law. 2 Roll. Abr. 390. pl. 6. 314. pl. 1.

If this Perſon ſhould fall under a temporary Diſability, as Lunacy, &c. the Biſhop may put in another; and ſo he may for any other Diſability.

Upon theſe Reaſons a Conſultation was prayed, but the Court enclined againſt it.

Rex & Regina *verſus* Evans.

THE Cuſtos Rotulorum of a County was diſplaced, and another conſtituted in his Room, to whom the Defendant, being Clerk of the Peace, refuſed to deliver the Rolls. 1 Show. 282.

He was indicted for this Misbehaviour and found guilty, and thereupon was removed from his Office; and now he brought a Mandamus to be reſtored, and all this Matter being returned, a Motion was made to maintain this Return; and it was ſaid that a Clerk of the Peace was a miniſterial Officer to the Cuſtos, and ought to deliver the Rolls to him at the End of every Seſſions: 'Tis true, he has a more fixed Eſtate in his Office than the Cuſtos hath, but ſtill he is but his Deputy, and is to be removed by a Charge exhibited to the Juſtices in Writing.

Chief

Chief Juſtice. The Clerk of the Peace ought to make out all the Proceſs, which cannot be done without the Rolls; when they are compleated, then he muſt deliver them to the Cuſtos; but as long as they are in Proceſs, they are to be with the Clerk of the Peace, and therefore it ſeemed reaſonable that the Defendant ſhould be reſtored. But three Judges were of a contrary Opinion.

DE

Term. Sancti Hill.

Anno 3 Gulielmi & Mariæ Regis & Reginæ Angliæ, &c. 1691.

The City of Exeter *verſus* Glide.

MAndamus to reſtore the Defendant to the Place of Alderman and Chamberlain of the City of Exeter.

The Subſtance of the Return was, That the City is an ancient City and Body Politick, that the Mayor thereof is an ancient Officer; that there are twenty-four Aldermen, and ſo many Citizens there, who have uſed to be of the Common-Council and had a Court there, &c.

That the Defendant being an Inhabitant of the ſaid City, was choſen Alderman thereof, and as ſuch was a Juſtice of the Peace, which is an Office of Truſt and Magiſtracy.

That he being ſo choſen, Receſſit elongavit & habitationem ſuam reliquit & deſeruit & amovebat ſeipſum & familiam ſuam ad Topſam extra civitatem, &c. & officium ſuum voluntarie reliquit & neglexit, and ſets forth wherein, &c.

That ſeveral Courts of Common-Council were held there, of which he had Notice, but did not attend, being abſent forty Times in three Years.

That when he was preſent he gave ſcurrilous and reproachful Language to the Court, for which he was removed from his ſaid Office.

That he could not be reſtored, becauſe he had not taken the Oaths before the firſt Day of Auguſt 1691. according to a late Act of Parliament, &c.

Thoſe who argued for the Defendant and againſt the Return ſaid, That it was inſufficient as to the Matter returned.

That the firſt Part thereof was not good for three Reaſons:

1. Becauſe 'tis not alledged that Topſam was extra libertates Civitatis; for it may be extra Civitatem, and yet within the Liberty of the City.

Beſides, if it had appeared that Topſam was extra Civitatem, yet the Defendant removing thither did not give them Cauſe to deprive him of his Office, becauſe it doth not appear by the Return that he was diſabled from doing his Duty by Reaſon of his Aboad there, or that his Attendance was neceſſary.

2. 'Tis not ſaid that the Defendant abſented himſelf, and removed his Family without a reaſonable Cauſe, as Sickneſs, &c. or how long he was abſent.

3. The next Cauſe aſſigned was, That he voluntarie neglexit thoſe Things which appertained to his Office as Juſtice of the Peace; this is too general, and a Return to a Mandamus ought to be as certain as a Return to a Habeas Corpus; and therefore where the Return of a Habeas Corpus was, that the Party was committed for inſolent Behaviour and ſcurrilous Words ſpoken at the Council-Table, not mentioning what Words; this was held inſufficient.

Cro. Car. 133.

Cro. Car. 579. *Freeman's* Caſe.

The like Return of a Commitment by the Lords of the Council for divers Miſdemeanors was held too general.

4. 'Tis returned, That the Defendant abſented himſelf from ſeveral Courts, &c. but 'tis not ſaid that he was duly ſummoned to ſuch Courts; therefore it can be no Cauſe of his Removal, and the rather becauſe it appears that there were a ſufficient Number to hold thoſe Courts, and if there is no particular Buſineſs, the Abſence of one Juſtice of Peace may be excuſed.

5. 'Tis not ſaid that any particular Damage happened to the City, by Reaſon of the Defendant's abſenting of himſelf; and Non-Uſer of a private Office without ſome ſpecial Damage, is no Cauſe of Forfeiture.

Co. Lit. 233. a.

3 Rep. 26.

6. The next Cauſe was, That he did publickly declare that he would never meet again, which amounts to no more than a Waver of his Office, which he may reaſſume at Pleaſure.

11 Rep. *Bragg's* Caſe.

7. Another Cauſe of his Removal was, for giving reproachful Language to the Mayor, &c. which might be a ſufficient Cauſe to bind him to the Good Behaviour, but not to

forfeit his Office, and they ought to have returned the Words spoken that it might appear to the Court of what Nature and Import they were.

8. They return that he could not be restored, because he had not taken the Oaths before the first Day of August; but he is not obliged to it, for the Statute requires it only of these Persons who are in Office; now it appears by the Return, that he was not an Officer then, for he was deprived.

They have proceeded illegally, for they have deprived a Man of his Office upon a General Summons which is against Law; the Defendant ought to be summoned specially to shew Cause why he should not be removed for such Causes.

Serjeant Tremaine and Mr. Roe who argued to maintain the Return, answered these Objections:

(1.) 'Tis returned that the Defendant absented himself, and removed out of the City, and out of the County of the City, and 'tis not to be supposed that the Liberties reached out of the City.

(2.) As to the second Objection, it need not be returned, that he absented without a reasonable Cause; for to be absent for Debt may be a reasonable Cause, but 'tis a sufficient Cause to remove him.

(3.) To absent himself voluntarie is not too general: For being absent, 'tis reasonable that another should supply his Place, and a voluntary Absence, without saying more, is a sufficient Cause of Forfeiture.

(4.) The most material Objection is, That he absented himself, but was not duly summoned: Now a Summons is not necessary in this Case, because there is no Place appointed where Notice ought to be given him.

But admitting a Summons to be necessary, he had sufficient Notice, for 'tis returned that such a Day a Court was held, Et licet sufficienter summonitus, the Defendant did not come.

And to prove this, Dr. Merriott's Case was cited, who being one of the College of Physicians was summoned by the President to a Court, and not coming, he was deprived. Mich. 33 Car. 2.

The other Objections were held to be immaterial; but as to the last Objection about taking the Oath, it was said, That if the Defendant should be restored upon a Mandamus, 'tis a new Admission, tho' he may be in his old Office and Title, and therefore ought to take the Oaths.

But upon the whole Matter there being a particular Custom of the City alledged, That he must be an Inhabi-

tant to be capable of this Office, therefore Commorancy goes
Sid 14. 81. thro' the whole Case, and the Office being for Administration of Justice is determined by Cesser.

Every Custom which is reasonable, is for that Reason obligatory, and is rightly called Lex loci; if therefore by this Custom set forth upon this Return, the Defendant is to be an Inhabitant of the City, then his Departure from thence makes him want a legal Qualification to be an Alderman of that Place.

Curia. Three Justices were of Opinion not to grant a peremptory Mandamus: For they held that amongst the many Causes returned of the Disfranchisement of this Person, one was sufficient, which they held to be, that being an Alderman and a Justice of Peace of the City, &c. Habitationem suam deseruit & reliquit, and did dwell at Topsam.

'Tis incident to the Duty and Place of an Alderman to be resident where he is chosen, his very Name imports it, and Removal makes him incapable of doing his Duty where he ought: 'Tis not a Place of any Profit, but of Freedom and Government of the City.

'Tis said that Glide Deseruit & reliquit habitationem, which must be intended a total Desertion, and tho' he may return
3 Bulst. 190. 1 Roll. Rep. 409. again it doth not appear when, so 'tis uncertain; and yet 'tis a good Return: For tho' there ought to be a convenient Certainty, yet 'tis not requisite to be very precise.

But supposing him to return again, it will not purge the Forfeiture after a Disfranchisement: 'Tis like the Case of Tenant for Life making a Feoffment, and entring before the Condition broken, notwithstanding which Entry the Reversioner may take Advantage of the Forfeiture.

But the Chief Justice was of another Opinion, That a Mandamus ought to go. It was agreed, That deserting his Office was good Cause of Disfranchisement; and so was absenting himself from the Council, and that the very
Moor 135. 833. Nature of the Thing did import so much: For every Alderman ought to be a Citizen, and an Inhabitant of the City where he is an Alderman; and if he removes, he ceases to be a Citizen, but may be a Freeman, tho' he wants that Qualification which enables him to be an Alderman.

It was agreed also, That there cannot be more apt and express Words of the Defendant's Absence, than the Words in this Return, Habitationem suam reliquit, and that he did inhabit at Topsam, extra Civitatem. That it was also his Duty to attend at the Common Council, and that it was contra debitum officii to be absent.

But that which made the Return not good was, That there was no particular Summons returned for the Defendant to appear and answer what should be objected against him; and therefore they had proceeded against him without hearing: and if so, his Disfranchisement was against Right and Justice.

This is the express Resolution in James Bagg's Case: And tho' 'tis said that he did not appear Licet summonitus fuit, that is not material; for he must and ought to have a particular Summons for a particular Charge; and 'tis not sufficient to summon him generally, and then to alledge particular Crimes against him, which he may not be prepared to answer.

If he left his Habitation for a Time, he might return, and coming before the Disfranchisement that might cure the Defect of his Removal, he might have some reasonable Cause for his Absence, as Sickness, &c. or going to the Bath, for the Recovery of his Health, or being employed in the Service of the King, and yet he may leave a Servant in his House, and be an Inhabitant there still.

Then as to the Certainty of the Matter here alledged, if it had been set forth in a Plea, it might have been sufficient, because the Party might reply and answer it; but being in a Return to a Mandamus, 'tis otherwise; and this is proved by the Case in Bulstrode cited by the other Judges to maintain this Return.

That Case was, it was returned, That Taylor was summoned before 30 of the Common Council in the Council-Chamber, and did not aver, That at that Time a Common Council was held, and for this Uncertainty, that Return was held insufficient.

But by the Opinion of the other three Justices, the Return in this Case was held good, and yet afterwards in Michaelmas Term, 7 Guilielmi, one Morris brought a Mandamus to be restored to the Place of Capital Burgess of the Devizes in Wiltshire, and a Return was made of the Causes of his displacing; but no Mention was made that he had any Notice or particular Summons to answer the Charge; and Judgment was given in that Case pursuant to the Opinion of the Chief Justice, that the Return was ill.

The

The Case of the Inhabitants of *Hornsey*.

1 Show. 270. 291.

The Justices of the Peace upon their View presented, that a Common Highway leading from such a Place, &c. to the Church of Hornsey, was out of Repair, and that the Inhabitants thereof ought to repair it.

Upon a Traverse to this Presentment, the Jury find that the Way was out of Repair, but that it was not a common Highway.

The Question was, Whether this should have been pleaded specially, or whether it might be given in Evidence upon the Traverse?

And it was insisted that this depended upon the Construction of the Statute of 5 Eliz. upon which this Presentment was made, and upon that Clause thereof, wherein 'tis enacted, That the Presentment of a Justice of Peace upon his own Knowledge shall be of the same Effect in the Law, as a Presentment upon the Oath of twelve Men, who may thereupon assess Fines at the Sessions, saving to every Person or Persons who shall be touched by such Presentment, to have his lawful Traverse to the same as they might have to any Indictment of Trespass.

Now on an Indictment upon this very Statute this Matter might be given in Evidence upon the General Issue, for if it had been pleaded that it was no High-way, such Plea would amount to no more than Not guilty, and would not have been good.

If then it may be given in Evidence upon this Plea, the Presentment in this Case is extrajudicial; for the Authority of the Justices is limited only to Common Highways, and it is found to be a private Way: Now they having a particular and limited Jurisdiction, when they exceed that, what they do cannot be justified; 'tis not like what they do relating to the Poor, for in that Case they are Judges.

Curia. Upon this very Statute the Defendant may traverse the Presentment of the Justices, and give Evidence that the Way is in Repair; for the Design of the Statute was to make the Presentment no more than an Inquisition, but before the Statute he could not have taken a Traverse: For then the Justices, as in Cases of Forcible Entry, were the only Judges, which could not be traversed.

But in this Case they ought to have pleaded reparare non debent, and that a Person (naming him) ought to repair; but by taking this Traverse, the Presentment is admitted to be good.

Sawyer *verſus* Killigrew.

Middleſex. ſſ.

Covenant for the Sale of an Office, and the Vendor to have the Penſion belongtng to it.

GEorgius Sawyer nupet de Weſtm. in Com. pred. Ar. alias dict. Georgium Sawyer, &c. ſum. fuit ad reſpondend. Guilielmo Killigrew Mil. de placito quod teneat ei convention. inter eos factam ſecundum vim formam & effectum cujuſdam ſcripti agreamenti inde intet eos confect', &c. Et unde idem Guilielmus per Johannem Edkins Attorn. ſuum dicit quod ipſe idem Guilielmus 27 die Julii anno Regni Dni. Caroli Secundi nuper Regis Angliæ, &c. triceſimo apud paroch. Sancti Martini in Campis in Com. præd. habuit tenuit & exercuit officium Vicecamerarii Sereniſſimæ Majeſtatis Katherinæ tunc Reginæ conſorti præd. nuper Regis & modo Reginæ Dotiſſæ Angl. adhuc ibidem in plena vita exiſten. & proficuis eidem officio pertinen' & ſpectan. Cumq; etiam poſtea ſcilicet prædicto 27 die Julii anno Regni dict. nuper Regis 34 ſupradict. apud paroch. præd. Sancti Martini in Campis pro veditione officii præd. per eundem Gulielmum prædicto Georgio fiend. per quoddam ſcriptum agreamenti inter eundem Guilielmum per nomen Domini Anglice **Sir William Killigrew** & prædictum Georgium per nomen Georgii Sawyer Ar. fact. quod quidem ſcriptum agreamenti idem Guilielmus ſub manibus & ſigillis prædict. Gulielmi & Georgii confect. hic in Curia profert cujus dat. eſt eiſdem die & anno præd. Georgius cum aſſenſu & approbatione prædictæ Reginæ agreavit cum prædicto Guilielmo pro officio ſuo Vicecamerarii prædicto quodq; ipſe præd. Guilielmus durante vita ſua naturali per agreament. prædict. Georgii & cum conſenſu præd. Reginæ teneret haberet gauderet & reciperet omnia proficua officii Vicecamerarii præd. adeo plene prout ipſe idem Guilielmus eadem tunc tenuit, viz. Penſion' annual. Ducent. Librar. legalis monet. per Annum per præd. Dominam Reginam durant. vita ipſius Guilielmi ſolvend. ac dona ſua novalia annualia Angl. **his yearly New-Year's Gifts.** Centum & Viginti Libr. legalis monet. per An. pro vita ſua Ac etiam annual. feod. & Liberat. Angl. **Livery,** exiſten. ſexaginta & ſex Libr. per Annum acetiam ſalar. Alimentar. Angl. **Salary Board-Wages,** de Officio Gazophilacii Anglice **Comptroller's Office** Centum & triginta Libr. legalis monet. per annum in toto attingen. ad ſummam Quingentar. & ſexdecim

Librar.

Librar. per annum vel eo circiter Omnia quæ præd. Georgius per ſcriptum præd. obligavit ſe quod pred. Gulielmus haberet perciperet & gauderet durante vita ipſius Guilielmi naturali Quodq; ipſe præd. Georgius nullam partem inde reciperet uſq; poſt Mortem pred. Guilielmi prædictuſq; Georgius per ſcriptum præd. agreavit accommodare prædicto Guilielmo durante vita ſua ipſius Guilielmi uſum Cubiculor, Anglice Lodgings, apud Domum vocat. Somerſet-Houſe, ſupra domos pro locatione Curruum Angl. Coach-Houſes, prout per ſcriptum præd. plenius apparet quodque ipſe idem Guilielmus Killigrew per agreament. præd. & per conſenſum præd. Reginæ fuit habere & durante vita ſua naturali gaudere & recipere tota proficua præd. officii Vicecamerarii tam plene quam ipſe adtunc tenebat officium præd. Ducent. libras per Annum a præd. Regina pro penſion. durante vita prædictæ Reginæ ac etiam annual. novi Anni Dona de Centum & viginti libris pro vita ſua ac etiam ſua annual. feod. dona & libetat. Anglice Liveries, exiſten. ſexaginta & ſex libr. per Ann. Ac etiam ſua Salar. Angl. Board-Wages, ab officio Gazophil. Anglice The Cofferer's Office, de Centum & triginta libris per Annum in toto ſe attingen. ad Quingent. & ſexdecim libras per An. aut eo circiter quæ omnia præd. Georgius per agreamentum præd. promiſit ad & cum præd. Gulielmo quod ipſe Gulielmus Killigrew reciperet & gauderet durante vita ſua naturali & quod ipſe Georgius non reciperet aliquam partem inde donec poſt mortem prædicti Guilielmi Et prædictus Georgius agreavit etiam cum prædicto Gulielmo accomodare prædicto Guilielmo durante vita ſua uſum cubil. apud domum Somerſet ſupra domos pro locatione Cur. prout perſcriptum præd. plenius apparet Et idem Guilielmus in facto dicit quod prædicta Regina adtunc & ibidem omnia in agreamento præd. approbavit & eiſdem conſenſit quodque ipſe idem Gulielmus in performation. agreamenti prædicti poſtea ſcilicet eiſdem die & anno ſupradictis apud paroch. Sancti Martini in Campis debito modo ſurſum reddidit officium præd. Reginæ predictæ ac ſuperinde in ulteriori performation. agreament. præd. præfat. Georgius per procurationem ipſius Guilielmi in officium illud per prædictam Dominam Reginam ibidem debito modo admiſſus fuit & officium illud una cum proficuis eidem officio pertinen. & ſpectan. abinde hucuſq; tenuit & graviſus fuit & adhuc tenet & gaudet & ſeptingent. & octoginta libr. de prædicto ſalatio alimentario

Breach aſſigned.

a ex

ex officio Gazophilacii ſolubil' officio Vicecamerarii præd. pertinen' pro ſex Annis finit ad feſtum Sancti Michaelis anno Dni. 1688. ad feſtum illud ſecundum convention. & agreament. præd. præfat. Georgii præd. Guilielmo ſolubil. devener. & ſolvi debuer. quas quidem ſeptingent. & octoginta libras idem Guilielmus non recepit & prædictus Georgius licet ſæpius requiſit. præd. 780 l. aut aliquem inde denar. eidem Guilielmo nondum ſolvit ſed illas ei ſolvere omnino recuſavit & adhuc recuſat & ſic idem Guilielmus dicit quod præd. Georgius convention. ſuam cum prædicto Guilielmo in hac parte fact. eidem Guilielmo ſecundum formam & effectum ſcripti il. non tenuit ſed infregit & il. ei tenere hucuſq; penitus contradixit & adhuc contradicit unde dic. quod deteriorat. eſt & damnum habet ad valentiam 800 l. & inde producit ſectam, &c.

The Defendant pleads, Actio non, &c.

Et prædict. **Georgius Sawyer** per Nathanielem Secomb Attorn. ſum. venit & defend. vim & injur. quando, &c. Et dic. quod præd. Guilielmus Killigrew action. ſuam præd. inde verſus eum habere ſeu manutenere non debet quia dicit quod ipſe idem Georgius a tempore confectionis ſcripti agreamenti præd. uſq; diem impetrationis brevis originalis ipſius Guilielmi permiſit ipſum Guilielm. recipere annuatim omnes denariorum ſummas pro Salar. alimentar. ex officio Gazophilacii præd. ſolubil. eidem officio Vicecamerarii præd. pertinen. ſecundam formam & effectum agreamenti præd. **Abſq; hoc** quod præd Georgius a tempore confection. ſcripti agreament præd. hucuſq; aliquod proficuum præd. officio Vicecamerarii ſpectan. vel pertinen. recepit vel gaviſus fuit & hoc parat. eſt verificare unde petit judicium ſi præd Guilielmus Actionem ſuam præd. inde verſus eum habere ſeu manutenere, &c.

To this the Plaintiff demurs: Et pro Cauſis morationis in lege idem Guilielmus juxta formam ſtatut. in hujuſmodi caſu edit. & proviſ. monſtrat & Cur. oſtendit has cauſas ſequen. viz. quod præd. Georgius in placito ſuo præd. traverſat materiam non allegat. in præd. narration. ipſius Guilielmi & quod placitum præd. eſt incertum & repugnans & caret forma, &c. (**Defendant joins in the Demurrer**) Et quia Juſtic. hic ſe adviſare volunt de & ſuper præmiſſis priuſquam Judicium inde reddant dies dat. eſt partib præd. hic uſq; a die Sancti Michaelis in tres ſeptiman. de audiend. inde Judicio ſuo eo quod iidem Juſtic. hic inde nondum, &c. Ad quem diem hic ven. tam præd. (Quer.) quam prædict.

(Defend.) per Attorn. ſuos pred. & ſuper hoc vif. præmiſſis & per Juſtic. hic plene intellectis videtur eiſdem Juſtic. hic quod præd. placitum præd. Georgii modo & forma præd. ſuperius placitat. materiaque in eodem content. ſufficien. in lege exiſtunt ad ipſum Gulielmum ab Action. ſua præd. inde verſus ipſum Georgium habend. præcludend. prout idem Georgius ſuperius allegavit Ideo conſ. eſt quod præd. Gulielmus nihil capiat per breve ſuum præd. ſed ſit in miſericordia pro falſo clamore ſuo Et quod præd. Georgius eat inde ſine die, &c.

The Agreement is ſet forth in the Pleading, and it was in theſe Words:

This is to declare, That I George Sawyer have by her Majeſty's Conſent and Approbation, as followeth, agreed with Sir William Killigrew for his Vice-Chamberlain's Place, and that he the ſaid Sir William Killigrew is, during his natural Life, by my Agreement, and with her Majeſty's Conſent, to hold, enjoy and receive the whole Profits of the ſaid Vice-chamberlain's Place, as fully as he himſelf doth now hold the ſame; that is to ſay 200 l. per Annum from her Majeſty by Penſion during her Life, and alſo his yearly New-Year's-Gifts of 120 l. for his Life, and alſo his yearly Fees and Gifts and Liveries, being 66 l. per Annum, and alſo his Salary Board-Wages from the Cofferer's-Office of 130 l. per Annum, in all amounting unto the Sum of 516 l. per Annum, or near it; all which I do engage my ſelf that Sir William Killigrew ſhall have, receive, and enjoy, during his natural Life, and I am to receive no Part thereof until after his Death; and I do alſo agree to lend the ſaid Sir William Killigrew, during his Life, the Uſe of his Lodging in Somerſet-Houſe, over the Coach-Houſe: In Witneſs whereof I have hereunto ſet my Hand and Seal this 27th Day of July, 1682.

Upon this Agreement an Action of Covenant was brought in the Common Pleas, wherein the Plaintiff did set forth, That he was Vice-Chamberlain to the Queen Dowager, and that there was an Agreement between him and the Defendant for the Sale of the said Office, which the Defendant was to have by the Consent of the Queen; that by the said Agreement the Plaintiff was to enjoy a Pension during the Life of the Queen, and the other Profits of the Office during his own Life; that pursuant to this Agreement he surrendred the Office to the Queen, and procured the Defendant to be admitted, which was accordingly done, and that he enjoyed the Office, and for six Years Arrears of Salary this Action was brought. 2 Vent. 79.

The Defendant pleaded in Bar, That he had suffered the Plaintiff to enjoy the Profits, &c. according to the Agreement, and traversed, that he had received any Part of the Profits of the said Office; and upon a Demurrer Judgment was given upon the Point of pleading, That the Traverse was ill. *This Judgment was for the Defendant* Sawyer, *That the Bar was good.*

And upon this Judgment a Writ of Error was brought in the King's Bench, and the Question there debated was, Whether this was a good Grant or not? And it was agreed, That nothing but Usage could support it.

Then it was argued, That this Covenant was in the Nature of a personal Warranty, and not to be compared to a Covenant for quiet Enjoyment, where, upon a Disturbance, the Party hath a Remedy over; but this Action rests upon the Covenant it self, and doth not wait upon the Office: For if the Queen should die, the Defendant is still bound, and so he is also if the Profits of the Office should be sunk.

'Tis more properly like the Case of Robinson and Cuthbert, which was in Consideration that the Plaintiff would deliver so much good Silk, the Defendant promised to see him paid. Mich. 21 Car. 2.

So another Promise was, That if the Plaintiff would deliver Wines to A. the Defendant said, He should not lose a Penny.

In both which Cases the Inference is, That he will pay it: 'Tis an Obligation and a peremptory Undertaking for him to pay the Money.

An Obligor in a Bond was not to be found, whereupon a third Person promised the Obligee, That in Consideration he would give him a Letter of Attorney to put the Bond in Suit, That he would warrant the Debt; the Breach was held to be well assigned; that the Plaintiff had performed the Consideration, and the Defendant had not paid Roll. Abr. tit. Voucher 738. pl. 1.

the Money (without saying that the Obligor had not paid it) because the Warranty was personal.

Sid. 170. So where a Man warranted to the Plaintiff all the Money which another Person owed him, the Breach is well assigned in not paying the Money, and not in the not warranting.

Econtra. The Meaning of this Covenant must be, That the Plaintiff must do some Act in order to receive the Profits, as to ask it of the Treasurer: The Defendant is not bound by this Agreement to pay the Money, but only restrained from intermeddling with the Salary, &c.

He engaged that the Plantiff should receive the Profits of
Cro. Eliz. 914. Yel. 30. idem. this Office, and in assigning of the Breach, the Plaintiff doth not shew that he was disturbed by the Defendant, or any wise hindred by him from receiving it; and therefore the Breach is not well assigned, and of this Opinion was the Chief Justice and Mr. Justice Eyre: The other two Justices contra. These two held that there was a good Breach, and that the Bar was good, and a direct Answer to the Breach, so all were against the Plaintiff in the Writ of Error; wherefore he proceeded no further, and there it hangs.

Newport *versus* Godfrey.

Mich. 1 Willielmi, *Rot.* 200.

3 Levinz. 267. 2 Ventris 184. DEbt in the Detinet against the Defendant, as Executor of Turner, for Rent-arrear, in the Life-time of the Testator upon a Lease-parol; and it appeared upon the Declaration that the Lease expired in the Life-time of the said Turner.

The Defendant pleaded several Bonds entred into by the said Turner for the Payment of Money which he averred to be just Debts, and that he had administred all præterquam, &c. which he retained to satisfy the said Bonds.

And upon a Demurrer to this Plea, Judgment was given in the Court of Common Pleas for the Plaintiff, that the Rent ought to be paid before the Bonds. For tho' it was objected, That if the Lease had not been determined, the Rent then due might be preferable to a Bond-Debt, because the Goods of the Testator are liable to a Distress: But now the Lease being determined, it was only a personal Thing, and could not take Place of Specialities; yet the Court was of Opinion that the Debt for

this Rent did ſtill ſavour of the Realty, and that the Determination of the Leaſe made no Alteration in the Contract, but that the Action might be maintained by Reaſon of the Profits of the Lands which the Teſtator had received.

Upon this Judgment a Writ of Error was brought, and it was affirmed in this Court. Vid. 2 Cro. 233. Barwick verſus Foſter, Fitz. Abr. tit. Avowry 240.

Grimly *verſus* Fawlkingham.

IN a Prohibition to a Libel in the Spiritual Court for the Tithes of a Water-Corn-Mill, a Modus was ſuggeſted. 1 Show. 280. 2 Inſt. 621. F.N.B. 51. h.

The Defendant confeſſed the Modus as to Part, but ſaid that there was an Addition to the ancient Mill; viz. another pair of Mill-ſtones (your Mill anciently had but one Pair of Stones, but of late had two Pair) and ſo prayed that the Prohibition might only go to the Tithes of the antient Mill.

It was argued that moſt Mills of common Right ought to pay Tithes, and that Executors may be ſued for Arrears of Tithes of Mills in the Life-time of the Teſtator.

'Tis true, no Tithes ought to be paid for Fulling-mills, 3 Bulſt 212. 2 Cro. 523. Lit.Rep.314. 1 Roll. Rep. 84, 405. 1 Roll. Abr. 656, 652. placit. 3. becauſe the Gain is uncertain, and ariſeth by the Labour of Men, and therefore Tithes in ſuch Caſes ought not to be paid without a ſpecial Cuſtom to warrant it, but only of things renovant.

Preſcription to a Modus to pay ſo much every Year in Lieu of all Tithes iſſuing out of two old Houſes and Mills, and afterwards the Owner of the Houſes built two new Corn-mills, under the ſame Roof; it was held that theſe new Mills ſhould not be diſcharged of Tithes by Virtue of the old Modus, becauſe ſuch Tithes are not meerly predial but perſonal likewiſe, and the Miller ought to pay the 10th Diſh; tho' 'tis ſaid in the ſame Book, that Tithes of Paper and Fulling-mills are perſonal.

Econtra. It was ſaid that the Modus extends as well to the new Mill-ſtones as to the old: For if theſe break, the Modus goes to the new, ſo that tho' they are laid down in any other Place, yet if they are under the ſame Roof, the Preſcription will extend to all, becauſe the Mill is the Subſtance to which it chiefly relates; the Preſcription is to the Mill in general, and 'tis but accidental whether there are one or two pair of Stones therein, 'tis ſtill but unum molendinum, and muſt be ſo demanded in a Præcipe,

In

In Lutterel's Case it was held, That if a Man had Estovers by Prescription, the Alteration of the Rooms in his House, or adding new Chimneys or Rooms will not destroy the Prescription.

So if an old Mill or House fall, or is pulled down, the Owner may re-edify upon the same Foundation which is the perdurable Part of the Estate, and in Judgment of Law includes the new as well as the old House when standing.

A Prohibition was granted.

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DE

Term. Sanct. Mich.

Anno 3 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1691.

College of Physicians *versus* Bush.

Trin. 3 Guilielmi, *Rot.* 717.

THEY brought an Action of Debt upon the Statute of H. 8. which prohibits the Practise of Physick within London or seven Miles thereof, under the Penalty of 5 l. for every Month, except the Party is approved under the Seal of the College: And for practising Physick in Westminster for so many Months, this Action was brought. 14 H. 8. cap. 5.

The Defendant pleaded Letters Patents of King Charles the Second, by which free Liberty is given to French Protestants to exercise the Faculty of Physick in London and Westminster, &c. and that he was a French Protestant, &c.

Upon a Demurrer the Plea was held ill; but then an Exception was taken to the Declaration, which sets forth, That the Defendant practised Physick in Westminster, and doth not say that it was within seven Miles of London, for which Reason the Defendant had Judgment.

Rex

Hannam *verſus* Woodford.

Trin. 3 Willielmi, *Rot.* 257.

3 Levinz. 312. After the Death of a Cognizee in a Statute, his Adminiſtrator ſued forth an Extent, and the Liberate being returned, he made an Aſſignment of the Lands without an actual Entry, or without executing the Deed upon the Land.

And the Queſtion was, Whether this Aſſignment was good or not?

It was compared to an Intereſſe Termini, and that this Aſſignment was good, becauſe a Man may grant or diſpoſe what he has not actually in Poſſeſſion.

2 Cro. 659. 2 Roll. Rep. 241. 1 Rol. Abr. 859. Palm. 208. Bridg. 12. And to prove this Aſſertion, the Caſe of Powſley and Blackman was cited, which is reported in many Books, and is ſhortly thus:

A Mortgage was made of Lands for Payment of Money within the Space of five Years at ſeveral Payments; and in the ſame Deed it was agreed, That the Mortgagee ſhould not intermeddle with the actual Poſſeſſion of the Profits until default of Payment, &c. Afterwards the Mortgagor made a Leaſe of the Lands for ſix Years; the Leſſee entred, the Money was not paid, and at the End of the Term the Leſſor had his Eſtate again; the Mortgagee, without any lawful Entry, deviſed the Lands to his Son, and died; and it was adjudged, That the Deviſe was good, which could not be, if the Leaſe made by the Mortgagor had been a Diſſeiſin.

But on the other Side it was ſaid, That by the Return of the Liberate, the Adminiſtrator had no Right, only a Poſſeſſion in Law, Quouſque de debito fuerit ſatisfactus; the proper Way had been to bring an Ejectment upon the Liberate to recover the Poſſeſſion, and then the Aſſignment had been good; and of this Opinion was the Court. Vid. Plow. 423. 1 Inſt. 270. a.

Rex & Regina *verſus* Buckeridge & *al'*,

AN Information was brought againſt the Defendant for not repairing of a Highway ratione tenuræ between Stratford and Bow: It was tried at the Bar by an Eſſex Jury.

The Evidence for the King was, That Mawd the Empreſs gave certain Lands to the Abbeſs of Barking to repair this Way, that the Abbeſs, &c. ſold thoſe Lands to the Abbot of Stratford, who by the Conſent of his Convent, charged all his Lands for the Repair of the Way; and thus it ſtood till the Diſſolution. &c.

Then all the Lands of the Abbot of Stratford being veſted in the Crown, were granted to Sir Peter Mewtis, who held them charged for repairing the Way, and from him by ſeveral meſne Conveyances they came to the Defendants: This was proved by ſeveral Witneſſes living in other Pariſhes. none being admitted to give Evidence, who lived in either of the ſaid Pariſhes of Stratford or Bow.

But it was ſaid for the Defendants, That no Lands ſhall be chargeable for the repairing this Highway, ratione tenuræ, but ſuch which were originally given for that Purpoſe, and ſo the Defendants could not be Guilty, unleſs it was proved that they had ſome of thoſe Lands in Poſſeſſion which were given by the Empreſs to the Abbeſs of Barking, and that no other Lands were liable, formerly belonging to the Abbot of Stratford, but ſuch which he bought of the ſaid Abbeſs.

The Court was of Opinion, That upon this Evidence all the Lands of the Abbot were liable to repair this Way, and directed the Jury accordingly, who found for the Plaintiffs.

Rex & Regina *verſus* Alſop.

THE Defendant was convicted before the Juſtices of Peace in Seſſions, upon an Indictment brought againſt him upon the Statute of E. 6. and upon that Conviction he was committed, and afterwards brought a Habeas Corpus, and being in Court, ſeveral Exceptions were taken to the Indictment. 1 Show. 339 2 & 3 Ed. 6. cap. 14.

First, It was agreed on all Sides, That this Statute was in Force, by which 'tis enacted, That no Perſon ſhall ſhoot in any Place any Hail-ſhot, or more Pellots than one at one Time; upon Pain to forfeit for every Time that he or they ſhall ſo offend, 10 l. and Impriſonment for three Months.

(1.) One Exception was, that the Indictment ſets forth, That the Defendant did ſhoot Conies in Codden Wood, but it doth not appear where he ſtood when he ſhot, which may be in

 ſeveral

ſeveral Wills, and the ſhooting being the Offence, it muſt be certainly laid; ſo that upon this Indictment there can be no Iſſue.

(2.) There is no Judgment given upon this Indictment; for 'tis ſaid, Quod forisfaceat, &c. it ſhould have been forisfaciat: 'tis like ſcire for ſciri.

But the Court would not quaſh the Conviction upon theſe Exceptions.

At another Day the Matter of Law was ſpoke to, That the Juſtices of Peace have no General Juriſdiction to hear and determine this Offence: For tho' their Commiſſion is, ad pacem conſervand. yet that Power is reſtrained to Caſes only of open Violence: So likewiſe by Virtue of their Commiſſion they may enquire, De omnibus & ſingulis malefactis & offenſis, which Words alſo have a Qualification of ſuch Offences only into which they may lawfully enquire.

12 Rep. 97. Cro. Eliz. 601, 697.

If therefore they have no Power by the general Words of their Commiſſion, which are reſtrained as aforeſaid, then they muſt have an Authority by the Statute, but that gives them none, therefore the Judgment ought to be quaſhed.

Econtra. The Juſtices have Cognizance of this Matter both by Statute, and alſo by Virtue of their Commiſſion.

33 H. 8. cap. 6.

1. By Virtue of the Statute of 33 H. 8. which enacts, That no Perſon ſhall ſhoot in a Gun under the length of one Yard, on pain to forfeit 10 l. Power is thereby given to the Juſtices of Peace in their Seſſions to hear and determine Offences contrary to that Law.

Now this Indictment was concluded generally contra formam ſtatut. ſo that any Statute will warrant and maintain this Indictment, which gives the Juſtices Authority in ſuch Caſes.

But the Offences againſt the Statute of Ed. 6. are alſo enquirable by them in their Seſſions, becauſe that Statute is not introductory of a new Law, but ſupplemental to that of H. 8. 'Tis recited therein, and 'tis provided, That it ſhall not reſtrain thoſe from ſhooting who have Authority ſo to do by that former Act; and that all others who ſhall preſume to ſhoot, ſhall preſent their own Names to the next Juſtice of Peace, who is to ſee them recorded at the Seſſions: So that it ſeems to be an Offence inquirable there.

To this it was anſwered, That the Names of ſuch Perſons were to be preſented and recorded at the Seſſions, that the King might know what Men were able to ſerve him in his Wars.

2. That the Juſtices of Peace have Authority to enquire into this Offence by Virtue of their Commiſſion, which gives them Cognizance of ſeveral Acts of Parliament ever ſince they themſelves were erected by the Statute of E. 3. and it would be a vain Thing to ſtuff their Commiſſion with the Recital of ſeveral Statutes, when the general Words will and may give them ſufficient Power.

In the beginning of their Commiſſion 'tis Aſſignavimus vos, &c. ad pacem conſervand, &c. ac ad omnia ſtatuta & ordinationes pro bono pacis noſtræ, &c. cuſtodiend. which are general Words, and this is an Offence againſt the Peace, and therefore they have Power to enquire into it.

And of this Opinion was Juſtice Dolben.

Chief Juſtice contra. The Juſtices of Peace by the general Words of their Commiſſion, have Power to puniſh Offences againſt any Statute made concerning the Peace of the Nation; but by this Act, upon which this Indictment is brought, the Peace is in no wiſe concerned, becauſe the Offence thereby created is for want of due Qualification of the Perſon to ſhoot, which is not an Offence againſt the Peace.

This cannot be an Indictment upon the Statute of H. 8. becauſe they do not ſet forth the Length of the Gun, which by that Law ought to be a Yard long; and therefore the general Concluſion contra formam ſtatut. will not help it: And for theſe Reaſons the Indictment was quaſhed.

But it was agreed, That the Party might be indicted for this Offence before the Juſtices of Oyer and Terminer, but not before Juſtices of the Peace, for want of Juriſdiction.

The Counteſs of Winchelſea *againſt the Lady* Maidſtone.

TRover for Goods, tried at the Bar by a Jury of Kent; upon the Trial the Caſe was thus:

The Earl of Winchelſea in the Month of Auguſt, 1689. made his Will, and hereby deviſed to the Plaintiff all his perſonal Eſtate to pay his Debts, &c.

The Will was proved:

But immediately upon the Death of the Earl, and before he was buried, the Defendant who was married to the eldest Son of the said Earl, took Possession of the House and Goods in the Declaration mentioned.

The Plaintiff produced the Will under the Probate, then she proved that the Goods were appraised at 1800 l. she produced an Inventory of them, and proved that they were the same contained in the Declaration; she likewise gave Evidence of the Conversion.

The Defendant produced a Deed of Gift of these Goods made by the Earl in the Year 1650. Habendum to Trustees therein named for the Use of his then Lady (but since dead) for the Term of her natural Life, and afterwards that they should be and remain to his Children.

The Counsel for the Plaintiff admitted, That tho' the same Goods for which the Action was brought, were likewise contained in the Deed of Gift, yet that Deed could not be good against a Creditor.

That the Earl being in Debt, a Judgment was obtained against him, and by a Testatum Fieri fac. his Goods were taken in Execution, and sold by the Sheriff in Hillary Term, 1657. for 800 l. which was after this Deed of Gift.

It was proved that his Steward paid the Money, and redeemed the Goods, and the Earl gave him a Bond for Repayment, which was done, and the Bond cancelled, so that by this Means he had gained a new Property.

A Copy of the Testatum Fieri fac. was produced, and likewise the Bill of Sale by the Sheriff, and the Bond cancelled, and thereupon the Plaintiff had a Verdict.

Sir James Smith's *Case.*

Farref. 77. 6 Mod. 78. 1 Vent. 66.

HE brought a Mandamus to be restored to the Place of an Alderman of the City of London.

The Substance of the Return was, That Sir James Smith was an Alderman of the said City on the 13th Day of February, 1688. That he was duly chosen according to the Custom, &c.

That he continued an Alderman thereof until the firſt Day of Auguſt 1689. That he did not take the Oaths enjoined to be taken by all Perſons in Office by Virtue of an Act of Parliament made in the firſt Year of the King and Queen, which Oaths were to be taken before the ſaid firſt Day of Auguſt, for which Reaſon he was deprived, and hath not been elected ſince.

The Words of the Statute 1 Guilielmi, &c. are, If any Perſon NOW HAVING any Office or Employment Civil or Military, ſhall neglect or refuſe to take the Oath thereby appointed to be taken, *&c.* before the firſt Day of *Auguſt*, 1691. or ſooner; if required, *&c.* that in ſuch Caſe the ſaid Office and Employment of the Perſon ſo neglecting, *&c.* ſhall be void.

The Queſtion was, Whether Sir James Smith was an Alderman at the Time of the making that Statute, and whether he continued ſo to be until the firſt Day of Auguſt, 1689?

And this depended upon the Judgment in the Quo Warranto againſt the City of London: For if the Corporation was diſſolved by that Judgment, then by conſequence Sir James Smith was no Alderman at the Time of the making of the Act 1 Guilielmi, and was not obliged to take the Oaths, &c.

And if ſo, then another Queſtion will ariſe, Whether by the Act for the reverſing the ſaid Judgment, and for reſtoring the City to its ancient Rights, (wherein the Judgment is recited and declared to be illegal) the ſaid Sir James Smith ought to be reſtored? The Words are theſe.

And be it enacted, &c. That all Officers and Miniſters of the ſaid City, that rightly held any Office or Place therein at the Time when the ſaid Judgment was given, are confirmed, and ſhall have and enjoy the ſame as fully as they held them at the Time of the ſaid Judgment given, except ſuch who have voluntarily ſurrendered any ſuch Office, or have been removed for any juſt Cauſe.

It was inſiſted, That by the Judgment in Quo Warranto (if legal) nothing was altered, for Execution was never ſued forth; it was like a Recovery in a Quare impedit, wherein the Party has a Title to a Writ to the Biſhop; but 'till then the Church is full. 3 Inſt. 118. *Ryley* placito 6. 188, 277.

Now whether a Body Politick may be diſſolved or not, is a Queſtion of great Conſequence, and never yet received any judicial Determination; it was a Thing not thought on at the Diſſolution of Monaſteries, and never attempted but in the late Reigns.

But

But admitting such a Judgment could be given, it was not intended that the Corporation should be dissolved thereby. for Sir Robert Sawyer, who was then Attorney General, said, It was only that the King might lay his Hands gently on the Franchises.

It may be objected, That the very Essence and Being of a Corporation consists in its Franchises; when these are gone or seised, the Corporation is dissolved.

But a Corporation is not known by such Name, nor taken Notice of as such by any Law-Book or Author of Credit.

Palm. 501. In Heyward and Fulcher's Case 'tis said, That a Name and Power makes a Corporation, and this may be either by Prescription, Patent, or Acts of Parliament.

Some Writers, and those of no mean Account in the Law, affirm, That tho' the King may create a Corporation, yet he cannot dissolve it, neither can they dissolve themselves by any voluntary Surrender; but if any of the Members offend against the Privileges granted to them, a Quo Warranto may be brought against such Offenders only, and not against the Body Politick.

They further affirm, That nothing can be seised into the King's Hand, but such which was part of the ancient Inheritance of the Crown, and then it is immediately extinct; or else such Things which have an Existence and may be restored, as Fairs, Markets, &c.

That most of the Authorities which seem to warrant a contrary Opinion, happen to be in the latter Part of the Reign of H. 3. and between that Time and the Reign of R. 2. which were tumultuous Times, and most of the Corporations were then seised; but then also the King took more or less of the Government as the Party offended.

Ryley 277. If the Fault was in the Mayor, then he seised the Mayoralty and put in a Custos, which was in order to preserve the Corporation, and the Writs of Restitution were always according to the Seizure.

'Tis true, the Judgments in Quo Warranto's are various, as when the Franchises were totally usurped, then the Judgment is quod extinguantur; but when they are abused, 'tis quod capiantur; which imports a future Time, and therefore that the Franchises have still a Being; and this is the Judgment in this very Case: But it seems to be contradictory in its self, for the first Part of it is, Quod libertat. & privilegia, &c. capiantur & seisantur in manus Regis: And the latter Part of it is, Quod capiantur ad

ſatisfaciend. Domino Regi de fine ſuo pro uſurpatione libertat', &c.

Then as to the Act of 2 Gulielmi, it ſets forth, That this Judgment was illegal and arbitrary, which is as much as to ſay that it had not the Form of Law; and therefore 'tis void; if ſo, the Corporation was ſtill in being.

Neither can it be objected, That the Parliament was of Opinion that the Franchiſes were gone by that Judgment: for tho' the Act takes Notice that it would tend very much to the Peace of the Kingdom to reſtore the Mayor, Commonalty, and Citizens, &c. to their ancient Liberties from which they had been deprived; yet it doth not follow from thence, that they were deprived by this Judgment; for it might be by Force or any other Means:

Nay, 'tis ſo far from importing that the Corporation was diſſolved, that it ſuppoſeth it to have Exiſtence; for it enacts, That all Officers who had rightfully any Office at the Time of the Judgment, ſhall be confirmed; which implies, That the Body Politick had then a Being, otherwiſe thoſe Words are of no Signification.

Serjeant Pemberton argued for a peremptory Mandamus, and that by the Judgment in the Quo Warranto the Corporation was diſſolved; for otherwiſe the Liberties and Franchiſes muſt remain, which could not be, becauſe Capiantur & ſeiſantur in manus Regis. *Contra.*

And this appears more plain from the very Nature of a Corporation, which is an artificial Body conſtituted of ſeveral Members like a natural Body; 'tis united by its Franchiſes, and 'tis called a Franchiſe by the very Letters Patents of Incorporation; for all Corporations were made by Letters Patents or Acts of Parliament, tho' in ſome Places they preſcribe to them, which in it ſelf implies a former Grant.

If then this Body Politick is a Franchiſe, or if the eſſential Part thereof is made up, and conſiſts in Franchiſes, then it ſeems plain, that in all Conceſſions and Grants of Franchiſes there is a tacit Condition implied in thoſe Grants, that the Perſons to whom they are made ſhall uſe them juſtly; and 'tis ſuch Condition, which if broken, will determine the very Grant it ſelf.

This is one Way by which a Corporation may be deſtroyed: So likewiſe for Miſuſer and Abuſer, the whole Franchiſes are forfeited for ever. 2 Inſt. 222: 20 Ed. 4. 5.

Now the proper Remedy for the King to take Advantage of ſuch a Condition broken is by a Quo Warranto, which is called The King's Writ of Right, in which the ſuppoſed Abuſe of Fran-

Franchiſes is examined, and either the Defendant is acquitted of the Franchiſes Capianrur, which is the final Judgment.

2 Inſt. 282, 283. 'Tis true, there are two Sorts of Judgments upon the Proceedings on this Writ; for if the Party make Default at the Return of the Venire facias, then the Judgment is, Quod capiantur nomine diſtrictionis, which is but a temporary Judgment till he appear; and 'tis repleviſable; but if the Replevin is not brought during that Term in which the Venire fac' is returnable, the Franchiſes are for ever loſt.

Co. Entr. 527. 15 Ed. 4. 7. Yel. 190. But if he appear and maketh out no Title, then the Judgment is, Quod libertates, &c. capiantur in manus Regis, &c. So that immediately upon entring of the Judgment the Party is ouſted, and no more Liberty remains in him, the Franchiſes being all determined.

As for the Word Capiantur in the Judgment, it cannot be ſaid that it implies any future Time when they may be taken, &c. for it amounts in legal Conſtruction to Capiun-
9 Rep. 98. a. tur; ſo in an amoveas manum, 'tis Quod manus Domini Regis amoveantur, becauſe when the Forfeiture is found the Party is immediately out, and the King is then in Poſſeſſion, and ſo the Law has been taken in ſuch Caſes.

Raſt. Entr. 540. Therefore in a Quo Warranto brought againſt the Defendant for claiming of a Court-Leet, the Judgment was, That it ſhould be ſeiſed for Miſuſer, and poſtea the Defend' pet' rehabere per finem & ei conceditur: Now if it had not been taken into the King's Hands, what need was there of the Words rehabere, & ei conceditur, as in the Entry of that Judgment.

Co. Entr. 539. b. 560. Some Judgments in this Proceeding are entred more at large, that the Liberties, Franchiſes, and Privileges in manus Dominæ Reginæ ſeiſantur, and that they remain in her Hands, &c. Et quod amodo eædem libertates Francheſiæ & privilegia extinguantur & amoveantur, and that the Offenders Capiantur to ſatisfy the Queen, De redemptione ſua pro uſu & uſurpatione ſuis ſuper dictam Dominam Reginam de libertatibus, &c.

15 Ed. 4. 7. But by the Words Capiantur in manus Regis, which is the uſual Form of the entring of the ſhort Judgment given in ſuch Caſes, all the Franchiſes are gone, and that ſo the Law has been conſtantly taken to be.

One of the Queſtions put in Sir George Reynell's Caſe was, Whether upon the Forfeiture of the Office of the Marſhalſea, the King could ſeize it without a Scire fac' firſt brought: And the Ld. Chancellor having asked the Judges who aſſiſted him,

how a Seizure might be made: My Lord Coke answered, That by an Inquisition and Award of Seizure, the King is in Possession, without any other Writ or Commission for that Purpose; which shews, That by the Word Capiatur there is a final Judgment, and the Franchises are dissolved.

There are but three Cases which can be cited out of all the Law-Books to prove, That there ought to be a Scire fac. before the King can make a Seizure; and these are,

6 Edw. 2. Membrane 2.
2 Inst. 572.
Ryley placita Parliament. 168, 169.

Which Cases are not to this Purpose; for 'tis true, as my Lord Coke hath observed upon the Statute of Articuli super Chartas, That if an Ouster le maine be brought, and afterwards a precedent Record is found to maintain the King's Title, he cannot reseize without a Scire fac. The Reason is, because he was out of Possession, and by the Office so found, his Title accrued before the Livery; but where a Judgment is final (as in this Case) the Franchises are then actually in the Possession of the King, and the Corporation is dissolved; for the Liberties which united the Body Politick are taken away, and then 'tis but as one single Person, nothing being left to distinguish them by the Name of Mayor, Aldermen, &c. and therefore there needs no Scire fac. in such Cases. 2 Inst. 572.

That the Corporation was dissolved appears yet more fully by the Act of 2 Willielmi, mentioned before; for thereby the Judgment is declared to be illegal, and in the Preamble, 'tis said, That it would tend very much to the Peace of the Kingdom to restore the Mayor and Citizens, &c. to their ancient Liberties, of which they had been deprived: Now 'tis a very forreign Construction to say, That they might be deprived by Force, and not by that Judgment, when 'tis plain that it was the Opinion of that Parliament, that they were deprived of their Liberties by that Judgment, for otherwise those Words are void.

If therefore by this Judgment the Corporation was dissolved, then Sir James Smith was no Alderman at the Time of the making the Act of 2 W. & M. c. 8. and having no Office

at that Time, is not therefore obliged to take the Oaths; and tho' he has not taken them, yet he ought to be restored.

Curia. A Corporation may be dissolved: For 'tis created upon a Trust, and if that be broken, 'tis forfeited; but a Judgment of Seizure cannot be proper in such a Case, for if it be dissolved, to what Purpose should it be seised?

Therefore by this Judgment in the Quo Warranto the Corporation was not dissolved; for it doth neither extinguish or dissolve the Body Politick.

Where-ever any Judgment is given for the King for a Liberty which is usurped, 'tis Quod extinguatur; and that the Person who usurped such a Privilege, libertat, &c. nullatenus intromittat, &c. which is the Judgment of Ouster; but the Quo Warranto must be brought against particular Persons.

2 Cro. 160. 15 Ed. 4. 7. 3 Rep. *Walker's* Case.

But where 'tis for a Liberty claimed by a Corporation, there it must be brought against the Body-Politick, in which Case there may be a Seizure of the Liberties, which will not warrant either the Seizure or dissolving of the Corporation it self.

Therefore the Corporation being not dissolved, Sir James Smith was still an Alderman, and ought to take the Oaths before the first Day of August; and so Judgment was given in Hillary Term following, That no peremptory Mandamus ought to go.

Justice Dolben doubted upon the main Point, for it seemed to him, That if the Liberties of the City were seised, then Sir James Smith was no Alderman, &c. and that the Parliament of 2 Willielmi did affirm the Judgment to be of Force, for they did not declare it to be void ab initio, but illegal.

Jefferies *versus* John Legendra.

2 Salk. 443. 3 Levinz. 320. 1 Show. 320.

An Action on the Case was brought by the Plaintiff upon a Policy of Assurance of Goods from London to Naples upon the Ship called the Olive-Branch; the Adventure was to begin at the Time of lading of the Ship at London, and seven Guineas was the præmium for every 100 l. insured, Dangers of the Seas only excepted.

At the bottom of this Policy, these Words were subscribed, upon which the Question did now arise, viz.

Warranted to depart with Convoy.

The Plaintiff in his Declaration did aver, That the Ship did depart with Convoy, that she was taken by the French, that the Defendant had Notice of it, but did not pay the Money, &c.

Upon Non assumpsit pleaded, the Jury found a special Verdict to this Purpose, viz.

They find the Policy of Assurance, and that the Defendant subscribed; That the Ship departed out the River Thames under the Convoy of a Man of War; that about the Isle of Wight she was separated from the Convoy by bad Weather, and put in at Torbay, and was there detained by contrary Winds; that the Master of the Ship expecting to meet the Convoy departed out of the Harbour, but could not meet her, being hindred by Stress of Weather; that the Ship was taken by the French, and so lost, &c.

The Question was, What the true Meaning of those Words are, viz. Warranted to depart with Convoy?

The Counsel for the Plaintiff would have it, That no more was intended than a Departure with Convoy at the first setting out of the River; which being provided by the Insurers, and so found by the Verdict, they had fulfilled their Warranty, and so ought to recover. Ex parte quer'.

That what was afterwards done by the Master of the Ship in coming out of the Harbour, ought not to prejudice the Plaintiff; for the Master is in Nature of a common Carrier to convey Goods from one Part to another; but as 'tis found by the Jury, he did not misbehave himself, for he came forth to meet his Convoy, and did endeavour it, but was hindred by the Weather.

These Words imply a mutual Covenant, and the rather because they come in the Conclusion of the Policy; but admitting it to be a Condition Precedent, the Plaintiff hath performed all he ought to do, for 'tis expressly found that the Ship did depart with Convoy.

Suppose the Words had been, Warranted to depart with Convoy, and so to continue to the End of the Voyage; (Dangers of the Seas only excepted) if the Ship should happen to be taken by the Enemy, that is a Danger at Sea; or if the Convoy leave her, being commanded another Way by the King; or if she is assaulted and will not fight, the Insurers shall lose nothing in either of

these Cases: The Meaning of these Words are, That all necessary Care shall be taken to preserve the Ship, which was done by the Plaintiff, therefore he ought to recover.

Econtra. By these Words, the Ship ought to go all the Way with Convoy, and not only out of the Mouth of the River where there is no Danger, for that could never be the Meaning or Intention of the Parties, and that she should be left at Sea where there is Danger.

Now a Policy of Assurance is but a Parol-Contract, and must be construed according to the Minds of the parties, and not according to the strict Sense of the Words.

Styl. 132. As if a Man covenants to make such a Voyage, and to bear all Losses (excepting Perils at Sea) and the Ship was taken in the Voyage per quosdam ignotos homines & bellicosos, such taking by Pirates was held to be perils of the Sea.

When a Person is obliged to secure a Thing under such Terms and Circumstances, the Manner of the Promise must be observed and pursued: As, if I promise to pay 5 l. to another, sending his Servant to me such a Day; if he doth not send his Servant, the Obligation ceases on my Part.

1 Roll. Abr. 450. placit 9. So if a Promise be made to deliver Goods in London, and for that Purpose they are put in a Boat, which is afterwards drowned, notwithstanding the Party used his Endeavour, that shall not discharge him, because he having undertaken to do the Thing on his Part, he ought to perform it.

'Tis found by the Jury that the Master of the Ship departed out of the Harbour, expecting to meet the Convoy, which must be to sail with her, and protect her the rest of the Voyage, or otherwise a Convoy will signify very little or nothing.

Here was a Severance by bad Weather: Now the Ship might have come up to the Convoy, or that to the Ship; but she did not stir out of Torbay till the Ship was taken, therefore the Insurers being to provide a Convoy, here is a Breach of the Agreement on their Side, which will hinder them from bringing this Action, especially since it is an entire Agreement, and no precedent Condition.

Curia. If the Insured have acted contrary to the Agreement, the Policy fails as much as if there had been a Deviation.

The Word Depart is only terminus a quo; if the Ship had departed from London, and came back again by Fraud, that had been no Departure within the Intention of this Agreement.

But upon this Departure (as 'tis found) the Voyage was begun with Convoy: They were afterwards separated by Stress of Weather, and both endeavoured to save themselves, and afterwards to find out each other; and there being no Fraud found in the Master, Judgment was given for the Plaintiff, tho' it might have been otherwise, if the Convoy had run from the Ship, and by that Means she had been taken.

Rex & Regina *versus* Anonymus.

THE Defendant some Years since killed one J. S. and fled for the same; he appeared now, and was tried the last Assizes in H. and found guilty of Murder, and being brought to the Bar, he pleaded his Pardon.

In which Pardon the Verdict was inserted, then the Writ of Allowance was read, (which is the Warrant remaining in Court for the Judges to allow the Pardon) reciting the Pardon and Sureties found, according to the Statute of 10 Ed. 3. cap. 2.

And now several Reasons were offered by Counsel against the Allowance of the Pardon: For as the Law now stands, he said (with some Heat) That it was Casus primæ impressionis.

It appears by the very Pardon, That upon Not guilty pleaded, the Jury have found the Defendant Guilty of Murder, then comes the Pardon, and after the Recital of the Offence; 'tis Sciatis, &c. quod nos pietate moti pardonavimus murdrum, &c.

Now the Kings of England have been always so far from pardoning of Murder by express Name, that formerly they did not so much as pardon Homicide, but in very soft and gentle Words, as, Sectam pacis nostræ quæ ad nos pertinet de homicidiis. 3 Inst. 235.

In the Register there are Forms of Writs of Allowance, where the King extends his Mercy to Murderers per infortunium, but no such Writ of Allowance for Murder; for 'tis a Crime for which no Mercy should be shewed; and this appears by the Coronation Oath, Part of which is, That the King will shew Mercy where it ought to be; which implies, that in some Cases Mercy ought not to be shewn.

And if in any Case, then certainly in this, for here is nothing pardoned, but what appears to be ex malitia præcogitata, which cries for Justice, and not for Mercy.

The ancient Laws were so tender of Pardons, even for Homicide, which is an Offence of far less Guilt, that the Sta-

2 E. 3. cap. 2. Statute of Ed. 3. was made to prohibit such Charters but where the King might grant them by his Oath; that is, where a Man was killed per infortunium, or in his own Defence.

4 E. 3. cap. 13. Staundf. placita Cornæ 100 b. 101 a. Two Years afterwards in the fourth Year of Ed. 3. another Law was made, taking Notice that Pardons had been granted contrary to the former Act, and thereby it is declared, That no Man shall be pardoned but in Parliament.

And because Kings had been deceived by false Suggestions, and had thereupon dispensed with these Statutes with a Clause of Non obstante inserted in the Pardons; therefore the Statute of 27 Ed. 3. was made, which provides, That in the Pardon shall be contain'd the Names of those Persons at whose Suggestions it was obtained, which if found false, the Pardon is not to be allowed.

13 R. 2. cap. 1. Afterwards upon the grievous Complaint of the Commons of England against such Pardons the Statute of R. 2. was made, by which 'tis expressly enacted, That all Pardons for Murder shall be disallowed.

But by the Iniquity of later Times, Non obstante's have been used to dispense with these Statutes which my Lord Coke calls excellent Laws for the Realm, but by this Means they are made ineffectual, tho' grounded upon the Law of God.

3 Inst. 236. 'Tis observed by that Judge. That before the making of that Statute of R. 2. a Pardon of Felonies would discharge not only Treason, but Murder likewise; therefore it was enacted by that Law, That the Offence committed shall be specified in the Pardon of Murder by express Name; because if it should be specified as such in the Letters Patents, the Parliament did believe the King would never pardon it.

But notwithstanding the new Invention of Non obstante to those Statutes, my Ld. Rolle in giving Judgment in Ricabie's Case said, That the King could not dispense with this Statute, no more than he could with buying and selling of Offices contrary to the Statute of Ed. 6. because it concerneth Justice, and was made for the Advancement thereof, which the King hath promised to observe, and that such Manner of pardoning was contrary to the known and settled Practice for 206 Years, and never heard of before Spencers's Case, which was carried with a strong Hand, and pro hac vice tantum.

But admit the Law and Practice to be so formerly, yet now by the Statute of 1 Guilielmi, which is penned by way of Declaration, that pretended Power (as 'tis there called) of dis-

penſing with Laws, or the Execution thereof by Regal Authority, is declared illegal.

If therefore by this Law Non obſtante's are taken away, no Body will affirm that this Pardon can be good without ſuch Clauſe. Raſt. Entr. 455, 456.

Curia. A general Non obſtante without a particular Recital of the Crime for which the Party is convicted, is not good ſince the making the Statute of R. 2. But at the Common Law, both before and ſince that Statute, the King may pardon Murder with a ſpecial Recital of the Fact, non obſtante that or any other Statute. Sid. 336. *Dudley's* Caſe. 21 Jac. cap. 27.

For ſuppoſe a Baſtard-Child ſhould be born dead, and the Mother conceals it, and 'tis afterwards diſcovered that ſhe had ſuch a Child; if ſhe cannot prove by one Witneſs that it was born dead, 'tis Murder in her by the Statute of King James; but it would be a very hard Caſe, if upon ſuch Circumſtances the King ſhould not have a Power of pardoning.

The Statutes which have been cited, are only to prevent the Frequency of Pardoning; they do not take away the King's Prerogative, but preſcribe certain Forms that Charters of Pardon may not be ſo eaſily granted, and that by ſuch Means the King may be appriſed of his Grants; For before the making of thoſe Statutes, the Parties got Inquiſitions to find the Fact Homicide, and thereupon got Pardons out of the Chancery, Ex merito Juſtitiæ, without applying themſelves to the King; which was prevented in theſe Statutes.

Now what Neceſſity was there of ſuch Regulations in the manner of pardoning, if at the Common Law the King had no Power to pardon Murder?

The Pardon was allowed.

Beak & *al' verſus* Kent.

Trin. 3 Willielmi *Rot.* 357.

INdebitatus aſſumpſit brought againſt an Executor, &c. for Wares ſold. 1 Show. 280.

The Defendant pleaded ſeveral Judgments, &c. and that he had not Aſſets ultra.

The

The Plaintiff replied particularly to each Judgment, and that they were kept on Foot by Fraud.

The Defendant in his Rejoinder put all the Judgments together, and ſaid they were not kept on Foot by Fraud.

2 Cro. 625. 1 Roll. Abr. 802. And upon a Demurrer, the Queſtion was, Whether he ſhould have made ſeveral Rejoinders to all the Judgments in particular, and not have put them all together, like the Caſe of Warkhouſe and Symonds, which was an Indebitatus aſſumpſit for Fees.

The Defendant pleaded ſeveral Judgments, as here, &c. and the Plaintiff made the like Replication.

Then the Defendant rejoined and ſaid, That the Judgments were all ſatisfied, and that he did not keep ſeparalia judicia prædicta on Foot by Fraud (and had left out, nec aliquod eorum;) And upon a Demurrer Judgment was given for the Plaintiff in the Court of Common Pleas, which was affirmed upon a Writ of Error brought in B. R.

Curia. The Plaintiff need not aver in his Replication that every Judgment, but that ſeparalia judicia prædicta, are kept on Foot by Fraud, which had been a good Averment, and then this Rejoinder had been likewiſe good.

If the Jury had found but one Judgment kept on Foot by Fraud, there muſt have been a Verdict for the Plaintiff, becauſe ſufficient Matter of the Iſſue would be then found for him: For 'tis enough if the Subſtance entitles the Plaintiff to an Action, and avoids the Defendant's Plea.

9 Cro. 84. As in the Caſe of Robſert and Andrews: Waſte was brought againſt the Defendant for cutting of 20 Oaks; the Defendant ought to plead, That he did not cut the 20 Oaks or any of them; but if an Action of Debt had been brought on a Bond conditioned, that the Obligor ſhall not do Waſte, and the Breach aſſigned, that he did cut 20 Oaks, 'tis ſufficient to ſay that he did not cut the ſaid 20 Oaks, modo & forma, &c. for if it be found that he cut one Oak, 'tis enough to forfeit the Obligation.

So in a Scire fac. upon a Judgment againſt Tertenants, who pleaded ſeveral Pleas, and the Plaintiff replied, Quoad ſeparalia placita, &c. without ſaying, Quoad placitum of the one, and ſo of the other particularly; for the Words Separalia placita ſhall refer to each Plea, reddendo ſingula ſingulis.

Rex & Regina *verſus* Warrington & *al'*.

AN Information was brought againſt three for a Riot committed in Cheſter, one of them being then Sheriff of the City. 1 Salk. 152. 1 Show. 327.

The Venire fac. was directed to the other Sheriff, and upon a Motion it was objected, That it was not well awarded, for it ought to go to the Coroner.

It hath been ſo where the Sheriff was Plaintiff in an Action, and returned a Tales de circumſtantibus, for the Array in that Caſe was quaſhed, and Proceſs was awarded to the Coroner. 8 H. 6. 12. Br. Abr. tit. *Proceſs.* Placito 58.

The Reaſon ſeems to be, becauſe the Sheriffs of a City or County are but one Officer, tho' they are diſtinct Perſons; and whenever any Writ is directed to them, it muſt be returned by both; for 'tis not ſufficient that one ſhould make the Retorn when the other is dead, becauſe there are not thoſe Sheriffs to whom the Writ was directed. 14 H. 4. 34. Br. Abr. tit. Retorne placito 42.

Econtra. There being a Suggeſtion made upon the Roll, That one of the Sheriffs is a Party, the Venire fac. is well directed to the other.

Coroners of a City are but one Officer in Law, as well as Sheriffs, to execute Writs; but if one of them ſhould be challenged in London, the Writ may be directed to the other.

Curia. If one ſhould die, the Court can award no Proceſs to the other.

If Conuſance of Pleas be granted to be held before two Bailiffs of a Corporation, and an Action ſhould be brought againſt one of them, that Perſon againſt whom 'tis ſo brought, ſhall not have Conuſance of this Matter, for that ſhould be to make him Judge in his own Cauſe.

But if one of them ſhould be Plaintiff in an Action, the Plea ſhall not be removed for that Cauſe, for they being both Judges of Record by Virtue of a Grant from the King, one of them may therefore in ſuch Caſe be both Judge and Party; but the Defendant may except againſt ſuch Proceedings, and then the Plaintiff muſt ſtay till he is out of his Office. 2 H. 4. 4. 1 Rol. Abr. 492.

Cro. Car. 138. 'Tis cuſtomary in ancient Corporations where the Bailiffs are Judges, that they are Officers alſo as to executing of Proceſs: There is a Caſe which ſeems to warrant the Objection now made, it was an Action brought in the City of Briſtol for a Reſcous; an Exception was taken in Style 342. Arreſt of Judgment, That (one of the Sheriffs being of Kin to the Plaintiff) the Venire fac. was awarded to the Coroners, when it ought to have been to the other Sheriff; but the Exception was not allowed, as appears by the Book, for Judgment was given there for the Plaintiff.

But in Eaſter Term following Judgment was given in this Caſe, That the Venire fac. was well awarded to the other Sheriff, and that it hath been formerly ſo reſolved in B. R. between Sir Peter Rich and Sir Thomas Player.

As to the Objection, That they are but one Officer in Law, 'tis plainly otherwiſe; for where one is challenged, the other ſhall ſupply that Defect, and not the Coroner; for he is not the Perſon to execute the Proceſs of this Court, 22H.6.51.b. placito 17. but only where the proper Officer is wanting, which cannot be where there is one Sheriff.

Thomas *verſus* Howel.

Trin. 3 Willielmi, *Rot.* 257.

1 Salk. 170. ERror to reverſe a Judgment in Ejectment for the Plaintiff, upon a Special Verdict found at the Grand Seſſions at Caermarthen, wherein the Caſe was thus:

Zachary Thomas being ſeized in Fæ, &c. had Iſſue three Daughters,

Jane, Mary, Sarah.	And having ſeveral Eſtates in three ſeveral Places, viz.	Lawhorne, Eglis, Kiffick.

He deviſed Lawhorne, which was the beſt Part of his Eſtate, to Jane and her Heirs, Upon Condition, That ſhe at or before her Age of 21 Years do Conſent to marry Theophilus Thomas, who was Nephew to the Teſtator.

Then he deviſed Eglis to Mary, and Kiffick to Sarah, in which Will there was a Proviſo to this Effect:

Provided nevertheleſs, and my will is, That in caſe my Daughter Jane ſhall refuſe to marry my Nephew Theophilus Thomas at or before ſhe ſhall be of the Age of 21 Years, or in the mean time ſhall marry any other Perſon, That the Deviſe to her and Mary ſhall be void.

And then he deviſed Lawhorne to Mary his ſecond Daughter and her Heirs, and Eglis to his eldeſt Daughter Jane, and ſo to his third Daughter ſeverally, upon Condition that they marry the Nephew,

Then follows this Clauſe: But in caſe neither of my ſaid Daughters marry my ſaid Nephew, then alſo the Eſtates given to them in Lawhorn, ſhall be void, &c.

Then he deviſed Lawhorne to ſix Truſtees, that they within nine Months after his Deceaſe, ſhould divide it equally amongſt his three Daughters, or in ſuch manner as the ſaid Truſtees ſhould think fit.

The Jury found that the Teſtator died ſeiſed, &c. and that Jane entred upon Lawhorne, that Theophilus Thomas died before he was twelve Years old, and unmarried; That he did not require Jane in Marriage, and that ſhe did not refuſe to marry him; but at the Age of ſeventeen ſhe married the Leſſor of the Plaintiff.

Upon this Verdict, Judgment was given below for the Plaintiff and Serjeant Pemberton and Mr. Finch (as it was ſaid) having given their Opinions that the Eſtate of Jane was determined, therefore this Writ of Error was brought.

The Queſtion was, What the Teſtator intended by this Deviſe, whether Jane ſhould have the Eſtate, if ſhe was never required, or refuſed to marry the Nephew? Or whether her Eſtate was determined if ſhe did never marry him, as ſhe did not?

It was agreed, That her Eſtate was loſt by marrying another Perſon, and this was collected from the different penning of the Conditions; for Jane was not to have the Eſtate if ſhe refuſed, &c. or if ſhe married any other Perſon.

Then when he demiſed it to Mary the ſecond Siſter, he did not put it upon her Refuſal, but generally upon her not marrying; ſo that this Meaning muſt be, If his two Daughters, contrary to his Direction, ſhould not marry him, then their Eſtate ſhould go to the youngeſt; and if none of them ſhould marry him, then to be equally divided, &c.

He had no more Kindness for one Daughter than for the other: So that it appears throughout the Will, that he intended only the Advancement and Propagation of his own Name; and if that failed, then the Estate was to be divided.

Econtra. If this Construction should be made of the Will, then the youngest Daughter, to whom the least Share of the Estate was intended, will have the most; for she will have her own Part, which was never stirred by the Devise, and a third of the other Part without any Default in her Sister; and the Case will be very hard upon the second Daughter, for according to this Interpretation, she must lose her Estate if she doth not marry the Nephew, tho' she is never asked, and never refused.

Neither was it the chief Intent of the Testator to keep the Land in his own Name, for then he would have given it to his Nephew in the first Place, upon whose Death the Proviso is determined, and all that comes after is made impossible.

His Meaning could not be to restrain his two Daughters from marrying other Men, if the Nephew should refuse them; so that the Words which follow, If she marry any other, must be intended, if she marry any other, so that thereby she made her self incapable to marry him, and the rather because the next Condition is, That if the second Daughter doth not marry him, &c. then, &c. but not if she marrieth another.

Suppose the Nephew had married the second Daughter after the first had given her Consent to marry him, the Estate of the eldest Sister should not be determined, because there was no Fault in her.

Curia. Three Judges for affirming the Judgment in Trinity Term following.

All Wills are to be expounded according to the Intent of the Testator collected out of the Words of the Will.

Now it plainly appears that the eldest should have Lawhorne, if there was no Defect in giving her Consent to marry the Nephew, which by the Act of God was afterwards made impossible; and therefore she shall not be divested of her Estate, being no wilful Fault or Refusal in her.

Thus it will stand upon the Proviso, if there had been nothing farther added in the Will; and as to the Clause which follows, that makes no Alteration in this Case, because it re-

fers to the same Matter, and being in a Will, shall not be construed or taken in a larger Sense, than the Proviso it self, and this is proved by the Authorities following.

A Man having Lands in three Places, devised all to his Son John in Fee; and if he died without Issue, then he devised his Lands in Ham to Henry his Nephew, and died. John entred and made a Devise of the Lands, and died without Issue. It was adjudged, That this was no Countermand of the first Devise to John, quoad those Lands in Ham, but a Limitation by way of Remainder to Henry. 2 Cro. 290. Yelv. 209. Moor 124.

So where an Estate is given in a precedent Clause by Will, it shall not be altered by any subsequent Clause in the same Will. Cro. Car. 396.

But in Deeds it was admitted, That subsequent Clauses which are general, shall be governed by precedent Clauses which are more particular: As, if a Man maketh a Lease for Years, and then giveth a Bond with Condition, That if he suffer the Lessee quietly to enjoy without any Trouble from him, or any other Person, then the Obligation to be void, here the Word Suffer rules the whole Sense, and tho' a Stranger should enter, the Bond is not forfeited. 2 Roll. Abr. 396.

So in Debt upon a Bond entred into by the Bailiff of an Hundred, with Condition to make a Return of All Warrants, &c. he pleaded Performance, &c. The Plaintiff replied, That he being Sheriff, Process was directed to him to levy Issues, and that he made a Warrant to the Defendant, which he did not return: And upon a Demurrer the Replication was held ill, because he did not shew that the Issues were to be levied within the Hundred, &c. for tho' the Words in the Condition are general, viz. All Warrants; yet it shall be intended of such only which are to be executed within the Hundred. Aleyn 10. 2 Saund. 413.

But Justice Gregory was of a contrary Opinion, viz. That the Judgment below ought to be reversed, because Jane the eldest Daughter had not an absolute Estate in Fee, but determinable by way of Limitation; for there was no Clause in the Will, that either of his Daughters should have Lawhorne, but upon Condition that they marry the Nephew, which is a Limitation of their Estate; and to prove this, he cited this Case.

The

Cro. Eliz. 833. 1 Roll. Abr. 411. Moor 644. Vaugh. 271.

The Teſtator deviſed to his eldeſt Son certain Lands in Fee upon Condition, that if he did not pay the Legacies given by the Will, that then his youngeſt Son ſhould have the Lands, &c. This was adjudged a future Deviſe to the ſecond Son, and good in Caſe of Non-payment of the Legacies; and tho' it was void as to the eldeſt Son, it being no more than what the Law gives him, yet if it had been a good Deviſe to him, 'tis a Limitation of his Eſtate; and therefore if he doth not pay the Legacies, the ſecond Son will have it.

DE
Term. Sancti Hill.

Anno 3 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1691.

Pitcher *verſus* Tovey.

Mich. 3 Guilielmi, *Rot.* 61.

ERror to reverſe a Judgment given in the Common Pleas in an Action of Covenant, wherein the Plaintiff declared, That ſhe was poſſeſſed of certain Houſes in St. Martin's Lane for a certain Term of Years, and that ſhe deviſed the ſaid Houſes to Richard Gill for 21 Years, under a certain Rent, which he covenanted to pay. 1 Salk. 81. 1 Show. 340.

That before the ſealing of the Leaſe, it was endorſed for the Payment of 12 Bottles of Canary Wine every Year to Chriſtian Tovey the Leſſor, &c.

That the Leſſee entred, &c. and made his Will, and did thereby conſtitute Suſan Gill ſole Executrix thereof, and ſoon after died.

That the ſaid Executrix proved the Will, and entred upon the Premiſſes, and aſſigned the Term to the Defendant Thomas Pitcher, who entred and was poſſeſſed, &c.

That he the ſaid Pitcher had not performed the Covenants, and aſſigned the Breach in Non-payment of 24 Bottles of Sack, which was due for two Years, and alſo for Arrear of Rent, after the Aſſignment made to him by the ſaid Executrix Suſan Gill.

The Defendant Thomas Pitcher pleaded, That before the ſaid Wine and Rent became due, he aſſigned his Intereſt to James Mott,

Mott, but did not plead Notice given to the Plaintiff, or that she had accepted the Rent.

And upon a Demurrer to this Plea, Judgment was given in the Common Pleas for the Plaintiff, and a Writ of Error was brought in B. R. and the common Error assigned.

The Questions, both in that Court, and in B. R. were,

1. Whether the Defendant Pitcher ought to have pleaded, That he had given the Plaintiff Tovey Notice?

2. If such Notice was necessary, yet whether this Action would lye against the Defendant after this Assignment made by him to Mott, &c?

Those who argued for the Plaintiff in the Action would have the Defendant still liable, notwithstanding the Assignment, without he had pleaded Notice thereof; because otherwise the Plaintiff could not tell against whom to bring the Action, or where to have his Remedy: For if he sue a wrong Person, he must discontinue and pay Costs, and he cannot bring it against the right one, without having Notice who it is.

Sid. 338. This was the very Reason of the Judgment given in Kighly and Bulkly's Case, which was an Action of Debt brought for Rent by an Assignee of the Reversion against the Assignee of a Term, who pleaded, That he had assigned over his Interest, but not that he had given any Notice of the Assignment.

'Tis true, he was adjudged to be still Tenant, because he had not pleaded such Notice: But this was contrary to the Opinion of Justice Twysden; for in pleading such Assignments none of the Precedents mention any Notice, &c. and tho' the Plaintiff may not know against whom to bring an Action of Debt for his Rent: yet he hath a better and more proper Remedy, viz. To distrain.

The Privity of Estate is transferred by this Assignment, so that nothing remains upon which Notice can be fixed, which is a Bar to this Action; and therefore the Plaintiff ought to have taken Notice at her Peril, for when an Assignment is made, 'tis publickly known to whom, and the Person in Possession is always taken to be the Assignee.

1 Roll. Abr. 465. Many Instances were given where Notice was not requisite: As, if the Lessee for Years gives Bond to his Lessor to deliver quiet Possession upon Request at the End of the Term,

and before that time the Lessor assigned the Reversion, yet at the End of the Term Possession must be delivered to the Assignee without giving Notice, that he is the Assignee.

So where the Assignee of part of a Term covenanted to repair, and the Assignor devised the Reversion, and died; the Devisee brought an Action of Covenant against the Assignee, and it was held good without giving Notice to the Devisee of the Reversion: Nay the Pleading of Notice is so far from being necessary in this case, that the Defendant might have pleaded Nil debet, and have given the Assignment in Evidence, which was done in the Common Pleas in the Case of Christy and Wilcox; and tho my Lord Chief Justice North directed the Jury to find the Assignment fraudulent, yet upon the special Finding, the Court were of another Opinion when it was argued. Godb. 161, 162. Trin. 30 Car. 2. Rot. 636.

There is a Case in Latch, where an Executor of a Lessee for Years assigned over his Term, and the Lessor brought an Action of Debt against the Executor for Rent arrear after the Assignment, who pleaded that he had assigned the Term, but did not shew that he had given Notice, &c. The Plea was held well enough, but the Plaintiff had Judgment, because the Privity of Contract did still remain between him and the Executor, who had no Power by any Act which he could do, to change or destroy the Action of the Lessor. Latch 260. Noy 97.

But if the Lessee for Years himself had made such an Assignment, and died, that might have made some considerable Difference: For then possibly an Action of Debt would not have lain against his Executor, because that must be maintained against him upon the Privity of Contract, which is removed by the Assignment of the Testator. It might be well brought against the Lessee himself in his Life-time upon the Privity of Contract, and so is Walker's Case. 3 Rep.

2d Point. But here is neither the one or the other, and therefore if it should be necessary on the Part of the Defendant to plead that he gave Notice of the Assignment, yet the Plaintiff cannot have Judgment against this Defendant, because the Action will not lye; for it must be supported either upon a Privity of Contract or Estate: Now there can be no Privity of Contract pretended between them; for the Defendant is only an Assignee of an Executrix of a Term; and there can be no Privity in Law, for that only lasts so long as the Estate continues, and no longer.

Cro. Eliz. 555. And therefore the Judgment in Overton and Sydall's Case was relied on in Point. It was Debt against an Executor of a Lessee for Years, after the Defendant had assigned the Term; and it was held that it would not lye, because it could not be brought against him upon the Contract of the Testator, to which he was neither party or privy; nor upon the Privity in Law, for then the Term must be still in him, which was gone by the Assignment; and so by Consequence the Action must fail, which is this very Case.

Another Objection was made, that the Action being brought as well upon the Covenant for the Bottles of Wine, as for Rent, and entire Damages given, 'tis naught; because the Wine arises in Covenant; 'tis a Reservation, and not properly a Rent, and so cannot be assigned to the Defendant who is a Stranger to this Covenant.

Econtra. It was agreed by the Counsel of the Plaintiff, that here was no Privity of Contract in this Case, but that there was a Privity of Estate remaining, notwithstanding the Assignment, which was not compleated till Notice.

If it should be otherwise, the Mischief would be very great; for against whom should the Lessor bring an Action? If against the Under-tenant he may be non-suited, unless he can prove the Assignment to him; and therefore in Judgment of Law the Privity must still continue, tho in rei veritate the Estate it self is assigned.

The Lessor has as much Right to his Rent, as a Patron hath to his Presentation: Now it will not be denied, that if there be a Deprivation by the Ordinary, the Patron must have Notice, otherwise the Bishop may take an Advantage of a Lapse by his own Act.

2 Cro. 432. 'Tis true, if I promise to pay to A. B. for Goods delivered, so much Money as C. D. sold the like Goods for at such a Market, and after this Agreement the Plaintiff declared, 1 Bulst. 44. That C. D. sold for so much: The Action is well brought, Roll. Rep. 1. p. 314. without alledging that he gave Notice to the Defendant 1 Roll. Abr. 463. that C. D. sold for so much, quia constat de persona. But 2 E. 4. 3. where the Person is uncertain, or where the Act is to be done by the Person to whom the Payment is to be made, there Notice is necessary: As, if I promise to pay a Man so much Money when he returns from London; there he ought to give me Notice of his Return, that being the Time of Payment.

In this Case, if the Plaintiff had accepted the Rent after the Assignment, yet the Defendant had not been discharged without Notice; so is Penant's Case in the third Report, where a Lease was made upon Condition, That the Lessee should not assign it without the Assent of the Lessor; he did assign it contrary to the Agreement; and the Lessor not having Notice, &c. accepted the Rent of the Lessee after the Assignment; but notwithstanding this Acceptance, he entred for Breach of the Condition; and it was adjudged lawful, because it being a collateral Condition, Notice is material; for otherwise it may be broken so secretly, that 'tis impossible for the Lessor to know it: And if Notice should not be necessary in such Case, then the Lessee may take Advantage of his own Fraud, which the Law will not permit.

The Reason given by my Lord Chief Justice Wray, in Gurney and Saer's Case, rules this at Bar; which was thus: A Man had a Reversionary Interest to a Term of Years after the Determination or Surrender of a Lease then in Being; they who had the present Interest, made a private Surrender, without giving Notice thereof to him in Reversion; and for that Reason it was adjudged, That it should not be prejudicial to him. 3 Leon. 95.

The Opinion of Justice Twysden, in the Case before-mentioned, stands single against the other Judges, and the Reason by him given, why Notice is not necessary, is of very little Weight; 'tis because the Plaintiff may distrain, if he cannot tell against whom to bring an Action: But if he may have two Ways to recover his Rent, why should he be defeated of one?

But the Remedy, by way of Distress, may prove ineffectual; for the Term may be assigned to a Beggar, or to a Person who may suffer the Houses to remain empty, and then there will be nothing to distrain.

As to the last Objection, That by the Endorsement, the Payment of the Wine is no Rent, but a Reservation, &c.

'Tis not material whether 'tis a Reservation or not: For 'tis a Duty, and it arises by Reason of the Thing demised, and goes along with it; and as to this Purpose, 'tis like the Case where two Copartners made Partition, and one covenanted to acquit the other of a Suit, occasioned by the Land so divided: The Covenantee aliened, and it is the Opinion of my Ld. Coke, That the Alienee, who is a Stranger to the Covenant, shall maintain an Action against the Covenantor, because the Acquittal runs with the Land. 1 Inst. 385. a.

It must be admitted, That in Overton and Sydall's Case, there is a Judgment seemingly in Point against the now Plaintiff, that the Action doth not lye against an Executor of a Lessee for Years, after such Executor had assigned the Term, because there is neither privity of Contract or Estate remaining in him to support the Action.

Sid. 266. In the Case of *Hellier* and *Casbard*.

But this hath been denied to be Law, because such Executor shall be still liable to the Contracts of his Testator, so long as he hath any Assets to satisfy them.

Judicium.

After two Arguments, Judgment was given in Easter Term following, for the Defendant in the original Action, and the Judgment in the Common Pleas reversed.

It was held, That the Assignee was chargeable by Reason of the Land, and when he had parted with his Interest, there could be no Reason given why he should be any longer liable, especially since the Executor of the Lessee is still bound to perform the Covenants in the Lease so long as he hath Assets, and that was the true Reason of the Judgment in Hellier and Casbard's Case, as hath been observed.

That of Kighly and Bulkly upon the Point of Notice, &c. was not adjudged upon much Debate; and therefore a Writ of Error was afterwards brought upon it in the Exchequer-Chamber; and my Lord Hale, who was then Chief Baron, and my Lord Chief Justice Bridgman were of the same Opinion with Justice Twysden, that Notice was not necessary.

2 Vent. 228.

The Pleadings in this Case you may see in Justice Ventris's Reports, and the Case put, but no Part of the Arguments on either Side.

Parker *versus* Harris.

Trin. 3 Guilielmi, *Rot.* 27.

3 Vent. 249, 270. 1 Salk. 262.

ERror of a Judgment in the Common Pleas in an Action of Debt for Rent, wherein the Plaintiff Harris declared upon two Demises, viz. of one Messuage, being in & super acclivitatem de Hampstead Hill, Anglice, the Rise of Hampstead Hill, habendum for seven Years, paying 18 l. per Annum, &c. and upon another Demise at Will, paying after the Rate of 18 l. per Annum, during the Continuance of that Demise.

The

The Defendant pleaded in Bar, That tempore dimiſſion. prædictarum, the Plaintiff nil habuit in tenementis, &c.

The Plaintiff replied, That before the Demiſes made by him to the Defendant, the Lord Wotton demiſed to the Plaintiff a Piece of Land, with an old Houſe and Barn, being Parcel of the Premiſes, for forty Years; the ſaid Lord Wotton, adtunc & ibidem plenam poteſtatem jus & titulum habent. ſo to demiſe it, &c. by Virtue whereof the Plaintiff was poſſeſſed, and made a Leaſe to the Defendant, modo & forma, &c.

To this Replication the Defendant demurred;

And an Exception was taken to it, That the Plaintiff ought to ſet forth what Eſtate the Lord Wotton had when he leaſed to the Plaintiff, and that plenam poteſtatem jus & titulum was not ſufficient without ſhewing what Eſtate he had; and this ſeemed in the Court of Common Pleas to be a good Exception, it being upon a Demurrer.

Then it was objected againſt the Plea, That the Defendant had ſet forth, that tempore dimiſſion. the Plaintiff nil habuit in tenementis; it ſhould have been temporibus, becauſe the Plaintiff had declared upon two Demiſes, and he might have a Title when one was let, tho' not when the other was demiſed; and this ſeemed to be a good Exception to the Bar, for that the Defendant ought to have pleaded diſtinctly to each Demiſe.

But then an Exception was taken to the Declaration, That there was no Place laid for the Premiſſes demiſed: For in & ſuper acclivitatem, &c. is only a Deſcription of the Situation; and of this Opinion was the Chief Juſtice; but the other three Judges held, That the Venue ſhould come out of Hampſtead, which ſhall be taken for the Hill, and that as well as if it had been ſaid apud acclivitatem; and ſo Judgment was given for the Plaintiff.

And now it was argued in B. R. That if Hampſtead be preſumed to be a Hill, 'tis but Part of it; and for that Reaſon the Venue is ill, for 'tis not good de Balliva, becauſe 'tis uncertain in the Limits.

If it be intended to be lieu conus, then 'tis naught, if alledged to be out of the Hill or Pariſh; and for that Reaſon a Venire fac. de Lincoln's Inn, has been adjudged not good.

Then

Then the ſecond Count is upon a Leaſe at Will, rendring ſecundum ratam, which is not a good Reſervation, becauſe it may be in Corn, or in any Thing ſatisfactory: Beſides, an Action may be brought every Day or every Hour, there being no Time limited when the Rent ſhall be; it might have been good upon a Contract for Goods, becauſe the Jury may judge of the Value, but not for Rent.

And as to the Replication, the ſame Objection was made, as in the Common Pleas, that the Plaintiff ought to have ſhewed what Title my Lord Wotton had at the Time of the Demiſe, that the Court might judge whether he had a Power or not to leaſe: And for this there is a Judgment in Point, in Glaſs's Caſe; where the Replication was, That the Plaintiff habuit bonum & ſufficien. ſtatum, &c. and it was adjudged upon a Writ of Error after Verdict, That the Eſtate ought to be ſet forth: But the Plaintiff had Judgment, becauſe aided by the Statute of Jeofailes, it being after Verdict.

2 Cro. 312. Yelv. 227.

Econtra. The Replication is good in Subſtance, for when the Plaintiff intends to avoid the Bar, he needs not plead it ſo ſufficiently, as if he had been to ſhew his own Title, like the Caſe of Lodge and Fry, where the Plaintiff in Bar to the Avowry, ſhewed, That the Land was Copyhold, grantable in Poſſeſſion or Reverſion for Life or in Fee, and that the Lord granted the Reverſion to him after the Death of W. who was Tenant for Life in Poſſeſſion: And upon a Demurrer, becauſe the Plaintiff had not ſhewed the Beginning, or by whom W. had the Eſtate; yet Judgment was given for the Plaintiff, becauſe this was but only a Conveyance to his Title, and not the Title it ſelf.

2 Cro. 52.

Cro. Car. 138.

Then as to the Objection, That there could not be a Venue from the Place where the Land doth lye, it being in & ſuper acclivitatem de Hampſtead Hill: It was anſwered, That this muſt neceſſarily be intended to be a Hill, Hamlet, or Lieu conus; if neither, then it may be a Lieu conus out of an Hamlet, which the Defendant ought to have pleaded in Abatement.

But the Venue muſt come from Hampſtead, becauſe 'tis ſaid in & ſuper acclivitatem de Hampſtead: Now in and apud are of the ſame Signification; and 'tis admitted, that if it had been apud acclivitatem, &c. it had been good.

17 Aſſ. 30. 6 H. 7. 3. 9 Ed. 4. 3. placito 9.

Lastly, The Payment secundum ratam, must be in Money and can be intended in no other thing, because 'tis in the Case of a Tenancy at Will.

The Reservation is good if it had been in an Assumpsit or Covenant, and it amounts to no more than a Contract between the Parties.

In the Case of Titus and Perkins a Custom was set forth to pay a Fine, tantam denariorum summam quantam terræ valebant per Annum tempore admissionis; and it was adjudged good, because it might be helped by an Averment that the Land was worth so much that Year. 3 Mod. 132.

So in Evidence to a Jury upon the Custom of a Manor, that the Land was demisable, paying the treble Value of the Rent, for 21 Years: And if the Termor died within the Term, that his Heir should have it, paying one Year's Rent, as a Fine certain; and if he assigned it, then the Assignee was to pay one Year's Value of the Rent; this seemed to be an uncertain Custom throughout, yet it was held good. 2 Cro. 671.

Services are of the same Nature with Things which are in Render, and those may be certain in an Incertainty; for a Man may hold of his Lord to cheer all his Sheep depasturing within the Manor, which at first is very uncertain, because he may have more or less; but because 'tis referred to a certain Manor, therefore 'tis held that the Lord may distrain for such a Service, which he could not do if it was not certain. 1 Inst. 96.

In this Case the Payment secundum ratam, &c. is no Part of the Thing demised, but Something out of it which may be reduced to a Certainty when Judgment is given by the Court for the Damages sustained by the Detainer of the Rent.

Curia. The Reservation ad ratam is not good, it being upon a Lease at Will, where the Time of Payment of the Rent should be very certain; for if the Tenant hold over a Day, he must pay the Rent of the next Quarter.

But Justice Dolben inclined, That it being uncertain how long the Tenant would continue in Possession, he being only Tenant at Will, this Reservation may be good.

As to the other Objections, it was held not to be material for the Plaintiff in his Replication to shew his Title, or what Estate he had in the Houses, upon the Reasons and Authorities alledged at the Bar.

And

And likewiſe the Court concurred in Opinion with the Judges of the Common Pleas upon the Place from whence the Venue ſhould ariſe, which muſt be from Hampſtead; for
Sid. 326. if it had been de vicineto Hampſtead, then there could be no Objection to it.

But becauſe the Reſervation was held to be void, the Judgment in the Common Pleas was reverſed in Michaelmas Term following.

Glover *verſus* Cope.

Paſch. 3 Willielmi, *Rot.* 267.

IN Covenant the Plaintiff declared, That the Manor of Hackney in the County of Middleſex was an antient
3 Lev. 326. Manor, whereof one Meſſuage with the Appurtenances
1 Salk. 185. in Meer-ſtreet is Copyhold of Inheritance.
1 Show. 284. That there is a Cuſtom within the ſaid Manor for every Cuſtomary Tenant thereof, being ſeiſed in Fee of any Copyhold Lands or Tenements, to demiſe the ſame for 31 Years more or leſs without Licence, &c.

That on the 31ſt Day of December 19 Car. 2. Sir William Bolton being then Lord of the ſaid Manor did grant the ſaid Meſſuage, &c. to George Hockenhall and Mary his Wife, and to the Heirs of the ſaid George, who was thereupon admitted.

That on the 20th Day of February, 1671. the ſaid Hockenhall and his Wife by their Indenture did demiſe the ſaid Meſſuage to the Defendant for 21 Years rendring Rent, in which Leaſe the Defendant covenanted to repair during the Term.

That by Virtue of the ſaid Demiſe, the Defendant entred and was poſſeſſed, &c.

That Mary Hockenhall died, and afterwards, viz. on the 20th of January 1684. the ſaid George Hockenhall granted the Reverſion of the ſaid Meſſuage, &c. to his Son George Hockenhall the Younger, and to his Heirs.

That afterwards, viz. on the 14th of Auguſt, 1 Jac. 2. the ſaid George Hockenhall the Son was admitted Tenant, and the ſame Day ſurrendred the Premiſſes to the Plaintiff Glover who was admitted, and now brought this Action againſt the Defendant for not repairing of the Premiſſes.

The Defendant pleaded, That after the Lease made to him, and before the Reversion came to the Plaintiff, viz. July 24. Anno 28 Car. 2. he the said Defendant assigned the Messuage, &c. to Sarah Pikes, of which the Plaintiff had Notice, by Virtue whereof she entred and was possessed, & hoc, &c.

The Plaintiff demurred, and the Defendant joined in Demurrer.

The Case upon the Pleadings is shortly thus:

A Copyholder in Fee made a Lease of a Messuage for 21 Years, warranted by the Custom, &c. the Lessee covenanted to repair during the Term.

Afterwards the Lessor granted the Reversion to his Son, who surrendred to the Plaintiff, who brought an Action of Covenant against the Lessee for not repairing; and whether the Action would lye or not? was the principal Question.

The Doubt did arise upon the Tenure of the Messuage, which was Copyhold; for if it had been a Freehold, the Action might have been well brought by the Assignee of a Reversion against a Lessee for Years after he had assigned the Term, notwithstanding the Lessor or his Assigns had accepted the Rent from the Assignee of the Lessee, and this upon the general Words of the Statute of H. 8. which giveth the Grantees and Assignees of Reversions of Lands, Tenements, and other Hereditaments, the like Advantage against Lessees by Entry for Non-payment of Rent, as the Lessors or Grantors themselves might have. 32 H. 8. cap. 34.

Now, whether Copyhold Lands may be comprehended in these general Words? was the chief Question.

First, It was premised, That without the Aid of the Statute, a Grantee of a Reversion might bring an Action of Debt; for so was the Law before this Statute was made; and it was grounded upon this Reason, That where-ever a Man was entitled to a Reversion, so that he had the Rent which is incident to it, and which is given by Law, there the Law did likewise create the Privity on Purpose to maintain an Action of Debt for the Rent. 5 H. 7. 19. 9 H. 6. 16.

Then two Questions were made,

(1.) Whether this Covenant runs with the Reversion? For if so, then the Plaintiff being a Grantee of a Reversion, may bring this Action at the Common Law.

(2.) If not, then, Whether the Aſſignee of a Reverſion of a Copyhold is aided by the Statute of H. 8.?

As to the firſt Point, this Covenant extends to ſupport the Thing demiſed: For 'tis to repair; 'tis appurtenant to it, and ſhall run with the Land, and will bind an Aſſignee of the Term, tho' he is not obliged by the expreſs Covenant; for 'tis Parcel of the Demiſe and Contract, and had an Exiſtence at the Time of the making of the Leaſe: And ſo is Spencer's Caſe.

5 Rep. 16.

Cro. Car. 137. In Debt for Rent by an Aſſignee of a Reverſion againſt the Aſſignee of the Term, he pleaded, That the Leſſor did covenant with him, That if he ſhould be diſturbed in the Poſſeſſion, &c. that then he ſhould detain ſo much of the Rent as he ſhould be forced to pay, &c. And he alledged, That ſo much had been levied upon him for Fines and Iſſues, which he withheld out of the Rent; and upon a Demurrer it was held, That he ſhould have the Benefit of this Covenant, for it runs with the Land, and upon ſuch a Covenant the Aſſignee of the Term might have detained the Rent at the Common Law.

The Objection, viz. That if this Covenant runs with the Land, then the Aſſignee, and not the Leſſee, muſt be chargeable, is of no manner of Force; becauſe the Leſſee is bound by expreſs Covenant to repair, and no Aſſignment of the Term, or Acceptance of the Rent by the Leſſor can diſcharge him.

Cro. Car. 188, 580. This is the expreſs Reſolution in ſeveral Caſes; and if it ſhould be objected, that in thoſe Caſes the Actions were brought by the Leſſors themſelves, and not by Grantees of

2 Cro. 522. the Reverſion, then the Judgment of the Court in Brett and Cumberland's Caſe, will be a direct Anſwer to that Objection, which was ſhortly thus: The Leſſee having covenanted to repair, aſſigned his Term; the Grantee of the Reverſion in Fee accepted the Rent of the Aſſignee, the Leſſee died, leaving the Defendant his Executor, and the ſaid Grantee brought an Action of Covenant againſt the Executor of the Leſſee for not repairing after the Aſſignments both of the Reverſion and the Term; and it was held, That it would lie upon the Statute, being a Covenant in Fact, and running with the Land, and that no Aſſignment made by the firſt Leſſee could diſcharge his Executors ſo long as they had Aſſets.

'Tis true, the Action could not be brought againſt them by Reaſon of any Privity of Contract, for there was none; but it may be brought upon the Covenant it ſelf, ſo long as they had any of the Teſtator's Eſtate in their Hands.

And therefore if the Plaintiff in this Case should not be entitled to this Action at the Common Law, yet he is aided by the Statute notwithstanding he comes to his Estate by Surrender, because a Surrenderee is an Assignee within the Equity and meaning of the Statute, in order to maintain either an Action of Debt or Covenant.

It has been formerly held that a Surrenderee of a Copyholder in fee is not such an Assignee as is intended by this Statute in order to take advantage of a Condition broken, because he is in by the Custom and not by Law, and cannot be privy to the Lease made by the Surrenderor; and so is Beale and Brasier's Case. 2 Cro. 305. Yel. 222.

But this was a Judgment without Argument, and only by two Judges, the rest being absent, so that 'tis not of that Force as a Judgment given by the whole Court upon a solemn Debate.

It hath been held also that Copyhold Estates are not within the Statute De donis, &c. and yet they do entail those Estates notwithstanding that Judgment. Cro. Car. 44.

It cannot be denied but that such Estates were valuable in the Law long before the making of the Statute of H. 8. for Justice Littleton tells us the Opinion of two Chief Justices in the Reign of Ed. 4. was, That if such Tenants pay their Services and are turned out of the Land, they may have Actions of Trespass against the Lord; nay they may prescribe against him, by Reason that they have fixed and perdurable Estates. Lit. Sect. 77.

Now this Statute was made for a general Remedy to give Actions to recover Men's Right, and therefore Copyholds must be included, because they are not only valuable in the Law, but are a great part of the Tenure of the Nation. Kelw. 76, 77.

And as they have been valued before, so likewise they have been since the making of the Statute: For if a Copyholder for life makes a Lease for three Years generally, having Licence to make it for 3 Years, if he so long live: Now tho' the Licence is not pursued, yet the Lessee may maintain an Ejectment. Owen. 72.

So where Lessee for Years was Dominus pro tempore of a Manor, who took a Surrender, and his Estate was determined before Admittance, yet it shall be compellable to be done according to the Surrender. 1 Inst. 59. b.

The Severance of the Inheritance of the Copyhold from the Manor will not destroy the Tenure it self, because the Estate of the Copyholder is established by Custom; and therefore 4 Rep. 24. b.

neither the Lord, or any claiming under him can turn out such a Tenant.

34 H. 8. cap. 14. 13 Eliz. cap. 7. Particular Statutes by which the Lord may have any Prejudice as to Fines or Amerciaments do not bind Copyhold Tenants.

As the Statute of H. 8. concerning Bankrupts did not extend to Copyhold, and therefore a subsequent Law was made to include them.

Owen. 37. Neither did the Statute of Recusancy extend to such Estates, and the Reason given is, because the Lord may thereby receive an Injury by the Loss of his Customs and Services.

But general Laws made for the Publick good, and where the Lords of Manors can have no Prejudice, are binding, and shall extend to Copyhold Lands, tho' they are not named in such Statutes.

3 Rep. 7. As in Heydon's Case, viz. a Religious House granted a Copyhold for two Lives, & Anno 30 H. 8. demised the same to Heydon for 80 Years; the very next Year a Statute was made, by which it was enacted, That if any Religious House shall within ONE YEAR next before the first Day of that Parliament or afterwards lease or grant, &c. any Lands in which any Interest or Estate for Life or Years was then in being; that such Lease should be void.

9 Rep. 104. Now the Grant of this Copyhold for two Lives in the Year before the Statute was made was adjudged an Interest, and within the general Words of the Act, and therefore the Lease to Heydon was void.

32 H. 8. cap. 2. By the Statute of Limitations 'tis enacted, That a Writ of Right shall not be maintained to any Lands, &c. or any farther Seisin alledged in the Ancestor, than for 60 Years next before the Teste of such Writ, which Words point only at an Interest at Common Law. and not by any Custom; and yet Copyhold Lands have been adjudged to be within that Act.

32 H. 8. cap. 9. So likewise by the Statute of Maintenance the buying any pretended Right or Title to any Manors, Lands or Tenements is prohibited, which Words have been adjudged to extend to a pretended Right to a Copyhold Estate, because the Statute was made for avoiding Maintenance in general, which Design would be lost if Copyholders Lands, which are a considerable part of the Kingdom, should be left out.

Now to enforce this Argument 'tis to be observed, that the two Statutes last mentioned were made in the same Year, and by the same Parliament, by which this Statute was

was made to enable Grantees of Reversions of Manors, Lands Tenements, and other Hereditaments to take advantage against Lessees; and if such Constructions have been made upon the general Words of these Statutes, what Reason can be given why the like should not be made in this Case?

Econtra. Mr. Roe argued to the contrary, That the Authorities cited for the Plaintiff are not applicable to the Case in Question.

And first as to those cited out of the Year-books, they are Actions of Debt for Rent, and are of a different Nature from those in Covenant which is a collateral Thing, and a Chose in Action, and will not follow the Reversion without the Help of the Statute.

So that if any Thing supports this Action of Covenant it must be the Statute, but 'tis not within the general Words or within the Meaning of that Law.

Nothing of Copyhold can be intended to fall under the general Words, viz. Manors, Lands, Tenements and other Hereditaments; for such are only known at the Common Law, and therefore can have no Reference to Copyhold Lands which are created by Custom, and are only Estates at the Will of the Lord.

This has been held to be the Sense and Meaning of those very Words in several Statutes of Jointures, Uses, and Partition.

So likewise upon the Statute of 11 H. 7. which makes the Alienation of the Wife void, of any Estate which she hath in Dower, for Life, or in Tail jointly with her Husband, &c. in any Manors, Lands, Tenements, or other Hereditaments; the Alienation of a Copyhold Estate, which she had in Tail jointly with her Husband was adjudged good, and not within that Statute. 11 H. 7. cap. 20. 1 Sid. 41.

Upon the Statute of 13 Eliz. cap. 7. which empowers the Commissioners of Bankrupts to sell their Lands, &c it hath been held they could not sell Copyholds, if that Law had not given them Power by express Words, viz. to sell as well Copy as free Land. 1 Leon. 98. Cro. Car. 24.

So are several Acts of Parliament which are made to give Forfeitures of Lands, Tenements, or other Hereditaments, &c. which Words do not extend to Copyholds, but only to Inheritances at Common Law.

And the Reason is because Copyhold Lands at the Time of making this and other Acts, and long after, were in no Esteem of the Law; for the Tenants of those Lands held them in Villenage, or at best were but Tenants at Will, and so not within the Provision or Care of Acts of Parliament.

And

And even at this Day their Eſtates are held only at the Will of the Lord according to the Cuſtom of the Manor: And in many Reſpects this Tenant hath a Dependance upon the Lord; for he can neither alien nor leaſe his Copyhold without Licence; and therefore when either is done, 'tis as well the Act of the Lord as of the Tenant.

Another Reaſon offered why this Action would not lie was, becauſe the Leſſee had not attorned to him in the Reverſion, according to the Opinion of my Ld. Hobert in Swinnerton's Caſe, where a Copyholder made a Leaſe for Years rendring Rent, and then he ſurrendred the Reverſion to the Defendant, who was admitted, and in a Replevin he avowed for Rent-arrear, which (it was ſaid) he could not do, or enter for a Condition broken, without the Attornment of the Leſſee to him. Hob. 177.

But this was not much inſiſted on becauſe the Law ſeems to be otherwiſe; for the Eſtate of a Copyholder doth not paſs by any Grant of the Reverſion at the Common Law, to which an Attornment is neceſſary, but by Surrender and Admittance.

Curia. A Copyholder hath an Inheritance, tho' he hath it in the Poſt, and his Eſtate is now fixed and eſtabliſhed by the Cuſtom; and therefore 'tis Reaſon to conſtrue him to be within the Equity of this Statute, and the rather becauſe of late he has been held to be within the Statute De donis, &c. And ſo without farther Argument Judgment was given for the Plaintiff.

Walwin *verſus* Smith.

Trin. 3 Willielmi, *Rot.* 361.

A Queſtion was moved, Whether a Diſcontinuance in an inferior Court is helped after Judgment by the Statute of Jeofails? And the Court was of Opinion that Diſcontinuance of Proceſs or in Pleading was helped by the Statute; but where the Cauſe is diſcontinued and out of Court, as in the Beginning of this Reign for not holding Hillary Term, all Cauſes were then diſcontinued, which could not be aided by any Statute of Jeofails, without a particular Act of Parliament for reviving thoſe Cauſes and Proceſs. 1 Salk. 177.

In Beecher's Caſe after a Verdict for the Plaintiff, there being ſome Doubt whether the Viſne was good or not, and the Plaintiff Co. 8. 58. 2 Cro. 211.

tiff intending to bring a new Action, got leave to diſcontinue, in which Caſe the Judgment ſhould have been entred, Quod * querens nil capiat per breve ſuum ſed ſit in miſericordia pro falſo clamore ſuo & præd. defendens eat inde ſine die.

But inſtead of ſuch an Entry, it was, That the Plaintiff by his Attorney, Venit hic in Curia & fatetur ſe in Curia hic ulterius nolle proſequi So Judgment was given, That the Defendant eat inde ſine die, which amounts to a Retraxit, and is a Bar to the ſame Action for ever, ſo long as that Judgment ſtands in Force.

Whereupon a Writ of Error was brought, and it was ſhewed that there was a Diſcontinuance; for the Verdict was 2 Jacobi, and the Judgment was 4 Jacobi; and no Continuance from one Term to the other, which might have been aided by the Statute of Jeofailes, if the Judgment had been given upon the Verdict; but it was upon the Retraxit, which is not within the Statute; and for this Reaſon that Judgment was reverſed.

* Nota, *So is the Entry after a Verdict upon Demurrer; but if upon a Non-ſuit, then tis* in mi'a quia non proſecutus eſt breve ſuum 2 Cro. 213.

DE

DE

Termino Paſchæ,

Anno 4 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1692.

Adams *verſus* Tapling.

Adams's Caſe. Farreſl. 17.

IN Covenant the Breaches aſſigned were, That the Houſes were not in Repair, that the Locks were taken away, and that the Hedges were broken down, and the Ditches unſcoured.

The Defendant pleads an Agreement made between the Plaintiff and him, That he ſhould employ a Workman three or four Days in and about the repairing of the Houſe, which ſhould be a ſufficient Satisfaction, and that he had employed a Workman, &c.

Upon this Plea they were at Iſſue, and there was a Verdict for the Defendant.

And now it was moved in Arreſt of Judgment, and the Exceptions taken were,

1. Where an Accord and Satisfaction is pleaded, it muſt be Real; but in this Caſe it was no more than the Defendant was obliged to do.

2. There are ſeveral Breaches aſſigned, and the Defendant has only anſwered to the Repairs of the Houſe, and ſo 'tis a Diſcontinuance in Pleading, which is not aided by a Verdict.

3. The Satisfaction is uncertain, viz. to employ a Man to work three or four Days; and for theſe Reaſons Judgment was ſtayed.

Curia. In Covenant where the Damages are uncertain, and to be recovered, as in this Caſe, a leſſer Thing may be done in Satisfaction; and there Accord and Satisfaction is a good Plea.

But in an Action of Debt upon a Bond where the Sum to be paid is certain, there a leſſer Sum cannot be paid in Satisfaction of a greater.

Bridges *verſus* Saer.

TReſpaſs for pounding of his Sheep; the Defendant juſtified the taking and pounding for Damage-feſant.

The Plaintiff in his Replication preſcribed to have a Common for Sheep, and the Preſcription being traverſed, the Jury found that the Plaintiff had Common for Sheep, and alſo for Cows.

An Objection was made that this Verdict did not maintain this Preſcription, becauſe it was larger than it was pleaded; but it was adjudged for the Plaintiff.

Carter *verſus* Horner.

AN Action on the Caſe was brought on a Wager, wherein the Plaintiff declared, That there was a Diſcourſe between him and the Defendant concerning a Meſſuage in Cookham, whereof Edward Darling was ſeiſed in Fee, and likewiſe concerning a Will which the Defendant affirmed to be publiſhed by the ſaid Edward Darling, by which he deviſed his Eſtate (having a Wife and four Children) in theſe Words, viz. All and ſingular the Reſt, Reſidue and Remainder of my ESTATE, of what Kind, Nature, or Quality ſoever, whether Freehold or Copyhold, which I intend to ſurrender to the Uſe of my Will, Leaſes, Goods, Plate, Debts and Chattels, I give and deviſe to Elizabeth Darling my Wife, and to George, Edward, Elizabeth, and Mary Darling in ſuch Manner and Form as herein-after is mentioned; that is to ſay, one Third Part to my Wife, the other two Thirds to my ſaid Children, equally to be divided Share and Share alike. 1 Show. 348.

The Teſtator farther deviſed, That the Share of George ſhould be kept entire till he was of full Age, And if any happen to die before 21, then to the Survivor and equally to be divided.

Edward died, Elizabeth ſurvived, and George died before 21.

The Queſtion was, Whether Elizubeth the Mother had an Eſtate for Life or in Fee by Vertue of this Will?

It was ſaid ſhe had an Eſtate in Fee upon this Difference, viz. If the Teſtator had been entitled to Lands in Fee, and likewiſe to mortgaged Lands not forfeited, and had deviſed his Lands in Fee to his Brother, and all the Reſt of his Leaſes, Mortgages and Eſtates, Debts and Duties, &c. of which he was poſſeſſed, &c. there the Word Eſtate being put amongſt Chattels ſhall only carry an Eſtate for Life, and the rather becauſe of the Word poſſeſſed.

Cro. Car. 447. 1 Roll. Abr. 834.

But where the Word Eſtate ſtands by it ſelf, and is not mingled amongſt perſonal Things: As for Inſtance, where a Man being ſeized in Fæ deviſed his whole Eſtate, there the Word Eſtate extends to the Land, and the Deviſee ſhall take it in Fee; for 'tis a Word which comprehends not only the Land it ſelf, but all the Intereſt the Teſtator had in it.

Style 281. 1 Mod. 100.

Econtra. The Word Eſtate ſignifies the Land and not the Intereſt which the Teſtator had in it; and being in a Will, that Word muſt be conſtrued according to the Common and known Acceptation of it, which imports the Land it ſelf, and not the Eſtate which he had in the Land, and therefore an Eſtate for Life only paſſeth.

The Words which follow, viz, of what Nature, Kind, or Quality ſoever, are a farther Deſcription of the Thing deviſed, which is the Land, and of what Tenure it may be; ſo that the Teſtator hath not left it to the general Conſtruction what ſhall paſs by the Word Eſtate alone.

3 Leon. pl. 88.

Thus it is in a Grant: As if a Leaſe is made to A. Remainder to B. in Tail, Remainder to the right Heirs of B. who bargains and ſells all his Eſtate to D. nothing paſſes to him but during the Life of the Grantor, whilſt the Eſtate-tail is in Being.

'Tis true, by a Deviſe of the whole Eſtate, it hath been held that a Fee did paſs, but it was upon a different Reaſon from the Caſe at Bar, for it was deviſed, paying Debts and Legacies, and it happened that the perſonal Eſtate was not ſufficient to do either. Adjournatur.

Burton

Burton *verſus* Woodward.

A Declation in Ejectment. 1 Show. 368.

Warwic. ff. MEmorand. quod die vene ris prox. poſt craſtinum ſanctæ Trinitatis iſto eodem Termino coram Dno. Rege & Domina Regina apud Weſtm. venit Thomas Burton per Willielmum Blencow Attorn. ſuum & protulit hic in Curia dict. Dni. Regis & Dominæ Reginæ tunc ibidem quandam billam ſuam verſus Robertum Woodward Clericum in Cuſtod' mar. &c. de placito tranſgr. & ejectrion' firmæ & ſunt pleg. de proſ. ſcilicet Joh. Doe & Rich. Roe quæ quidem billa ſequitur in hæc verba. Warwic. ff. Thomas Burton queritur de Roberto Woodward Cletico in Cuſtodia Mar. mareſc. Domini Regis & Dominæ Reginæ coram ipſis Rege & Regina exiſten' pro eo videlicet quod cum quidam Edmundus Budd Clericus decimo die Martii Anno Regni Domini & Dominæ Willielmi & Mariæ nunc Regis & Reginæ Angl. &c. tertio apud Burton Daſſet in Com. præd. dimiſiſſet conceſſiſſet & ad firmam tradidiſſet præfat. Thomæ unum meſſuagium cum pertin. ſcituat. jacen. & exiſten' in Burton Daſſet præd. in Com. præd. habend. & tenend. meſſuagium præd. cum pertin. præfat. Thomæ & aſſign' ſuis a feſto Sancti Mich' Archangel' tunc ult. præterit. uſq; finem & Terminum quinque Annorum extunc prox. ſequen' & plenar. complend & finiend' virtute cujus quidem dimiſſionis idem Thomas in tenementa præd. cum pertinen. intravit & fuit inde poſſeſſionat. quouſq; præd. Robertus poſtea ſcilicet eodem decimo die Martii Anno tertio ſupradicto apud Burton Daſſet præd. in Com. præd. vi & armis &c. in meſſuagium præd. cum pertin. in & ſuper poſſeſſion. ipſius Thomæ inde intravit & ipſum Thomam a firma ſua prædicta termino ſuo prædicto inde nondum finito ejecit expulit & amovit ipſumque Thomam ſic inde eject. expulſ. & amot. a poſſeſſione ſua inde extratenuit & adhuc extratenet. Et alia enormia ei adtunc & ibidem intulit contra pacem dict. Domini Regis & Dominiæ Reginæ nunc & ad dampnum ipſius Thomæ decem librar. Et inde producit ſectam, &c.

Et præd. Robertus per Carolum Ballet Attorn. ſuum ven. & defend. vim & injur. quando, &c. & dicit quod ipſe non eſt inde culpabilis. Et de hoc pon. ſe ſuper patriam & præd. Thomas inde ſimiliter &c. Ideo ven. inde Jur. coram Domi-

Not guilty pleadea.

no Rege & Domina Regina apud Weſtm. die Mercurii prox. poſt tres ſeptimanas Sanctæ Trinitatis, Et qui nec, &c. Ad recogn. &c quia tam, &c. idem dies dat. eſt partibus prædict. ibidem, &c. poſtea continuat. inde proceſſus inter partes pred. de placito præd. per Jur. poſit. inter eas in reſpectum coram Domino Rege & Dna. Regina apud Weſtm. uſq; diem veneris prox. poſt tres ſeptimanas Sancti Michaelis ex tunc prox. ſequen' niſi Juſtic. Domini Regis & Dominæ Reginæ ad Aſſiſas in Com. præd. capiend. aſſign. prius die Lunæ decimo die Auguſti apud Warr. in Com. præd. per formam ſtatuti &c. ven. pro defectu Jur. &c. ad quem diem, coram Domino Rege & Domina Regina apud Weſtm. venit præd. Thomas per Attorn. ſuum præd. & præfat. Juſtic. ad Aſſiſas coram quibus &c. miſ. hic record. ſuum coram eis habit. in hæc verba

The Poſtea. Poſtea die & loco infracontent. coram Johanne Powell Mil. uno Juſtic. Dni. Regis & Dominæ Reginæ de Banco & Georgio Dodſon Armig' eidem Johanni Powell & Nicholao Lechmere Mil. uno Baron. Scaccarii Dom' Reg. & Dom. Reginæ Juſticiariis ipſorum Dni. Regis & Dominæ Reginæ ad Aſſiſas in Com. Warr. capiend. aſſign. per formam ſtatuti &c. hac vice aſſociat. præſentia præd. Nich. Lechmere non expectat. virtute brevis eorundem Domini Regis & Dnæ. Reginæ de ſi non omnes &c. venerunt tam infra nominat. Tho. Burton quam infraſcript. Robertus Woodward per Attorn. ſuos infracontent. & Jur. Jurat. unde infra fit mentio exact. quidam eorum videlicet Georgius Warner Henr. Norton Job Everton Robertus Dodington Joſephus Sherſton Thomas Coles Guilielmus Chaplin Tho Thompſon Georgius Cotterell Thomas Gardiner & Elias Wells ven. & in Juram ill. jurat. exiſtunt & quia reſid. Jur. ejuſdem Jur. non comperuer. Ideo al. de circumſtan. per Vicecomitem Com. præd. ad hoc elect. ad requiſition. præd. Thomæ Burton ac per mandat. Juſtic. præd. de novo apponitur cujus nomen panello infraſcript affilatur ſecundum formam ſtatut. in hujuſmodi caſu edit. & proviſ. qui quidem Jur. ſic de novo appoſit. videlicet Robertus Onely exact. ſimil' ven. qui ad veritatem de infracontent. ſimul cum al. Jur. præd. prius impanellat. & jurat. dicend. electi triat, & jurat. dicunt ſuper ſacrament. ſuum quod Rectoria de Burton Daſſet in Com. Warr' infraſcript. eſt & a tempore cujus contrar' memoria hominum non exiſtit fuit impropriat. quodq; Vicaria Eccleſiæ de Burton Daſſet præd. a toto tempnre ſupradicto fuit

Si non omnes

Tales.

&

& eſt Eccleſiaſticum beneficium & dotata, quodque meſſuagium cum pertin. infracontent' eſt & infraſcript. decimo die Martii Anno tertio infraſcript necnon a toto tempore ſupradicto fuit pertinen. ad vicariam præd. & parcell. poſſeſſion. ejuſdem vicariæ unde eadem vicaria ut prefertur dotat eſt & gaviſum fore debet per Vicarios Vicariæ præd. pro tempore exiſten. quodq; decimo quarto die Februarii Anno Regni dicti D'ni Regis & Dnæ. Reginæ nunc primo quidam Chamberlain Hamerſley Clericus fuit vicarius vicariæ præd ac vicarius ejuſdem vicariæ continuavit & eandem vicariam habuit uſque deprivationem ſuam pro cauſa inferius ſpecificat. videlicet quouſque vicaria præd. vacua devenit virtute cujuſdam ſtatuti in Parliamento dict' Dni. Regis & Dnæ. Reginæ nunc apud Weſtm. in Com. Middleſex Anno Regni eorundem Dni. Regis & Dnæ. Reginæ nunc primo tent. de abrogation. Sacramentorum Primatiæ & Ligeantiæ Angl. The Oaths of Supremacy and Allegiance, & de appunctuand' alia ſacramenta edit. & proviſ. quodque præd. Chamberlain Hamerſley præd' decimo quarto die Februarii tunc primo ſupradicto & continue poſtea uſq; deprivation. ſuam præd. fuit ſeiſit. de præd. meſſuagio cum pertin' in Dominico ſuo ut de feodo in jure vicariæ ſuæ præd. quouſq; præd. Chamberlain Hamerſley poſt editionem ſtatuti præd. & ante primum diem Auguſti Anno Dni. 1689. in ſtatuto præd. mentionat. ſeu eodem primo die Auguſti ſeu unquam poſtea hucuſq; non præſtitit ſacramenta Anglice did not take the Oaths, per ſtatut. illud appunctuat. fore præſtand. per quod præd. Chamberlain Hamerſley vigore ſtatuti præd. de vicaria præd. ipſo facto deprivat. fuit & vicaria illa vacua in lege devenit quodq; infraſcript. Edmundus Budd Clericus adtunc exiſten. presbyter ſecundum leges & ſtatut. hujus Regni Angliæ debite ordinat. poſt finem ſex menſium ſecundum computation. viginti & octo dierum pro quolibet menſe computat. poſt præd. primum diem Auguſti prox. ſequen. & ante finem ſex menſium ſecundum Computation. Calendar. computat. Anglice Calendar Months poſt eundem primum diem Auguſti prox. ſequen. ſcilicet 29 die Januarii Anno primo ſupradicto ad vicariam præd. præſentat. inſtitut. & induct. fuit & omnia quæ per leges & ſtatut. hujus Regni Angl. requiſit. vel neceſſar. fuer. ad ipſum perfectum incumben. dictæ vicariæ faciend' (ſi prædicta vicaria prædicto tempore preſentation. inſtiturion. & induction. præd. vacua fuerit) debita

debita juris forma fecit & perimplevit qui quidem Edmundus Budd poſtea ſcilicet eodem viceſimo nono die Januarii in meſſuagium præd. cum pertin. intravit & fuit inde ſeiſit' prout lex poſtulat. Et ſic inde ſeiſit' exiſten' præd' Edmundus præd. decimo die Martii Anno tertio ſupradicto dimiſit præd. Thomæ Burton Meſſuag. præd. cum pertin' habend' & occupand' meſſuagium præd. cum pertinen' præd' Thomæ & Aſſign' ſuis ab infraſcript. feſto Sancti Michaelis Archangeli tunc ult' præterit. pro & duran' infraſcript' termino quinq; Annorum extunc prox' ſequen' plenar' complend. & finiend' quodq; idem Thomas Burton poſtea ſcilicet eodem decimo die Martii Anno tertio ſupradicto in meſſuagium præd' cum pertin' intravit & fuit inde poſſeſſionat' prout lex poſtulat quouſq; præd. Robertus Woodward eodem decimo die Martii Anno tertio ſupradicto vi & armis in meſſuagium præd. cum pertin' ſuper poſſeſſion' præd' Thomæ Burton intravit & ipſum a firma ſua infraſpecificat' ejecit prout idem Thomas Burton interius verſus eum queritur. Sed utrum ſuper tota materia præd. ſuperius in forma prædicta compert. vicaria prædicta tempore preſentation' inſtitution' & induction' pred. vacua fuit necne Jur' penitus ignorant & inde petunt adviſament' & conſideration' Juſtic' & Curiæ hic & ſi ſuper tota materia præd' per Jur' præd' in forma præd. compert' videbitur eiſd' Juſtic' & Cur' hic quod vicaria prædicta præd. tempore preſentation' inſtitution' & induction' præd' vacua fuit tunc iidem Jur' ſuper ſacrament' ſuum præd. dicunt quod præd. Robertus Woodward eſt culpabilis de tranſgr. & ejection. præd. prout præd. Thomas Burton interius verſus eum queritur & aſſidunt dampna ipſius Thomæ occaſione tranſgr' & ejection. præd. ultra miſ. & cuſtagia ſua per ipſum circa ſectam ſuam in hac parte oppoſit. ad duodecim denar' & pro miſ. & cuſtag. ill. ad 53 s. & 4 d. & ſi ſuper tota materia præd. per Jur' præd. in forma præd. compert' videbitur eiſd. Juſtic' & Cur' hic quod vicaria præd. tempore præſentation' inſtitution' & induction' præd. non vacua fuit tunc iidem Jur. ſuper ſacrament' ſuum præd. dicunt quod præd. Robertus Woodward non eſt culpabilis de tranſgr. & ejection. præd. prout præd. Robertus interius pro ſe placitando inde allegavit. Et quia &c.

Burton

Burton *verſus* Woodward.

UPon a ſpecial Verdict in Ejectment the Caſe was thus: 1 Show. 368.
The Vicaridge of Burton Daſſet was a Vicaridge endowed, to which the Meſſuage now in Queſtion did belong.

That on the 14 Day of February, 1 Willielmi, one Chamberlain Hamerſly was Vicar thereof, who was deprived for not taking of the Oaths by a Statute made Anno primo of the King and Quæn.

That the Leſſor of the Plaintiff after ſix Lunary Months to be computed from the firſt Day of Auguſt, &c. was preſented, inſtituted and inducted to the ſaid Vicaridge; but whether it was void or not at the Time of ſuch Preſentation? was the Queſtion.

And this depended upon the Conſtruction of a Paragraph of the Statute made for abrogating of the Oaths, and taking of new ones.

And be it enacted, &c. That if any Archbiſhop or Biſhop or any other Perſon now having any Eccleſiaſtical Dignity, Beneſice or Promotion, ſhall neglect or refuſe to take the Oaths, &c. in ſuch manner as is therein directed before the firſt Day of Auguſt 1689. every ſuch Perſon and Perſons ſo neglecting or refuſing ſhall be, and is, and are hereby declared and adjudged to be ſuſpended from the Execution of his or their Office, by the Space of ſix Months to be accounted from the firſt Day of Auguſt. And if the ſaid Perſon, &c. ſo having neglected or refuſed ſhall not within the ſaid ſix Months take the Oaths in ſuch Manner, Court or Place, as they ought to have taken the ſame before the ſaid 1ſt of Auguſt, then he, &c. ſhall be ipſo facto deprived, &c.

Now if the ſix Months appointed by this Act ſhall be accounted Calendar Months; then the Plaintiff had no Title, becauſe the Church was all that Time full of Hamerſly.

It was argued for the Plaintiff that thoſe ſhall be accounted Lunary Months; for in all Statutes where the Word Month is uſed the legal Computation ſhall be 28 Days.

As where an Information was brought for uſing of an unlawful Game 7 Months upon the Statute of 33 H. 8. it hath been held, That theſe Months ſhall be accounted by 28 Days to each Month. 2 Roll Abr. 521. Dyer 218. 33 H. 8. cap. 9.

So upon the Statute of Enrollments, by which 'tis enacted, That no Freehold or Inheritance ſhall paſs but by Deed in writing, and enrolled within ſix Months after the Date thereof, there it ſhall be alſo accounted 28 Days, Cro. Eliz. 835. 2 Inſt.

In

2 Cro. 167. In like Manner, where a Leet is to be held within a Month after Easter and Michaelmas, that Month shall be likewise accounted 28 Days.

Econtra. It was argued on the other Side, that Months generally speaking shall be accounted in the legal Construction 28 Days; but where an Act of Parliament doth relate to Laymen, it shall be construed according to the usual Account amongst them. viz. 28 Days.

And where it relates to Ecclesiastical Persons, as in this Case, it shall be according to their Computation.

'Tis true the former of these Cases usually happens, because there are more Laymen than Churchmen, and for this Reason and upon this distinction the Authorities cited on the other Side are Law.

Now here is an Act of Parliament relating only to Ecclesiastical Persons, by which Act a certain and determinate Time is limited for a Thing to be done, the Neglect whereof being penal, it shall be accounted according to their Months, and not by 28 Days.

2 Cro. 166. Yel. 100. id. 6 Rep. 62. Hob. 179. Lit. Rep. 19. 2 Inst. 320. As for instance in the Case of a Lapse, upon a Quare Impedit the six Months shall be accounted according to the Calendar: So upon the Statute 2 & 3 Ed. 6. cap. 13. which gives a Consultation if the Suggestion is not proved by two Witnesses within six Months next after the Prohibition granted: And it was never adjudged otherwise when the Thing related to Ecclesiastical Persons, and very often where it doth not concern them, as upon the Statute of H. 4. for suppressing Riots, which gives the Justices Authority to enquire of Riots within a Month after the Offenders are departed, &c. which shall be construed according to the Almanack Months, and not by 28 Days.

13 H. 4. cap. 7. Dyer 142. 218. Sid. 186. Cro. Eliz. 227, 835.

The very penning of this Act may be a good Inducement to shew that the Makers thereof were of this Opinion; for there is a Time given to all Ecclesiastical Persons to come in and take the Oaths, viz. before 1 Augusti, otherwise to be suspended: This is not so much a Punishment as an Admonition that they may keep their Dignities by a farther Compliance with the Law; then a Day is given which is a Day of Grace and Favour, to which a Penalty is annexed in Case of not complying; so that they shall have the longest Day to conform to this Law, and therefore the Construction of these Words shall be according to the Subject-matter, as if I am to pay Money on the first Day of Michaelmas

Michaelmas Term, it ſhall be paid the firſt Day in full Term, and not on the Eſſoin-day which in legal Conſtruction is the firſt Day of the Term. Adjournatur.

Knight *verſus* Symms.

EJectment for five Cloſes called Furlong containing 20 Acres of Arable and Paſture, to have and to hold the aforeſaid Cloſes of Land, &c. Upon not Guilty pleaded the Plaintiff had a Verdict, and it was moved in Arreſt of Judgment, for that he ought to demand ſo many Acres certain of Arable and ſo many of Paſture; and upon this very Exception a Judgment in Ejectment was reverſed upon a Writ of Error brought in this Court, viz. 1 Salk. 254. 1 Show. 338.

The Plaintiff declared of a Meſſuage and 40 Acres of Land Meadow and Paſture thereunto belonging, and did not diſtinguiſh how much of each. Cro. Car. 573.

Savell's Caſe is expreſs, that an Ejectment will not lie of a Cloſe, but it muſt be of a certain Number of Acres, and the Nature of the Land muſt be particularly expreſſed. 11 Rep. 55.

It has been held that tho an Ejectment would not lie de uno clauſo generally, becauſe the Sheriff cannot tell of what to deliver Poſſeſſion; yet where a Name is given to the Cloſe without ſetting out the Number of Acres, 'tis well enough; and this was the Caſe of Jones and Howell in Cro Eliz. 235.

But in the ſame Book, and but two Years afterwards, it was ruled, that it would not lie of a third Part of a Cloſe, tho a Name was given to it; and the Reaſon there given was, becauſe an Ejectment is in Nature of a Præcipe, which muſt contain a certain Number of Acres. Cro. Eliz. 338.

But that which comes nearer to the Caſe now in Queſtion is, That of Weeks and Sparrow, which was an Ejectment of two Cloſes called Gulwel, containing 3 Acres of Land, and did not ſhew what each Cloſe contained, which was held good becauſe the Quality of the Land was mentioned: But Juſtice Houghton was of another Opinion in that Caſe, which ſeems to be very reaſonable; for if an Ejectment will not lie de uno Clauſo, becauſe of Incertainty; the Addition of theſe words which follow, viz. containing 3 Acres of Land, doth not make it more certain. 2 Cro. 435.

An Ejectment de caſtro villa & terris in Kilborough ſeems to be certain enough to deſcribe the Thing demanded, in order to recover the Poſſeſſion; but it was held to be too general, Yel. 118. Style 202.

and upon which no Haberi facias could be awarded, and therefore inſufficient.

Serj. Tremaine contra: If there is ſuch a Certainty of which the Sheriff may deliver Poſſeſſion, 'tis well enough.

In Savel's Caſe there was neither the Quantity or Quality of the Land deſcribed; but here is both: That was an Ejectment of a Meſſuage and a Cloſe called Dovecote Cloſe containing 3 Acres, but doth not ſay whether Land, Meadow, or Paſture, &c.

Sid. 295. This Action is in Nature of a Trepaſs, and therefore it will lie de uno pomario, or de una domo; but 'tis not doubted but it will lie de uno meſſuagio ſive tenemento, with this addition, viz. vocat. the Black Swan.

Curia. All the Certainty in this Caſe is the Addition of the Name called the Long Furlong; without thoſe Words the other are very uncertain.

Now Names of Places are neither neceſſary or material in giving Poſſeſſion, becauſe they often change with the Proprietors; and the Sheriff muſt have ſufficient Notice out of the Record it ſelf to give Poſſeſſion.

'Tis a Doubt whether an Ejectment will lie of a Cloſe, giving it a Name without adding the Number or Quality of Acres; for if an Aſſize ſhould be brought de uno caluſo vocat. Black-acre, 'tis not good.

But here 'tis very uncertain, for the Plaintiff did not ſhew how many Acres of each in Paſture and Meadow; and then to ſay habendum clauſa terræ is yet more uncertain; for tho the Word terra in legal Acceptation comprehends Arable Land, yet it doth not relate to Paſture; ſo nothing is ſaid of that: And for thoſe Uncertainties the Judgment was reverſed after two Motions in Trinity Term following.

Loder *verſus* Snowden.

IN an Appeal of Murder the Writ was returnable a die Paſchæ in quindecim dies but there being a Defect of Pledges, and that being returned by the Sheriff, the Appellant came into Court, and by his Counſel prayed that he might find Sureties, &c. 1 Salk. 64.

Quarto die poſt the Appellant appeared per Attornatum, and then the Defendant was arraigned.

Serj. Pemberton took Exceptions to the Declaration, and prayed that the Defendant might be diſcharged, becauſe the Appellant appeared by Attorney, which in this Caſe could not be; and therefore it was no Appearance, and if ſo, 'tis a Diſcontinuance of the Suit upon Record. 2 Inſt. 313.

The Court having takin time to conſider, the Appellee was brought to the Bar a ſecond Time, and then the Appellant was there in Perſon, and Sureties were taken, but the Filing of the Warrant of Attorney was rejected; then the ſame Exception was moved as before, viz. That an Appeal being of a different Nature from other Actions, it ought to be in propria perſona ſua inſtanter appellat, and not per Attornatum; ſo that there being an Intermiſſion, the whole is diſcontinued, and the Court gives no Day over.

'Tis true in an Appeal of Mayhem, where the Plaintiff did appear by Attorney (as in this Caſe) the Defendant prayed, That he might be demanded, which was done, and he not appearing in propria perſona, was nonſuit. 2 Inſt. 313.

But the Law is not that the Appellant ſhall be demanded of Neceſſity, becauſe 'tis incumbent upon him to proſecute his Appeal; and if there is any Laches in him, then 'tis a Diſcontinuance; and if he is demanded at any Time, and doth not appear, the Court will then record the Nonſuit, for the Appellant muſt be all the Term in Court.

There is a Precedent in Raſtall's Entries, where Judgment was given againſt the Widow for want of a Declaration the firſt Day of the Term; and therefore the Appellant having now failed in his Action there can be no Amendment, it being in an Appeal of Death, where no ſuch Favour is given either by the Statute or Common Law. fol. 46. c. placit. 1.

Curia. Tho the Declaration is void in it ſelf, yet 'tis not all one as if there had been no Declaration; 'tis only void ſo far as not to oblige the Defendant to make Anſwer to it; the Appeal may be arraigned again, eſpecially the Appellant being the ſame Day in Court, and the whole Term ſhall be taken as one Day.

The Defendant upon the Arraignment ſhould have prayed that the Plaintiff might be demanded, becauſe he could not appear by Attorney, and then if he had not appeared in perſon he ſhould be nonſuited.

He was not arraigned again, but the Secondary read the Record.

The Defendant prayed Oyer of the Writ and Return, which was returned, and read, and then by his Counſel moved that it might be entred as it was, and that Continuances from Time to Time might be entred in Regard he was going into the King's Service which was granted.

Then he pleaded a Conviction of Manſlaughter, which was inſiſted on to be a good Plea in Bar to an Appeal of Murder, &c. and had his Clergy, &c. and prayed that his Plea might be allowed.

It was read by the Secondary.

3 Mod. 156. The Caſe of Goring and Deering was now cited, where it was the Opinion of 10 Judges that a Man indicted for Murder, and found guilty of Manſlaughter, the Court ought not to ask him what he had to ſay, &c. thereby to let him into the Benefit of his Clergy, and this for the Advantage of the Perſon who intends to bring an Appeal. Tamen quære, for the Law ſeems to be otherwiſe.

Rex *verſus* Roberts.

1 Show. 389. Information for Extortion, ſetting forth, That there is a Common Paſſage and Ferry-boat, &c. for tranſporting of People and Cattle, &c. from ſuch a Place, &c.

That the uſual Rate for the Paſſage of a Man and a Horſe was a Penny, and for a Score of Sheep 2d. &c.

That the Defendant being the Common Boatman, did carry at certain Times ſeveral Perſons, and ſeveral Score of Sheep, and that during that Time he did extort de quibuſdam ignotis,

ignotis, for the Uſe of the ſaid Boat in paſſing over, &c. viz. pro tranſportatione cujuſlibet equi 2d. & pro quibuſlibet viginti ovibus Anglice Score of Sheep 4d. & ſic ſecundam ratam, &c.

The Defendant was found guilty, and now ſeveral Exceptions were taken in Arreſt of Judgment.

(1.) 'Tis not ſaid from whom he extorted thoſe Sums, but only de quibuſdam ignotis.

(2.) No Time certain was mentioned when the Wrong was done.

(3.) 'Tis not ſaid how many Score of Sheep were carried over, or that the Defendant carried any, but only that he took for every Score, &c.

Like Marrin van Henbeck's Caſe againſt whom an Information was brought upon the Statute of 18 H. 6. which requires that all Pipes of Wine ſhall be gauged, &c. before they are ſold, and that ſo much of the Price as it wants in Meaſure ſhall be abated, on Pain to forfeit the Value to the King and Informer; and for that the Defendant had ſold ſeveral Pipes of Wine, none of which contained 126 Gallons, and that he had not abated, &c. but did not ſhew how much was wanting in each Pipe, and for this Reaſon Judgment was againſt the Informer. 2 Leon 38. 18 H. 6. cap. 17. 2 Bulſt. 31.

Econtra. 'Tis not material to name the Perſons from whom the Defendant extorted Money, 'tis ſufficient if the number was ſet forth: And therefore an Indictment that A. cum viginti ſeptem aliis engroſſed, &c. has been held good: Cro. Car. 380.

May tho' the Number ſhould not be ſet forth, yet it ſeems well enough, becauſe the Crime is the Taking, and when the Fact is found, 'tis not material from how many he took; the Verdict finds the Taking unlawfully, which could not be if the Cauſe had not been ſhewed.

The Law was very nice in Indictments till my Ld. Dyer's Time, but he held that an Indictment quod (the Defendant) felonice cepit bona cujuſdam ignoti was ſufficient; and the Reaſon given by the Book was, becauſe the Goods may be carried into another County, and ſo not known who had the Property. Dyer 99

So here the People may live in remote Parts, who have been carried over the River, and the Informer may not know who they are, or whither they are gone.

As

As to the ſecond Objection, That no certain Time is mentioned, &c. it was ſaid that was not material after a Verdict: It might be a good Exception upon a Demurrer.

As for inſtance, the Statute of 3 Jac. 1. requires that a Popiſh Recuſant convict, who ſhall conform and go to Church, ſhall within the firſt Year after his Conformity, and every Year afterwards, receive the Sacrament, or otherwiſe for the ſaid firſt Year he forfeits 20 l. the ſecond Year 40 l. and every Year afterwards 60 l. and if doth receive it one Year and neglect the next Year, and ſo once a Year, then for every Year he is to forfeit 60 l.

2 Cro. 365. An Information was brought upon this Statute, ſetting forth, That the Defendant ſeipſum conformavit, being a Recuſant convicted in due Form of Law, but had not received the Sacrament for 3 Years, &c. Upon not guilty pleaded, the Informer had a Verdict, and it was held, That the Information was well enough, tho' no certain Time of the Conviction was ſet forth, nor before whom, &c. but the Court allowed it to be a good Exception upon a Demurrer.

Then as to the third Objection, 'tis not material to ſet forth the number of Sheep becauſe the Taking is the Offence which is found by the Jury, as aforeſaid; and the Informer being a Stranger, 'tis enough upon Evidence to ſhew the Fact, and not to ſet it forth particularly in the Information.

5 Ed. 6. cap. 14. And where a Fiſhmonger was indicted for engroſſing Fiſh ea intentione to ſell them again contra formam Statuti, &c. which is at unreaſonable Prices.

Cro. Car. 314. Now tho' a Fiſhmonger cannot be within that Statute, or ſaid to be an Ingroſſer, buying Fiſh only, which is his Trade ſo to do; yet if he Regrate, that is, buy Fiſh in a Market, and ſell it again there or within 4 Miles at unreaſonable Prices; he ſhall be within that Statute, being indicted, that he bought ea intentione ad revendendum contra formam Statuti, which muſt be that he engroſſed, and did not ſell for a reaſonable Price; for if he did, it would have been given in Evidence to the Jury, but the Fact was otherwiſe proved to them, and therefore the certain Matter need not be ſet forth.

2 Cro. 240. So an Information per viam corruptæ barganiæ & Chevianſiæ fact. the Defendant did receive ſo much, &c. now tho' the Bargain was not certainly ſet forth, yet the Receipt being proved to the Jury, that was held ſufficient.

As to Van Henbeck's Caſe it doth not appear by the Report, whether Judgment was given after Verdict, or upon a Demurrer, but be it as it will his Offence was againſt a Statute, but this is an Offence at the Common Law.

An Indictment againſt an Innholder upon the Statute of 13 R. 2. and 4 H. 4. for that he exiſtens communis ſtabularius vendidit diverſis ſubditis infra domum manſionalem. He was found guilty, and it was moved in Arreſt of Judgment that ſelling in his Manſion-houſe diverſis ſubditis is no Offence if it was not in an Inn, and to his Gueſts; yet the Indictment was held good. 2 Cro. 609.

Curia. Every Taking is a ſeveral Offence and Extortion, and here are a whole Heap of Offences put together. It may be as well ſaid that an Indictment for Battery will be good, ſetting forth that the Defendant beat ſo many of the King's Subjects between ſuch a Day and ſuch a Day.

The Caſes cited by the Counſel for the Informer, will not warrant this Judgment.

As to that upon the Statute of Recuſancy, 'tis very uncertain, becauſe 'tis not ſaid when the Defendant was convicted, or when he conformed, and therefore that was now held to be no Law.

The other Caſe of the Fiſhmonger was grounded upon the Purview of the Statute againſt foreſtalling and regrating; ea intentione ad revendendum, is well enough, and the Defendant to excuſe himſelf ought to have produced ſome Evidence at the Trial to bring himſelf within the Proviſo of the Act, viz. That he dwelled within a Mile of the Sea, and bought the Fiſh to ſell at reaſonable Rates.

The Judgment was ſtayed.

Then a Motion was made, that the Defendant might be bound to the Good Behaviour, ſeveral Affidavits being produced that he continued his Extortion to that Time; but it was denied.

Barſdale

Barſdale *verſus* Drew.

WRit of Error upon a Judgment in the Common Pleas, and the Judgment was affirmed in B. R.

The Plaintiff brought a Certiorari to remove the Recognizance it ſelf into this Court, which was given in C. B. upon the Allowance of the Writ of Error, ſo that he might ſue out a Scire facias againſt the Bail.

But it was alledged, that B. R. could not grant ſuch a Writ, becauſe the Recognizance is a Record, which is not to be removed by Certiorari; for that only removes tenorem Recordi, and not the Record it ſelf.

Dyer 275. a. A Certiorari like this was brought in Eaſter Term. 10 Eliz. to remove the Record of a Verdict out of the Common Pleas in order to bring an Attaint againſt the Jury; but it was diſallowed for this Reaſon, viz. That no ſuch Writ had ever been allowed; for the Clerk of the Treaſury in the Common Pleas upon the Removal of the Record it ſelf makes this Entry, viz. Quod Recordum removetur virtute brevis de certiorand. which removes only tenorem Recordi.

F. N. B. 244. a. Now although Mr. Fitzherbet ſeems to be of another Opinion, where he ſays, That if a Man recover in an Aſſize of Novel diſſeiſin before the Juſtices of Aſſize, and before Execution the Record is removed into the Chancery by Certiorari, he may then ſend it into the King's Bench, &c. but this muſt be intended where a Writ of Error is depending.

Econtra. Bail in inferior Courts is taken upon the Roll it ſelf, and ſo part of the Record; and therefore when that is removed, the Recognizance muſt come with it; and upon the Affirming the Judgment, a Scire facias may be Ad. 213. brought in B. R. againſt the Bail, who cannot plead Nul tiel Record, becauſe the Recognizance is well removed.

But in the Courts at Weſtminſter the Recognizance is taken by it ſelf, and is no Part of the Record upon the Roll; and therefore a Certiorari may be to remove it, tho' it cannot remove the Record it ſelf: And it was allowed accordingly.

Chiefly

Chievly *verſus* Bond.

Hill. 3 Willielmi, *Rot.* 307.

AN Action on the Caſe was brought upon a Promiſe made by the Defendant to pay a Bill of Exchange drawn 14 Years ſince. 1 Show. 341.

The Defendant pleaded the Statute of Limitations, the Words of which Statute are, That all Actions of Treſpaſs, &c. all Actions of Accompt, and upon the Caſe (other than ſuch Actions which concern the Trade of Merchandize between Merchant and Merchant, their Factors or Servants) ſhall be brought, &c.

Plaintiff replied, that the Bill was a negotiating Bill, and that it was upon an Account between Merchants, &c.

The Defendant demurred, and had Judgment, becauſe the Statute excepts only Accounts which are current between Merchants, and not any which are ſtated; for if an Action is brought againſt a Drawer for Value received, that is no Account current, but ſtated. 2 Saund. 124.

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Term. Sanct. Trin.

Anno 4 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1692.

Philips *verſus* Bury.

Caſes in Parliament. 35

MR. Colmer a Fellow of Exeter College in Oxon, was expelled by Dr. Bury the Rector, &c. for Incontinency; the ſaid Mr. Colmer appealed to the Biſhop of Exeter, who is the Viſitor of the College: He received the Appeal, and granted an Inhibition to any further Proceeding againſt the Appellant, and made an Order requiring the Rector and Fellows to give an Account of their Proceedings, Sub pœna juris & contemptus.

This Order was ſerved upon the Rector and Fellows, and then he ſent a ſubmiſſive Letter to the Biſhop, and no farther Proceedings were had for four Months.

Afterwards Dr. Maſters was commiſſionated to determine this Appeal in a formal Viſitation, for which pupoſe a Citation was fixed on the Chapel-door of the College, requiring the Rector, &c. to appear on Saturday 23 Martii 168½.

He appeared accordingly, and tendred a Proteſtation, but the Commiſſary proceeded to give Sentence for Mr. Colmer to be reſtored, and awarded him 20 Marks for Coſts.

Some time after this Sentence the Rector and Fellows proceeded againſt Mr. Colmer (as pretended Fellow) for another Act of Incontinency, who appealed again to the Biſhop, and he received the Appeal a ſecond Time, and reſolved upon a Viſitation in Perſon, and in Order thereunto he ſent a Citation to the Colleg[illegible], dated

May 16. 1690. and came himſelf to viſit on the 16th of June following.

When he came the Chapel-doors were ſhut againſt him, Then he appointed another Viſitation on the 24th of July following, and coming thither the Rector and Fellows tendered a Proteſtation under the Common Seal, becauſe by the Statutes of the College he was to viſit but once in five Years, and having viſited ſo lately by his Commiſſary he could not come again ſo ſoon.

Whereupon the Biſhop ſuſpended 5 of the 7 Senior Fellows (having ſuſpended 11 in all) and reſtored Mr. Colmer, and proceeded to deprive the Rector, and then 7 of the Senior Fellows, who were ſo after the Suſpenſion of the other, choſe Mr. Painter to be the Rector.

Mr. Bury continuing ſtill in Poſſeſſion, the Leſſor of the Plaintiff brought an Ejectment of a Meſſuage in Oxon upon the Demiſe of William Painter, &c.

The Defendant pleaded, that the Meſſuage in the Declaration, &c. is the Freehold of the College, and that he being Rector thereof did enter in Right of the ſaid College, &c. and traverſed that the Leſſor of the Plaintiff was Rector at the Time of the Demiſe, &c.

The Plaintiff replied, That the Meſſuage did belong to the College, and that he was Rector at the Time of the Leaſe made, & hoc petit quod inquiratur per patriam, and being at Iſſue, the Jury found a ſpecial Verdict, viz.

That Exeter College is a Body incorporate (founded by Walter Stapleton) by the Name of Rector and Scholars, &c. and that ſeveral good Laws were made by the ſaid Founder for the better Government of the ſaid College; and among the reſt they find that every Scholar is enjoined to take an Oath before the Rector, &c. to obſerve the ſaid Laws, and if he ſhall be expelled, never to appeal.

That the Biſhop of Exeter for the Time being was by a Statute of the ſaid College conſtituted the ordinary Viſitor thereof, by which it was directed at what Time he ſhould viſit, viz. when required by the College, and de quinquennio in quinquennium ſemel per ſe vel Commiſſarium ſuum ſi non requiſitus.

That at the Time of Mr. Colmer's Appeal the ſaid Biſhop was Viſitor thereof. Then they find ſeveral Statutes made by the Founder, and amongſt the reſt the Statute de viſitatione, as aforeſaid.

They find another Statute, by which 'tis provided, That if the Bishop proceed to Deprive the Rector or Expel any Scholar, that if they cannot acquit themselves of the Charge against them, then amoveantur sine appellatione vel ulteriore remedio, dummodo ad expulsionem scholaris concurrat consensus Rectoris & trium ex septem maxime senioribus tunc in Universitate præsentibus; & si AD AMOTIONEM RECTORIS per hujusmodi EPISCOPI COMMISSARIUM etiam consentientibus quatuor ex septem maxime senioribus supradictis.

They find another Statute entitled Propter quas causas Rector ab officio privari debet, in which Statute several Causes are particularly named, and by which 'tis directed in what manner he shall be removed viz. He shall be admonished by the Sub-Rector and five Senior Fellows quietly to depart, which if he refuse (within a certain Time therein limited) then that the Bishop shall be acquainted with it, who is empowered to hear the Accusation, and if he find it true, to remove him from his Office, &c.

They find the Charter of Queen Elizabeth, by which it was incorporated de novo, and being a Hall before was then made a College.

They find that before the Lease made, James Colmer was convicted before the Rector of Incontinency, there being present also at the said Conviction, the Sub-Rector and five Senior Fellows of the College; that he was expelled and appealed to the Bishop, who appointed Dr. Masters his Commissary to hear and determine the same.

They find that the Commissary came to the College 22 Martii for that purpose, and did sit in the Chapel; That Mr. Colmore appeared before him, but that the Rector did not come, but made a Protestation in Writing, setting forth the Oath of a Scholar not to appeal against him for Expulsion; and therefore he denied the Authority of the Commissary to examine this Matter.

That notwithstanding this Protestation the Commissary did proceed to hear and determine the Fact ex parte, and restored Mr. Colmer.

That afterwards upon the second Removal of Colmer, the Bishop issued forth a Citation for a general Visitation on the 16th Day of June following; That he came to the College, and was hindred by the Porter from entring into the Chapel, which is locus visitationis; that the said Porter was then under the Power of the Rector, who departed re infecta.

That the Bishop summoned another Visitation on the 24th Day of July following, against which the Rector, &c. protested (being within the Time) insisting on the Statutes of the College, which he was bound by Oath to observe.

That the Bishop received this Protestation, quatenus de jure, and that the Rector disagreeing to this Visitation departed in Contempt of the Court; That he was summoned several Times to appear, and refusing, was pronounced contumax, and thereupon was deprived by the Consent of four of the seven Senior Fellows not suspended, who were then resident in the University, but who were not Seniors but by the Deprivation of Dr. Hern, and by the Suspension of five others.

That after this Sentence Mr. Painter the Lessor of the Plaintiff, was chosen Rector of the said College, &c. who made the Lease, &c.

This was the Substance of the special Verdict (which was very long) so far as necessary for the understanding these Points which were raised upon it, which were three.

(1.) Whether the local Statutes of the College did not take away that Power the Visitor had to give such a Sentence of Deprivation? If not,

(2) Whether the Concurrence of any other Person was necessary to strengthen his Authority?

(3.) Whether this Sentence was examinable in any other Court?

As to the first it was agreed, That tho' by the Statutes of the College the Bishop had Power to make a formal Visitation only de quinquennio in quinquennium; yet these Words are not restrictive of his Power, but directive to him: for eo nomine he is a Visitor, he hath Power to come at any Time to hear Appeals, and redress upon Complaints made, tho' not to make a formal Visitation; and this is such a Power which cannot be restrained but by negative Words.

Dr. Masters came not as a Visitor, but for a particular purpose to hear and determine the Appeal of a single Fellow: He was not to visit thew hole College, his Comission gave him no such Authority; neither can the coming of the Bishop himself on the 16th Day of June be called a Visitation. 'Tis probable he might have an Intention to visit, but was prevented by the Opposition then made to his Authority;

Authority, and it would be a very absurd Thing to say, that he being hindred did visit the College.

If so, then his coming again in July must be a Visitation warranted by the Laws of the Founder; for it was in general to hear Complaints, and to redress those Disorders which were made by the former Contumacy of the Rector and Fellows; and 'tis a vain Thing to suppose that the Intention of the Founder, or of his Laws was that such Disorders should not be examined till five Years afterwards.

2d Point. There is no Necessity of the Concurrence of any other Person to strengthen the Authority of the Bishop.

When a Visitor is appointed by the Founder, the corporate Body is subject to no other Person, 'tis to be governed by him according to the local Statutes made and published by the Founder; and therefore the Statute of 43 Eliz. which empowers Commissioners to visit Hospitals, doth provide against their Authority where any special Visitor is appointed by the Founder.

In this Case the Bishop of Exeter is appointed by the Founder to be Visitor, he is to have the continual Inspection of this College; this is a Right granted to him without any Implication of Law; he hath propriam & non alienam jurisdictionem: For notwithstanding he is made by the Appointment of another, yet he hath an immediate Authority in his own Right quatenus Visitor, which is vested in him by the Law; he hath the same Power which was originally in the Founder, and if any other Person should endeavour to visit this College he might have a Prohibition.

6 H. 7. 14. F.N.B. 42. a.

Now a Visitor quatenus such hath always a sufficient Authority to deprive without the Concurrence of any other Person; and this Authority is not abridged by the local Statutes of this College; for tho' 'tis said, if the Bishop proceed to deprive the Rector or expel a Scholar, amoveantur, dummodo ad ejus expulsionem concurrat consensus Rectoris & trium ex septem senioribus; which must relate only to the Expulsion of a Scholar; for tho' the Rector is named, yet certainly this Clause cannot concern his Deprivation: for if it should, then his own Consent is required to his own Deprivation, which is very incongruous.

The next Clause is, si contra Rectorem ad amotionem per Episcopi Commissarium. &c. There 'tis true, the Consent of four of the Senior Fellows is requisite; but that is only to his Deprivation by the Commissary, which is not this Case; for he was deprived by the Visitor himself.

This appears yet more plain by the latter end of the ſame Clauſe, where 'tis ſaid Non negamus ei (that is Rectori) omnes exceptiones juſtas, &c. ad dominum Epiſcopum, which muſt be, that if he is deprived by the Commiſſary, he may appeal to the Biſhop; which ſhews that the Power of the Commiſſary is reſtrained to the Conſent of the four Seniors Fellows, but the Biſhop himſelf by Virtue of that Power which is incident to him as Viſitor, hath an abſolute Authority to deprive without the Concurrence of thoſe Fellows.

This Authority is derived out of that Fulneſs of Power which the Founder had in himſelf; 'tis not like any Juriſdiction of the Courts at Law, nor to be guided or examined by their Rules; 'tis true, by this laſt Clauſe that original Power which the Biſhop had quatenus Viſitor to deprive, &c. may ſeem to be reſtrained, and that there ought to be a Deprivation by the Commiſſary firſt, and then an Appeal to the Biſhop; for otherwiſe 'tis like an original Order made at a Seſſions of the Peace to which any Statute directs an Appeal, and therefore void.

But the Caſes are not parallel, becauſe a Juſtice of Peace hath his Authority from particular Statutes, but a Viſitor hath his Power by the Common Law; 'tis true he is named by the Founder, but he is veſted with Power by the Law.

In the next Place, it would be very abſurd to conſtrue this local Statute to extend to the Deprivation of the Rector by the Commiſſary, and not by the Biſhop, becauſe it cannot be imagined that a Deputy can do what the Perſon from whom he derives his Authority cannot do; but if ſuch Conſtruction ſhould be made, that there muſt be firſt a Deprivation by the Commiſſary, then if he ſhould refuſe to deprive or agree with the Fellows againſt the Biſhop, the Power of a Viſitor would be of very little Force.

But admitting ſuch a Concurrence of the Fellows neceſſary, 'tis ſufficiently found by the Verdict, and ſet forth in the Pleadings that the Deprivation of the Rector was with the Conſent of the ſeven Seniors then in the Univerſity, and the Statute doth not ſay that they ſhall be reſident in the College, ſo that 'tis ſufficient if they are the Seniors of ſuch who are then preſent; and it doth not appear by the Verdict, that the Five who are ſuſpended, were after that Suſpenſion preſent in the College; but on the Contrary, 'tis found they were called and did not appear.

3d Point. This Sentence is not examinable in any other Court.

This may be enforced from the Nature of Eleemosynary Corporations, and from many Authorities in the Books.

Now as to the Nature of such Corporations, they are by Law subject to a Visitor, the Extent of whose Power reaches as well to the Head as Members; 'tis true they have a Freehold, but tis sub modo.

The Charity was given by the Founder, and those who partake of it must receive it subject to such Limitations as he thought fit to impose upon them: He has appointed a Person to visit them who is Testatoris vices agere, he is made fidei Commissarium; and therefore the Sentence given by him shall be presumed to be the Sentence of the Founder himself, which cannot be thought unjust, especially by those to whom his Charity is extended; and if not unjust, then not to be examined elsewhere.

Then as to the Authorities in the Books, the constant Course hath been to deny a Mandamus when prayed to restore any person deprived or expelled from such a Corporation; and there is no Precedent in the old Books of any Restitution in such Case to a Monk, Prior, &c.

Dyer 209. Dr. Coveney, President of Magdalen College, was deprived by the Bishop of Winton who is Visitor; he appealed to the Queen in Chancery, and it was resolved, That it did not lie: For it was not within the Statute of H. 8. because that directs to whom Appeals shall be made in Causes only of Spiritual Jurisdiction; but a College is not a spiritual Corporation, neither is the Act of Deprivation of spiritual Cognizance.

24 H. 8. p. 12.

'Tis true the Book saith, that because there was no Appeal, ex hoc sequitur that the Party may have an Assize; but certainly that could never be the Opinion of my Ld. Dyer, because the Governour of a College hath not sufficient Estate in Law to maintain an Assize: For he alone without the whole Body aggregate hath no sole Seisin or Right in any thing belonging to the Corporation; therefore that Sequel cannot be Law.

But admitting it to be the Opinion of the Chief Justice Dyer, it stands single by it self without any Authority to support it; 'tis no Judgment in Law, and my Ld. Hale in Appleford's Case affirmed, That an Assize would not lie: And the Reason is plain, because where a proper Court hath

an Original Jurisdiction, no other Court will examine their Judgment after Sentence given; so is Bunting's Case, viz. If there is a Sentence in the Spiritual Court to dissolve a Marriage, tho' it be against the Reason of our Law, yet the Judges usually give Credit to it, because the Court which gave the Sentence had the proper and original Cognizance of the Matter. 4 Rep. 29. a. Moor. 169.

The same Reason is given in Kenn's Case which was cited as a Ground for the Judgment in Dr. Widdrington's Case, and likewise in the Case of Allen and Nash, where a spiritual Person was deprived by the High Commission-Court for a Contempt to the Ordinary generally, without shewing any particular Cause, and it was held good; for B. R. gives Credit to Sentences given by proper Judges. 7 Rep. 2 Rol. Abr. 219.

These are modern Authorities, but grounded upon former Resolutions in the Law; for in 8 Ed. 3. one Shirax was Warden of a lay Hospital, and deprived by the Visitor, the Archbishop being Patron put in Poplington, and Shirax as Warden brought an Assize. 8 Ed. 3. 69. b.

The Archbishop pleaded, nul tort, &c. and Poplington's Plea was, That the Demandant ought not sue as Warden for he was deprived by the Visitor; and it was the Opinion of Herle then Chief Justice of the Common Pleas, that whether the Deprivation was right or wrong, it was not examinable in that Court: For if he is deprived of his Name of Dignity by the Ordinary, he must recover it again before he shall sue by that Name. 13 Ass. placit. 18 Ass. placit. 29, 31.

The Court of Marshalsea is restrained to 3 sorts of Actions, viz. To Contracts and Covenants where both Parties are of the Houshold; to Trespasses when either Party is of the Houshold; and to other Trespasses within the Verge, when neither Plaintiff or Defendant is of the Houshold: An Action on the Case upon an Assumpsit was brought where neither of them were of the Houshold; the Plaintiff recovered, and the Bail of the Defendant was taken in Execution, who brought an Action of False Imprisonment, and had Judgment: Now this Matter was in a collateral Action, yet no Inference can be made from thence as to the Case at Barr; for the Proceedings in the Marshalsea were coram non judice, and therefore examinable in a superior Court; but it doth not follow from thence that this Court should examine the Proceedings of a Visitor in a formal and lawful Visitation, when he hath a full and proper Jurisdiction to visit. 10 Rep. 76. b.

Neither is it any Objection to say, That the Visitor had a qualified Power, viz. to deprive for Contumacy, and for no other Cause: For if that is examinable here, then the Court takes upon them the Office of Visitor, which was never intended by the Founder.

It has been said, That the Rector hath a Freehold in his Office; and therefore ought to be protected by the Law, and to have the Privilege of applying himself to the King's Courts for Relief against any Injury done by a Visitor: But this Objection also fails, for his Freehold is gone by Deprivation, for that works an absolute Avoidance of it.

If it should be farther objected, That Disfranchisements of Corporations, Decrees made by Commissioners of Sewers, and Proceedings of Commissioners of Bankrupts are examinable in this Court, yet from none of these can it be inferred that the Proceedings before a Visitor shall be likewise examined here; because in those former Instances the Persons are not trusted with a Power of Judicature, what they do is extrajudicial; but in this Case the Visitor hath the sole and absolute Determining and Judging of the Actions of those who for the most part subsist by the Charity of the Founder; he is made a Judge by the Common Law, and tho' it should be said that the King cannot commission any one to exercise such a dispotick Power, yet the Common Law gives that Authority where the Consent of all are involved.

Pro Def. Econtra. (1.) This Sentence of Deprivation is void.
(2.) If not, 'tis examinable in this Court.

'Tis void, because if a Founder appoints a Visitor and prescribes Rules to his Authority both as to Time, Person, and Place, and if that Power thus circumscribed is not exactly pursued in his Proceedings, and in all its Circumstances, 'tis not only Error, but all is coram non judice.

Now the Visitor hath no Authority but what was given to him by the Founder, and his Power being restrained, if he exceeds, then he acts without Authority, and is in the same Case as if the Justices of the Common Pleas should receive Appeals of Murder or Felony, and attaint the Defendant: 'tis all void, for they have no such Authority by their Patent. Or, like a Sheriff holding his Turn other than within a Month after Michaelmas or Easter; all Indictments and Presentments taken before him are

22 Ed. 4. 33. a.

coram

coram non judice, because by the Statute of Ed. 3. he is enjoined to hold it within that Time. 13 Ed. 3. cap. 15.

There can be no Differenee between these Instances and the Proceedings of a Visitor, who must be subject to these particular Rules and Orders, by which his Jurisdiction is established; and if it doth appear to this Court that he hath exceeded those Rules, then his Sentence will be pronounced to be void.

Another Thing to be observed is, That the Visitor had no Power to hold this Court either by Prescription or Charter; 'tis neither found so by the Verdict, or given to him; but if it should be admitted that he had Power by Charter, yet he could not give such a Sentence, because such a judicial Power could not be delegated by the Founder who was a private Person, and who could not erect such a Judicature; for what was done by him was only ministerial and extrajudicial; it was only a Power of annexing Laws and Rules of Government to those who partake of his Gift and Charity; but in Matters of Deprivation the Proceedings must be in the ordinary Course of Law.

Suppose a Man should give his Estate to particular Persons upon certain Trusts, &c. and if any Breach happens, that it should be examined by a particular Person, and no other; this is not good, and yet a Man hath as much Authority over his Land, as the Founder had over his Estate, who tho' he might give it to whom and upon what Conditions he thought convenient, yet it must be still subject to the Common Law, because it was so before any Disposition made by him, which is the Reason of the second Point.

(2.) That the Sentence of this Visitor may be examined in B. R. upon a collateral Action.

Because that Court hath a Superintendency over all such Proceedings, which may appear by many Instances of a higher Nature; where a Power is given by Act of Parliament, or by Letters Patents, even in such Cases their Proceedings are examinable here. 8 Rep. Dr. *Bonham's* Case. 11 Rep 93. 10 Rep. 141.

So are all Proceedings of Commissioners of Sewers who have a larger Power given them by the Statute of H. 8. to survey and amend, &c. at their Discretion and Wisdom; yet the Judges of the Common Law have interpreted that to be a legal Wisdom and Discretion. 23 H. 8. cap. 5. 5 Rep *Root's* Case.

So are also Proceedings of Commissioners upon the Statute of Bankrupts; for tho' they have an Authority under the Great Seal established by Act of Parliament, yet if they declare a Man a Bankrupt who is not so, he may traverse the Bankruptcy and try it here; and yet these Men are made by a higher Power than a Visitor is made; therefore his Proceedings may certainly be inquired into by this Court.

Now here if the Visitor had pursued the very Method prescribed by the Laws of the Founder, yet if the Rector is not guilty he can have no Relief but here; and the Rules to avoid Judgments in inferior Courts, either by Writ of Error or Attaint, are not applicable to a Sentence given by a Visitor.

'Tis true such Sentences are judicial, where the Foundation is spiritual, because the Ordinary is a spiritual Judge by the Law; but in a Lay Corporation 'tis otherwise, for their Acts are but ministerial; and from their Sentences an Appeal may be brought, which my Ld. Coke calls a natural Defence, and not to be taken away by any Power.

4 Inst. 340.

'Tis true also that such an Appeal was denied in Dr. Coveney's Case, because his Deprivation was temporal; but the Book saith, ex hoc sequitur that an Assize will lie because he hath no other Remedy.

As to Shirax's Case in the Year-book of Ed. 3. 'tis an Authority for this very purpose; for that being a Lay Foundation, and he being deprived by the Ordinary, brought an Assize, and it was held good.

Fitz. Abr. tit. Assize. placit. 150.

If a Corporation hath Power either by Charter or Prescription to disfranchise, and upon Complaint made, B. R. doth award a Writ to restore the Party, or shew Cause, &c. if they return a sufficient Cause tho' false, there is an End of the Writ; but the Party hath an Action on the false Return; so that an oppressed Man is never left by the Law without proper Remedy.

11 Rep. 99. b.

'Tis denied that because the Founder is the Master of his own Liberality, he may prescribe what Rules he pleaseth to govern his Charity, and so may make the Sentence of a Visitor final; for an Appeal is a natural Remedy, and not to be taken away by any Power; it lies to this Court which is the supreme Visitor, and its Jurisdiction is not to be abridged, even by Act of Parliament without particular Words.

The Statute of 24 H. 8. provides, That where a Cause is commenced before the Bishop or his Commissary; that an Appeal lies from him to the Archbishop of the Province within

24 H. 8. cap. 12.

within 15 Days after Sentence; and the Statute of 25 H. 8. gives Appeals from the Courts of Archbishops to the King in Chancery, which Court hath Power to issue a Commission under the Great Seal to certain Persons named by the King to hear the Appeal, and in both Cases their Sentences are made definitive; yet my Ld. Coke is of Opinion, That notwithstanding such a definitive Sentence, the King may grant a Commission of Review, because the Pope could do it by the Canon Law, and the Kings of England, have by subsequent Statutes the same Authority which the Pope had here. 25 H. 8. cap. 19. 4 Inst. 341.

Now tho' a Commission of Review is not properly an Appeal, yet 'tis a remedial Course of Proceeding, and 'tis not material by what Name an injured Person hath Remedy, so that he is relieved.

Many more Instances may be given to prove that the Party grieved may have a Remedy from a Sentence given by Persons who have lawful Authority so to do; as Justices of the Peace may make a Conviction of Force upon their View; they are made absolute Judges by the Statute, and may make Orders upon such Conviction; yet such Orders may be quashed in B. R. upon a Motion. Sid. 156. Jones 171.

The Visitor is made a Judge by the Founder, but 'tis no Consequence from thence that his Judgment shall be final; for an Arbitrator is likewise made a Judge by the Party, and his Judgment is usually vacated in B. R. without a Writ of Error, and no more Respect ought to be had to the Judgments of either than to a By-Law.

But if such Sentences of Visitors should be definitive, and not to be examined elsewhere, then great part of the Nation in those Days would not have been subject to the Rules and Government of the Common Law; for the rich Men were got into Guilds and Fraternities, the Men of Learning into Colleges and Halls, the poor Men into Hospitals, and those called Religious into Monasteries: Now in all these the Nation had a publick Interest, these were all Places and People of publick Use and concern, so that it would be very absurd to say that they shall be governed by particular Laws made amongst themselves, and exempted from the Power and Authority of the Common Law.

This Court takes Cognizance of the Extent of the Power of a Judge, Sheriff, or Executor, as soon as named; but it hath no Notion of a Visitor; 'tis a Word affected by the Canonists, who being made by the Founder, can have no Authority but what is given to him, and may be compared

4 Inſt. 267. red to an Officer conſtituted by Act of Parliament, who hath no other Power than is given him by the Act by which he is created, and therefore cannot preſcribe as an Officer at the Common Law.

Then it was argued, That if the Viſitor had ſuch a definitive Power, yet here was no juſt Cauſe to ſupport this Sentence, but a plain Defect, which made it void, becauſe he had no Power at the Time of this Sentence given; for by the local Statutes he is to come but once in 5 Years, &c. Now this Limitation of Time is annexed to his Power by the ſame Law which made him Viſitor.

His receiving the firſt Appeal made by Mr. Colmer, and his Commiſſion thereupon granted to Dr. Maſters was a Viſitation; for he hath no Power over the College but as Viſitor.

It hath been objected, that tho' this was in ſome Meaſure an Execution of his viſitatorial Power, yet 'tis not ſuch a Viſitation which may reſtrain him to come again within 5 Years, becauſe 'tis not a perſonal Viſitation, but by his Commiſſary only; and it was made to a particular Purpoſe, viz. to hear an Appeal, which he hath always a conſtant Juriſdiction to do quatenus Viſitor; ſo that it was not a general Authority given to him to exerciſe the whole Power of a Viſitor, which is to enquire into all Abuſes, &c.

But this is an Objection of little Force, becauſe the coming of the Commiſſary is the coming of the Biſhop himſelf; and tho' this Viſitation was to a particular Purpoſe, yet there are no Words in the Statutes which give him Power to make a general Viſitation; and if he is not reſtrained from coming oftner than once in 5 Years, then thoſe Words de quinquennio in quinquennium ſignify nothing.

So that 'tis plain that the Biſhop coming a ſecond Time ſo ſoon after his Commiſſary made a Viſitation, he adminiſtred an Oath which he could not do but as Viſitor; and this ſeems yet more plain from the very Words of the Statute de Viſitatione, which are, Liceat Domino Epiſcopo, &c. quoties per Rectorem & in ejus abſentia Subrectorem & quatuor alios ex ſeptem maxime ſenioribus fuerit requiſitus, necnon abſque requiſitione ulla de quinquennio in quinquennium ſemel ad dictum Collegium per ſe vel Commiſſarium accedere. Now 'tis no Objection to ſay that he may come oftner, becauſe there are no Negative Words of this Law to reſtrain him; for the firſt and laſt Words of this Sentence liceat accedere imply a negative, viz. That it ſhall be lawful for him to come then, and not as often as he will: and the Words abque

requiſitione ſemel do farther imply, that he is not to come without Requeſt but once in five Years.

Neither can it with any Colour of Reaſon be denied, That Mr. Colmer's Appeal did amount to a Viſitation; for if the Hearing, Receiving and Adjudging Appeals is part of the Viſitatorial Power, then the Hearing this Appeal is a viſitatorial Act, upon which the Party Appellant was reſtored.

Again, tho a Viſitor have Power by the Common Law to execute ſuch things which belong to his Office quatenus Viſitor, yet he muſt be ſubject to the Laws of the Founder; becauſe the Authority which he hat his chiefly derived from him; no Part of his Power is ſupplied by the Common Law, for he is a Viſitor ſecundum tenorem ſtatutorum.

Now the Viſitor hath executed that Power which he had not: For he is reſtrained by particular Words in the Statutes of the College to the Concurrence of four of the ſenior Fellows, who have equal Power with him in the Deprivation of a Rector, and there was no ſuch Conſent; for thoſe who agreed with the Viſitor were not Seniors, but by the Suſpenſion of five who were their Seniors: Now a Fellow of a College ſuſpended remains a Fellow ſtill, his Intereſt ceaſes for a particular Time only, and may revive again; for he never ceaſes to be Fellow but by Deprivation, &c. But certainly a Suſpenſion can with no Pretence be called a Deprivation, becauſe by the expreſs Proviſion of theſe Statutes there muſt be the Conſent of the Rector to the Deprivation of a Fellow, which was not in this Caſe.

If the Statutes ſhould be otherwiſe conſtrued ſo as to give Power to a Viſitor to let in other Fellows by the Suſpenſion of their Seniors, this would be to overturn the Laws of the Founder who hath given the Rector a Power conjunctim with him.

To which it was anſwered, That there was the Concurrence of four of ſuch Seniors, which might very well ſatisfy the Law of the Founder: For tho' the four conſenting were not maxime Seniores (as required by his Law) unleſs by the Suſpenſion of the other five, and tho this is in the Caſe of a penal Law, yet they ſhall be conſtrued to be ſuch Seniors as are intended by the Founder to concur with the Viſitor in Deprivation; for penal Laws may be conſtrued according to Equity: As for Inſtance.

By the Statute of 28 H. 8. 'tis provided, That Offences committed upon the Sea within the Juriſdiction of the Admiral, ſhall be tried by Commiſſion under the Great Seal Dyer 211. b.

Seal directed to the Admiral and three or four Commissioners to be named by the LORD CHANCELLOR.

Now if such Commissioners are named by the Lord Keeper, yet the Commission is good, because the granting of such Commissions is good; the granting Commissions being a ministerial, and not a judicial Act.

32 H. 8. cap. 1. 25 H. 8. cap. 1. 1 Ed. 6. cap. 12.

So by the Statutes of 28 H. 8. and 25 H. 8. Clergy is taken away from those who maliciously set Houses on Fire, and by the Statute of 1 Ed. 6. 'tis likewise taken away from several other Offenders, and allowed in all other Felonies, except such as are therein mentioned, and Burning of Houses is not there mentioned; then comes the subsequent Statute of 5 and 6 Ed. 6. reciting those three former Acts, and for that several Robberies and Felonies were committed since the making those Laws, &c. then it revives the Act of 25 H. 8. touching putting SUCH Offenders from their Clergy touching SUCH Offences, &c. Now the relative SUCH doth refer to the precedent Matter, and not only to Burglaries and Felonies named in that Act of

11 Rep.

Reviver; but to SUCH Offences in Mischief as those are; and therefore in Alexander Polter's Case it was held that Burning of Houses should not be exempt from Clergy.

So in this Case tho there was not the Concurrence of four of the seven Senior Fellows, but by the Suspension of the Seniors, yet there was the Concurrence of SUCH Seniors, which was sufficient to fulfil the Meaning of the Founder's Law.

Resolutio Curiæ.

Afterwards in Trinity Term 6 Willielmi, by the Opinion of three Justices Judgment was given for the Defendant Dr. Bury, the Substance of whose Arguments, and the Reasons given for their Judgment were offered upon these two Heads.

1. That the Rector was not well deprived.
2. That this Court hath Power to examine the Matter in a collateral Action.

4 Inst. 200.

And first, the Visitor hath no greater Power than that was given by the Founder; 'tis true, he is made a Judge, but he hath not an absolute Jurisdiction, but is subject to such Limitations and Restrictions which are imposed on him by the Laws of the Founder, one of which is, That the Rector is not to be deprived without the Consent of the four Senior Fellows resident in the University,

which was not had in this Case, but by the Suspension of their Seniors.

Now a Fellow suspended remains Fellow still, for that Disability being removed, there is no Occasion of any Readmission; neither is this Suspension a temporary Deprivation, because that cannot be by the Constitutions of the College without the Consent of the Rector, which was never had.

In the next Place, the Bishop's coming on the 16th of June was a Visitation; he did an Act proper to the Office of a Visitor, he examined the Person about the Citation upon Oath, and this after a Protestation made by some of the Scholars, as coming so soon after his Commissary within time: Now he could not administer an Oath but as Visitor, and by the Laws of the College he could not visit, but once in five Years; therefore he was restrained to come again in July, and by consequence the Deprivation of the Rector at that time must be void.

2. This may be examined in a Collateral Action in B. R.

For the College is a temporal Corporation, and the Deprivation of the Head is a temporal Thing and cognizable at Law: The Wisdom whereof hath not trusted any one Court with the final Determination of Matters, tho' they arise within its Jurisdiction, but Writs of Error and Appeals may be brought to correct their Proceedings.

The Nullity of this Sentence of Deprivation is no more than an erroneous Judgment at the Common Law, which may grieve the Party, but he is not without Remedy in another Court.

In 13 Assizarum placito 2. Parning, who was then a Justice of the Common Pleas, took this Difference, That where a Warden of a Chapel is deprived by one who had no Title, he may have an Assize to restore him by the Name of Warden; but where the Ordinary who had a Title doth deprive him, there he must first recover his Name of Dignity before he can have an Assize. Bro. Abr. tit. nosme placit. 37.

And upon this Distinction all the Authorities will turn which were cited to exalt the Power of a Visitor: For all the Deprivations made by Ecclesiastical Persons, viz. by Ordinaries, and those who have any spiritual Jurisdiction, and likewise formerly by the High Commission-Court, who acted by the Course of the Ecclesiastical Law, were Sentences given by spiritual Persons, whose Proceedings are different from those at the Common Law, and therefore can no more be avoided by a Civil Action, than by a Writ of Error. Moor 228. Moor 781. Jones 393. 5 Rep *Cawdrie's* Case. 7 Rep. *Kenn's* Case. 4 Rep *Bunting's* Case.

And 'tis for this Reason, that when a Bishop acts as Ordinary, and exceeds his Jurisdiction, yet this Court must give Credit to his Sentence, because 'tis given by a proper Judge, and the Law hath allowed no other Remedy but an Appeal.

But in the Case of a Temporal or Lay-Corporation (as a College) their Proceedings must be always subject to the Determination of the Common Law; and therefore a wrongful Deprivation by a Visitor shall be examined here.

The Resolution in James Bagg's Case seems agreeable with this Opinion, where it was held, that if a Citizen is disfranchised, and brings a Writ of Restitution, if a sufficient Cause is returned (tho' false) Restitution shall not be awarded, but the Party is not without Remedy; for he may have a special Action on the Case.

If therefore a wrongful Disfranchisement or Deprivation by the Persons who have Authority in a Lay-Corporation may be avoided by a Collateral Action, a fortiori a void Deprivation may be examined in this Court.

Chief Justice, contra.

(1.) The first Question is, Whether the Sentence of Deprivation of the Rector by the Bishop as Visitor, hath made his Place void or not? And he held that it was made void by the Sentence.

(2.) Admitting the Visitor had Power to give such a Sentence, whether 'tis examinable in this Court? And he held it was not.

'Tis agreed, That the Bishop had Power to make a Visitation but once in five Years, unless required; but it was denied that the coming of Dr. Masters was a Visitation, who came for a Particular Purpose to hear a single Appeal.

Now tho' a Visitor may be restrained by particular Laws of the Founder to visit ex officio, but once in five Years; yet he hath a constant and standing Authority given to him by the Law of the Land to determine all Differences whatsoever, which may arise where he is Visitor in the mean Time, and from whose Sentence there is no Appeal.

1 Mod. 84. This was the Opinion of my Ld. Chief Justice Hale in Daniel Appleford's Case, viz. That if there is a proper Jurisdiction in a local Visitor, and he hath determined the Matter, no Mandamus will lie; and therefore he denied it to restore a Fellow of a College, which is a Case in point.

To make this Matter a little more plain, viz. By the Law Diocesan Bishops can visit but once in three Years, yet their Courts are always open to hear and determine Offences.

Now in this Case if the coming of the Bishop in June was a Visitation, then he could not by the Laws of the College visit again ex officio in July; but that in June could not be a Visitation; for his Calling over a few Names, and Administring an Oath could not make it so, that being only to call them to an Account for Contumacy, in Order to punish them when he should make his formal Visitation in July following.

It has been urged, That the Deprivation was void, because without the Consent of four of the seven Senior Fellows; but their Consent is not necessary to the Deprivation of the Rector, even upon the Construction of the Statute de Visitatione: For the Bishop being ordinary Visitor of the College (quatenus such) he is invested with an ample Power to amove and deprive; and there are no Words in that Statute to qualify his Power.

The Words are, si ad privationem Rectoris aut expulsionem Scholaris, &c. dummodo ad ejus expulsionem concurrat consensus Rectoris, &c. So that Expulsion must be applied to a Scholar, and Deprivation to the Rector; for 'tis impossible those Words (ejus expulsionem) should refer to the Rector, for then he must consent to his own Expulsion.

By this Statute the Rector hath a Benefit which is denied to the Scholars, viz. an Appeal: for if he is deprived by the Commissary (which must be with Consent of four Senior Fellows) he may appeal to the Bishop as Visitor; if a Scholar is in Fault, amoveantur sine ulla appellatione, so that the Power of the Commissary is abridged: But there is no Qualification of the Visitor's Power.

'Tis true the Suspension of a Fellow is no Impediment to his Consent, for he remains a Fellow; but his Consent being in no wise necessary, 'tis not material whether suspended or not.

2. This Matter of Deprivation is not examinable in this Court by a Collateral Action.

The Reason is obvious, because the Visitor is the proper Judge whose Sentence in this Case is definitive.

There are two Sorts of Corporations aggregate, one for the publick Administration of Justice, and the other for private Charities.

The first of these being of publick Government, is to be regulated and reformed by the Justice of Courts of Westmin-

ſter-Hall, of theſe there is no Founder or Viſitor; they ſubſiſt by Virtue of the King's Letters Patents, and the Law ſupplies all Defects in the Conſtitution; for tho' they may
Hob. 286. 1 Roll. Abr. 513. have no expreſs Power granted to make Laws, yet ſuch Power is incident to their Incorporation, and ſuch Laws made by them are always ſubordinate to the Laws of the Land.

Now no Man can ſay, That a College is ſuch a Corporation aggregate as has been deſcribed.

The ſecond ſort of Corporations are private, and the Founder and his Heirs are Viſitors, and they ſhall always ſupply the defective Conſtitution of ſuch a Corporation: This is to be governed by particular Laws of their own making, and the Laws of the Land ſeldom or never interpoſe; but where the Founder hath appointed no Viſitor, and then it deſcends to his Heirs, who are to be perpetual Viſitors of ſuch Corporations which ſubſiſt by the Charity of their Anceſtors, and thoſe who are ſupported by it are to be regulated by particular Laws and Conſtitutions enjoined by the Founder of the Charity, and not by the Common Methods and Rules of Law.

The Caſe of Shirax in the Year-Book is not applicable to this Purpoſe; for he having a Donative, and being deprived by the Archbiſhop of York as Ordinary and Viſitor, and another being collated, the Queſtion was, Who was Viſitor? And it appeared plainly it could not be the Archbiſhop, becauſe the Matter was not ſpiritual; it was in the Caſe of a Lay Hoſpital which had no ſpiritual Poſſeſſion; it was neither College or Convent, and for that Reaſon the Aſſize was held good, which proves nothing in the Caſe of a ſpiritual Corporation: For if the Deprivation had been by a proper Viſitor, and one who had a lawful Juriſdiction, his Sentence would have been final, and no Aſſize could have been brought to examine it.

Raſt. Entr. 1. Another Reaſon why this Sentence is definitive, and the Cauſe thereof not to be examined, appears in the Book of Entries, viz. in the Pleading of a Sentence of Deprivation there is no Neceſſity of ſhewing the Cauſe, for that is not traverſable, which is a very good Argument that the Cauſe is not to be enquired into.

The Reaſon given why this Deprivation is examinable by a collateral Action is, becauſe from ſuch Sentence there lies no Appeal; and 'tis agreed on all ſides, that 'tis not to be examined in this Court if an Appeal did lie.

But if this Reaſon fails in Caſes of a like Nature, then it will be of little Force here.

Now an Appeal will not lie from a Sentence given by a proper Auditor, tho' there is no Cauſe expreſſed in ſuch a Sentence, and this appears upon the Statute of 1 Eliz. by which the High Commiſſion was erected, and Power given to the Queen and her Succeſſors by Letters Patents to authorize Commiſſioners to exerciſe Eccleſiaſtical Juriſdiction; a Parſon was deprived for Contumacy, not ſetting forth any particular Act, and the Sentence of the Commiſſioners was held good, as if given by the Ordinary himſelf, and not to be examined in a temporal Court, becauſe the Proceeding was according to the Eccleſiaſtical Law againſt a ſpiritual Perſon. Repealed, 17 Car. 1. cap. 1. 2 Roll. Abr. 219. Allen *verſus* Naſh.

Dr. Coveney had no Remedy upon his Deprivation by the Biſhop of Winton; for it was adjudged that no Appeal would lie, and the Inference in the Report, viz. ex hoc ſequitur that an Aſſize will lie, cannot be Law, becauſe the Head of a College cannot maintain an Aſſize in any Caſe whatſoever; for he hath no ſole Seiſin; he hath no Eſtate to ſupport a real Action; he is only a viſible Perſon of the Body aggregate, but hath not the leaſt Title to the Rents and Profits of the College till after a Dividend made.

But notwithſtanding Judgment was given for the Defendant by the Opinion of the other 3 Judges; which Judgment was reverſed in the Houſe of Peers in Hillary Term, 7 Willielmi Tertii Regis.

After this Reverſal a Motion was made in B. R. that the Judgment in this Court being quod querens nil capiat per Billam, and a Writ of Error being brought upon that Judgment in Parliament, and the Judgment being there given quod judicium præd. revocetur & quod. pred. Richardus Philips reſtituatur, &c. That now the Plaintiff might have Judgment in B. R. to recover the Term, becauſe the Record it ſelf was always here, and only a Tranſcript thereof ſent into the Parliament.

But it was objected, that the Court above ſhould have given a new Judgment in Purſuance of what was done there; and therefore the Plaintiff muſt bring a new Action to recover the Term.

To which it was anſwered, That B. R. will give a new Judgment upon the Reaſonableneſs of the Matter, and upon Conſideration of ſeveral Precedents in the Exchequer-Chamber reſembling this Caſe; for if the Defendant hath Judgment in B. R. which is afterwards reverſed in the Exchequer-Chamber, and the Record certified here, the Court hath given a new Judgment; and this was done between Faldo and Ridge, viz. where in Treſpaſs the Defendant pleaded 2 Cro. 206. Yelv. 76.

ed in Bar, &c. the Plaintiff replied, &c. and upon a Demurrer to the Replication the Defendant had Judgment in B. R. which was reversed in the Exchequer-Chamber, Et quod querens recuperet, &c. and the Record being remanded, this very Court awarded a Writ of Enquiry, and upon the Return thereof a new Judgment, that the Plaintiff should recover his Damages, which was contrary to their former Judgment.

'Tis not necessary that the Court which reverseth a Judgment should give a new one, or the same which that Court should do who gave the first Judgment: As, if a Writ of False Judgment is brought in the Common Pleas, upon a Judgment given in a Court of Antient Demesne, and reversed, the Plaintiff shall not have Judgment there to recover Seisin of the Land, but shall be restored to his Action; upon which he shall have such Judgment as is usual to be given in the inferiour Court.

So if a Bill in Chancery is dismissed, and upon an Appeal to the Parliament that Dismission is reversed, the Court of Chancery thereupon always gives Relief suitable to the Judgment in Parliament; for upon such Appeals and Writs of Error brought they have no Rolls before them, but only tenorem recordi, upon which no Judgment can be properly given; and therefore if B. R. where the Record is, should not give Judgment, it would be a very imperfect Record, as standing without any Judgment, because by the Reversal the first Judgment is erroneous.

The Reversal also above would be invalidated by this Means: For there can be no Award of Execution there, and therefore 'tis most agreeable to Reason that the Court which sends forth the Execution should also give the Judgment.

Econtra. A new Judgment ought to be given by that Court, which reverseth the former; and 'tis no Argument to say that the Exchequer-Chamber doth not give new Judgments upon the Reversal of the old upon Demurrers; for that Court hath only a Power to affirm or reverse in such Cases; it cannot award a Writ of Enquiry of Damages, and that was the Reason of the new Judgment given in B. R. in Faldo and Ridge's Case after a Reversal in the Exchequer-Chamber; it was a Judgment given in B. R. upon a Demurrer.

But where Judgments are given in B. R. for Defendants, either in Ejectments or special Verdicts, and reversed in the Exchequer-Chamber, they may award a Judgment Quod recuperare debeat; and that was the Case of Sarsfield and Witherly.

Now the Judgment above is not ſo much; 'tis Quod judicium præd' revocetur, &c. which is only a Stop to B. R. not to execute the former Judgment; and therefore cannot be conſtrued or extended to give a new Judgment for the Defendant.

But admitting B. R. could give a new Judgment upon the Reverſal above, and ſuch as ſhould have been given upon the original Record, yet that muſt be underſtood when the Judgment was given for the Defendant; but in this Caſe the Judgment for the Defendant is reverſed.

Beſides, the Authority of the Exchequer-Chamber is eſtabliſhed by Act of Parliament, and limited to particular Errors of Judgments in B. R. which Judgments they muſt either affirm or reverſe by the expreſs Direction of the Statute, which enacts, That after ſuch Affirming or Reverſal the Record muſt be brought back again into B. R. that farther Proceedings may be had thereon, as well for Execution or otherwiſe; ſo that theſe Caſes do not reſemble this. 27 Eliz. cap. 8.

It has been ſaid that the Parliament ſeldom gives any new Judgment, but only reverſeth or affirmeth the Judgment below: But in the Caſe of Noel and Nelſon, they did more than affirm the Judgment below, for they gave an Award of Execution and Coſts for Delay upon the Writ of Error, and this may be very well done; for after the Chief Juſtice is commanded by the Writ of Error to ſend the Record to the King in Parliament, that the Proceedings below may be examined; then follow theſe Words, Ut inſpectis Recordo & proceſſu prædictis ulterius inde de aſſenſu Dominorum ſpiritualium & temporalium in eodem Parliamento exiſten', &c. fuerit faciend. which import that ſomething elſe may be done, beſides Reverſing or Affirming the Judgment. 2 Saund. 225.

'Tis plain that Judgments have been given by ſuperior Courts upon Reverſals, and ſent down to the Courts below to execute: As, Error was brought in B. R. upon a Judgment in Ireland in Ejectment, where it was given for the Defendant and reverſed here, and the Judgment was, Quod querens recuperet Terminum; and becauſe by the Writ of Error, the Record it ſelf was removed, and muſt therefore remain as a Record here after the Reverſal, thetefore B. R. did make a Mandate to the Chief Juſtice there to ſee Execution done.

But at another Day the Chief Juſtice delivered the Opinion of the Court, That they had executed their Authority by giving the firſt Judgment, and that there was no Precedent of B. R. giving a new Judgment after a new Reverſal above:

Where-

Whereupon the Remittitur, by which the Record is ſent back to B. R. being not entred, the Court of Parliament was moved upon this Matter, and a new Judgment was added, that the Plaintiff recuperet Terminum ſuum præd', &c.

Ruſſel's *Caſe.*

IN a Prohibition to the Court of Honour held before the Earl Marſhal upon a Libel there, ſetting forth, that there are three Kings at Arms, Garter, Clarencieux, and Norroy, and ſix Heralds skilful in Deſcents, Pedigrees, and Arms, to whoſe Offices it doth belong to marſhal Funerals of great Perſons at Requeſt, &c. and that Ruſſel and others had encroached upon their reſpective Offices by taking upon them to paint Arms, and marſhal Funerals, &c.

The Defendant ſuggeſted the Statute of Magna Charta, viz. that no Man ſhall be diſſeiſed of his Liberties and free Cuſtoms, but by Judgment of his Peers, &c.

The Counſel againſt the Prohibition inſiſted that it would not lye to this Court of Honour, 'tis a Court by Preſcription for Degrees of Honour, and the Heralds there proceed according to antient Cuſtoms, and being skilful in Deſcents and Pedigrees, do at the Requeſt of ſeveral Perſons marſhal Funerals; and if ignorant Men ſhould be ſuffered to attempt Things of this Nature, great Confuſions would follow amongſt noble Families.

Sid. 355. They have as abſolute a Determination in Matters of Honour, Pedigrees, Deſcents and Armories, as the Chancery hath in Matters of Equity, and no Prohibition was ever yet granted to a Court of Equity.

13 R. 2. cap. 2. This being a Court of great Antiquity hath endeavoured ſeveral Times to extend its Juriſdiction; and therefore ſeveral Acts of Parliament have been made to reſtrain them in their proper Limits, but Care was always taken to preſerve their Rights.

By the Statute of 13 R. 2. the Authority of the Earl Marſhal is declared, and a Remedy is given, where 'tis abuſed; but 'tis not by way of Prohibition by the Courts at Law, but by a Priby Seal from the King directed to the Earl Marſhal not to proceed where he has no Authority: And for theſe Reaſons it was prayed that no Prohibition might be granted,

Econtra. It was admitted that the Court of Honour hath a Jurisdiction to marshal Arms, but the Plaintiff in the Prohibition had not offended against that Court, for he had all his Escutcheons from the Heralds; and as to marshalling Funerals, there are no negative Words in the Statute of R. 2. to restrain him; neither have the Heralds any such Power by the original Patent, by which they are incorporated; they may as well complain against every Upholster who hangs a Room with Mourning, and against every Parish-Clerk who assists at Funerals, as against the Plaintiff in this Case; therefore they ought to be prohibited.

Curia. Upon the Matter set forth in the Libel they might maintain an Action on the Case; for if true, 'tis a Wrong done to their Possessions by doing such Things which belonged to their respective Offices.

Here is no Complaint of any Thing done against the Rules of Honour; and therefore this Matter cannot be determined, unless a Prohibition is granted, and the other Side demurr to the Suggestion.

Many Prohibitions have been granted in Cases of like Nature, as to the Dutchy-Court in Matters of Equity; and so a Prohibition was granted in this Case.

Culliford *versus* Blandford.

DEBT upon the Statute 23 H. 6. against the Mayor of Dorchester for a false Return of a Burgess to Parliament; by which Statute the Penalty of 40 l. is given to the King, and 40. l. to the Burgess chosen, and not returned, so as he sue for the same within three Months after the beginning of the Session of the said Parliament, or to any Person, who in Default of him so chosen, shall sue for the same. 6 Mod. 219. 23 H. 6. cap. 15.

The Plaintiff was a Stranger, who after the three Months, and before the End of one whole Year sued out a *Latitat* against the Defendant; but this was within a Year after the Offence committed.

(1.) The Question was, Whether the Plaintiff was a common Informer, and so ought by the Statute 31 Eliz. to bring his Action within a Year after the Offence? In the Preamble of that Statute 'tis said, That no Person other 13 Eliz. cap. 5.

than the Party grieved, shall be received to inform upon a penal Statute, and then it is enacted, That where a Forfeiture is given to the King only, the Action shall be brought within two Years after the Offence; but if it be to the King and Prosecutor, then it must be within a Year.

(2.) If the Plaintiff shall be taken to be a common Informer, then whether the Suing out this Latitat is a Commencement of the Action?

Justice Eyre and Gregory held the Affirmative in both Points; but they insisted chiefly on the first Point, That the Plaintiff is no common Informer, because the Penalty was given to the Prosecutor, and no Time limited by this Statute when he should commence his Action. He stands now in the Place of the Party grieved, who did not sue within the three Months limited by the Act, and no Body will say that he is a common Informer.

The other two Judges doubted of this Point, but were divided upon the second, viz.

Justice Dolben was of Opinion, that the suing out of the Latitat within the Year, was a good Commencement of the Suit, and sufficient to avoid the Statute.

But the Chief Justice held, That a Penalty being given to the King as well as to the Prosecutor, if he had brought his Action for the whole 80 l. tam pro Domino Rege quam pro seipso, he had been within the Statute of 31 Eliz. and a common Informer; but here the Action was brought only for one 40 l. which makes some Alteration.

But as to the second Point, A Latitat was never yet construed to extend to a Statute where a Penalty is given to the Prosecutor, and therefore cannot be a Commencement for a Suit upon a penal Law.

'Tis otherwise where the Party is limited and barred from his Right by any Statute for not prosecuting in Time; therefore if the first Point is not for him, the last is against him: But yet the Plaintiff had Judgment.

Smith *verſus* Milford.

UPon a ſpecial Verdict in Ejectment the Caſe happened to be thus, viz. 1 Lutw. 96: 1 Vent. 66.

John Dalacourt being ſeiſed in Fee of the Lands in queſtion, did by Indenture bearing Date the fifth of June, 17 Car. 1. and made between him of the one Part, and John Perenchard and John Cadidge of the other Part, in Conſideration of a Marriage then intended to be had between George his ſecond Son, with Mary Perenchard, and in Conſideration of a Portion of 200 l. &c. and for the ſettling his Land upon the Truſts therein declared, did covenant with the ſaid Truſtees to levy a Fine of his ſaid Eſtate before Michaelmas Term next following, to the Uſe of himſelf and Elizabeth his Wife, and to the Survivor of them for Life, then to George his Son for Life, then to Mary his intended Wife for Life, and afterwards to the Heirs of the Body of the ſaid George to be begotten on the Body of the ſaid Mary, Remainder to his own right Heirs.

There was no Fine levied, but three Years after the Sealing this Deed John Dalacourt made his Will, in which (amongſt other things) there was this Clauſe, viz.

Item, I do ratifie and make good all thoſe my Eſtates made or granted in Marriage to George my Son, according to the Writing made by me in Truſt.

The Jury found that there was no Writing made by him in Truſt to any other Perſon or Perſons whatſoever, other than the Deed of the fifth of June, which they found to be the very Deed of John Dalacourt.

They found that the ſaid John Dalacourt had Iſſue John his eldeſt Son and Heir, who entred and died, leaving Iſſue Mary his only Daughter and Heir.

They find that George his ſecond Son and Mary died, leaving Iſſue a Son, who was Leſſor of the Plaintiff, &c.

The Queſtion was, Whether the Will did ſupply the Defect in the Deed, which without a Fine would not operate to create an Eſtate-tail in George the ſecond Son?

It was argued that it did, and that the Plaintiff had an Eſtate-tail; for in Wills, if the Intention is certain, though not fully expreſſed in Words, 'tis well enough.

Now the Intention of the Teſtator is very certain here from the Nature of the Thing devised, viz. I do ratifie all thoſe my Eſtates granted to George in Marriage: by which Words he takes Notice that George was married, that he granted an Eſtate to him, which is a compleat Deſcription of the Deed, eſpecially ſince 'tis found that there was no other Writing.

And this agrees with the Rule of Law, that a Deviſe muſt be taken according to the Intent of the Teſtator, ſo as ſuch Intent is expreſſed in the Will; and therefore ſince the Statute of Uſes, if a Deviſe was, that his Feoffees ſhall convey the Land to N. and his Heirs, this is an immediate Deviſe of the Land it ſelf by Reaſon of his Intention.

Hob. 32. 1 Roll. Abr. 611.

Nay, it hath been held, that a Man might deviſe an Uſe before the Statute; for if he had made Feoffees to Uſes (which he could not by the Common Law, though he might by Cuſtom) before the Statute, and * afterwards he had deviſed, that the Feoffees ſhould convey ſuch an Eſtate to W. this is alſo a good Deviſe becauſe of the Intention of the Party. Brook. Abr. Tit. Deviſe placito 48.

* *It muſt be after the Statute of* Wills. Poph. 188. 1 Leon. 313.

But a Caſe which comes nearer to this in queſtion, is that of Molineux and Molineux, as reported by Juſtice Croke, viz. It was a Deviſe of ſeveral Rents expreſſed in ſeveral Writings; and it was adjudged a good Deviſe of the Rents themſelves; in which Caſe it is ſaid to be the Opinion of the Chief Juſtices, &c. that if a Feoffment is made to divers Uſes without Livery, which is as great a Defect in the Execution of that Conveyance, as a Fine is in this at Bar, and the Feoffor afterwards deviſeth the ſame Lands in ſuch Manner, and to ſuch Perſons as he appointed by the Deed of Feoffment, 'tis a good Deviſe of the Land it ſelf.

2 Cro. 145.

Econtra. The Will confirmed no more than what was granted by the Deed, which was nothing at all; it was barely a Covenant to levy a Fine to ſuch Uſes, which cannot operate to raiſe any Eſtate without it is actually levied.

The Words in this Caſe are doubtful, and the Intention of the Teſtator doth not plainly appear ſo far as to diſinherit his Heir, who is always favoured by the Law.

A Deviſe of all his Mortgages to R. whom he made Executor, this was held a good Deviſe of the Lands in Mortgage; but in the ſame Book it is held, That a Deviſe of

Cro. Car. 37.

al his Eſtate, Mortgages, &c. whereof he was poſſeſſed, &c. that no Fee paſſed in the Lands mortgaged, becauſe the Heir ſhall not be diſinherited without apparent Intention of the Teſtator manifeſted by expreſs and plain Words in the Will.

But without further Argument Judgment was given for the Plaintiff.

Maſon *verſus* Hanſon

DEbt for Rent by an Adminiſtrator due in the Life-time of the Inteſtate. Upon nil debet pleaded, they were at Iſſue, and the Plaintiff had a Verdict; and it was moved in Arreſt of Judgment that the Plaintiff had made out no Title; for he had ſet forth Adminiſtration was committed to him by the Official Reverendi viri Johannis Hall Præbendarii præbendi & peculiaris juriſdiction' de Brampton in Eccleſia Cathedrali de Lincoln, and doth not ſay that it did belong to him to grant Adminiſtration, &c. 1 Show. 355.

This Official is neither Biſhop, Ordinary or Archdeacon; and therefore it ſhall not be intended, that he had an Authority, if not ſhewed by the Plaintiff; 'tis otherwiſe in Caſe of a Defendant. Cro. Eliz. 431, 791. 879. Sid. 228.

This is in a peculiar Juriſdiction, and therefore in entitling himſelf, the Plaintiff ought to ſay, cui adminiſtratio pertinuit, &c. and ſhew that he had a lawful Power to grant it, for it ſhall not be preſumed to be proved at the Trial; he may have a peculiar Juriſdiction to be exempt only from the Viſitation of the Biſhop, but not to grant Adminiſtration. Styles 282. 16 & 17. Car. 2.

Econtra. This might have been a good Objection upon a Demurrer, but 'tis cured by the Verdict ſince the Statute of 17 Car. 2. and before the making that Statute, it hath been held that in an Action brought by an Adminiſtrator, omitting profert hic in Curia literas Adminiſtrationis, was good after Verdict; ſo the Judgment in this Caſe was affirmed. Aob. 38. 1 Roll. 78. 2 Saund. 402. Sid. 98.

Hele

Hele *verſus* the Biſhop of Exeter, *& al'*

Caſes in Parliament 88. 3 Lev. 311. 2 Salk. 539.

IN a Quare impedit the Plaintiff Sampſon Hele declared, That he was ſeized of the Manor of Southpole in the County of Devon in Fee, to which the Advowſon of the Church there did belong, and that being ſo ſeized he preſented, &c. that his Preſentee was afterwards admitted and inducted, and that the Church became void by his Death, and that now it belonged to him to preſent, but was hindred by the Biſhop and his Collatee, &c.

The Biſhop pleaded in Bar, viz. That the Church was within his Dioceſs, that he claimed nothing but as Ordinary, that it was a Benefice with Cure, &c. that the Church became void by the Death of the laſt Incumbent, &c. that the Plaintiff did preſent to him Francis Hodder within ſix Months after the Vacancy, as his Clerk, qui quidem Franciſcus Hodder fuit Perſona in literatura minus ſufficiens ſeu capax ad habendum dictam Eccleſiam, &c. that the Biſhop did examine him, as he lawfully might, and upon his Examination found him to be in literatura minus ſufficien' ac ea ratione fore perſonam inhabilem & minime idoneam ad habendum beneficium cum cura animarum; for which Reaſon the Biſhop did refuſe to admit him, and gave Notice thereof to the Plaintiff within ſix Months after the ſaid Refuſal that he might preſent another, &c. That the Plaintiff did not preſent within the ſix Months, by Reaſon whereof it belonged to the Biſhop to collate, &c. who thereupon did collate the other Defendant, who was inſtituted, &c. Et hoc paratus eſt verificare, &c.

The Incumbent pleaded the ſame Plea;

The Plaintiff replied That Hodder was Vicar of the Church of Uxborough in Comitatu præd. at the Time of his Preſentation to Southpole; that he was homo literatus, and in Prieſts Orders, and was licenſed to preach the Word of God by the late Biſhop of Exon, and had celebrated Divine Service many Years, and was ſatis & ſufficienter literatus to celebrate the ſame, &c.

There was a Rejoinder and Sur-rejoinder much to the ſame Effect with the Plea and Replication, and upon a Demurrer to the Sur-rejoinder, the Queſtion in the Common Pleas was, and afterwards in B. R. upon the Pleading.

For

For it was admitted by both Courts that the Ordinary in this Case was not a Minister, but a Judge constituted by the Law of the Land, and that it was proper to his Office as Judge to examine Persons presented to him by Patrons, &c. and if he found them defective in Learning, that he may refuse to admit them.

That it was against Sense and Reason, and against a plain and positive Law to object, that because this Person hath been ordained by a former Bishop, and admitted to another Curacy, that therefore he shall be presumed to have a sufficiency of Learning: and that his former Examination and Admission, shall be an Estoppel (as it was said) against all succeeding Bishops of that or any other Dioces.

For every Ordinary is obliged by the Duty of his Office to judge for himself; and therefore 'tis plainly against Common Reason for him who is appointed to be a Judge, to say a Man is sufficiently learned, because another Person in the same Office hath thought him so.

'Tis likewise against a positive Law; for the Statute of Articuli Cleri provides, That if the Bishop refuseth to admit Ecclesiasticks propter defectum scientiæ, they shall not be examined by the Lay-men, for that is against the Canons, but they shall go to an Ecclesiastical Judge, cui de idoneitate personæ præsentatæ pertinet examinatio. 9 Ed. 2. cap. 13.

Now 'tis plain by these Words the Presentee must be idonea persona, and that the Bishop to whom he is presented is the Judge of his Ability.

But in the Common Pleas the chief Objections were to the Pleading, and therein it was considered,

(1.) What Learning was requisite to capacitate a Man to have a Living, Cum cura animarum?

(2.) Whether by the Plea it was sufficiently shewed that Hoder the Presentee was incapable?

As to the first Point, an ordinary Sufficiency in Learning is enough to entitle a Man to preach, for otherwise in many Parishes there would be no Preaching; and that to understand the Latin Tongue was not an absolute Qualification to reading and praying, since both the Scripture and Liturgy are now in English.

'Tis true, as to Preaching 'tis required by a particular Law to understand the Latin Tongue, viz. to be able to answer and render to the Ordinary an Account of his Faith in 13 Eliz. c. 12.

in Latin, otherwiſe not to be admitted to preach; and ſince that is allowed by the Law to be a ſufficient Qualification, the Defendant ought in his Plea to have purſued the Statute by ſhewing that the Preſentee could not render an Account of his Faith in Latin.

But be it how it will, minus ſufficiens in Literatura can be no good Plea, becauſe of the Incertainty.

(2.) And therefore the Defendant ought to have ſet forth in what Learning this Hodder was defective, that this Court might judge whether it was good Cauſe of Refuſal by the Biſhop.

8 Rep. 68. b. 'Tis a Rule in Law, That all Pleas which go to the Diſability of a Perſon ought to be certain, and therefore a Plea of Excommunication, propter contumaciam in non comparendo, being lawfully cited, hath been adjudged naught, becauſe it doth not ſhew any ſpecial Cauſe, that the Judges of the Common Law may ſee whether the Spiritual Court had Cognizance of the Original Cauſe.

Lit. Sect. 195. Raſt. Entr. 686. So in an Action brought by a Villain, formerly, it was not enough for the Lord to plead that he was his Villain, but he muſt ſhew how, viz. quod præd A. eſt villanus ipſius B. ſpectans ad manerium ſuum de R. &c.

But for an Authority in Point Specott's Caſe was relied on, where the Biſhop pleaded, that the Preſentee was Schiſmaticus inveteratus, and the Plea was held ill, becauſe he ought to ſhew the particular Schiſm; for tho' he is appointed Judge de idoneitate perſonæ, yet becauſe 'tis to juſtify his own Act to the Prejudice of another, which Act is of Record, therefore ſuch general Allegation is not good.

'Tis no Objection to ſay, That the temporal Courts cannot determine what is Schiſm; for let the Cauſe of Refuſal be what it will, it muſt be directly ſet forth and alledged: If it be ſpiritual, the Party may deny it, and then the Court muſt write to the Metroplitan to certify the Cauſe, whether juſt or not; if it is temporal, then he may traverſe it, and the Iſſue taken upon the Traverſe ſhall be tried by a Jury.

Cro. Eliz. 186. Sid. 295. March. 96. In Common Actions on the Caſe the Law requires Certainty, and an Ejectment de uno Meſſuagio ſive tenemento, or de uno Meſſuagio ſive repoſitorio was held ill, becauſe of the Incertainty in the one Caſe, and becauſe of the various Signification of the Word Repoſitorium in the other Caſe.

4

Many

Many more Instances may be given of this Nature, the Books are full of them: As, if Detinue of Charters be pleaded in Bar, 'tis not good without shewing the Certainty of the Writings, or that they were in a Chest, &c.

So where a Man undertook to bring a sufficient Man to be Bail, &c. 'tis not enough to plead, That he brought a sufficient Man, but he must shew quomodo sufficiens.

And if the Law requires so much Certainty in these Cases, a fortiori 'tis required in all Pleas, which go to the Disability of a Person in his Profession.

The word Literatura is an ambiguous and equivocal Expression, it signifies Grammar Learning, Writing, Reading, or any sort of Learning, possibly the Bishop might intend that Hodder did not write a good Hand; he could not mean any such Learning, which was proper for his Profession, because that must be particularly alledged to shew wherein the Insufficiency did consist; but if Issue had been taken upon this single Word Literatura, the Court would have been misguided; for if he had been found insufficient in the Mathematicks or Astrology (for those are Literaturæ) he must have been refused.

Econtra. First it was premised, That no particular Rules or Measures were settled by the Law to shew what Learning was sufficient to qualify any Man for a Benefice; therefore a General Allegation that he is minus sufficiens in Literatura is enough to unqualify him for that Purpose.

And this would not be any Means to exalt the Power of the Ordinary by giving him a Latitude of Refusal upon such a general Instance of Disability, and so to injure the Patron in his Right of Presentation: For if the temporal Courts should take upon them to judge in this matter, 'tis the same Thing to the Patron, because 'tis equal to him which of those is to declare the Insufficiency of the Person presented.

Therefore this Pleading must be good.

(1.) From the Impossibility of pleading it otherwise.
(2.) That it is certain enough.

First, From the Impossibility of pleading otherwise, for the Nature of the Thing will admit of no greater Certainty; if the Bishop should set down every particular Defect in Learning,

ing, it would be impoſſible to join Iſſue upon it; and then the Plaintiff would have demurred, &c. If he ſhould aſſign but one particular Cauſe, that would likewiſe be inſufficient, becauſe one ſingle Act would not make a general Inability, as thoſe words minus ſufficiens do import, and therefore inhabilis, &c.

Learning is a Thing which conſiſts in many Particulars, and the Judgment which is to be made upon it may ariſe upon Variety of Queſtions and Anſwers; the Right of Examination belongeth to the Biſhop; and therefore if he find any Defect in Learning, he may refuſe the Clerk, and plead, as he hath done, minus ſufficiens in literatura, for he cannot plead otherwiſe.

All other Inabilities of a Clergy-Man conſiſt and do depend upon one ſingle Inſtance, as Baſtardy, Excommunicated, &c. and therefore the true Reaſon why in all ſuch Caſes Criminoſus generally is not a good Plea, is, becauſe if any one of thoſe ſingle Inſtances is diſtinctly alledged, and well proved, it would make the Clerk minime idoneus, &c.

But it would not be ſufficient to ſay a Man is unlearned becauſe he is defective in one ſingle Point of Learning, or in any one Art or Science; this Defect muſt ariſe from a general Inability, and doth conſiſt in many Particulars impracticable to be enumerated in a Plea, and not to be proved by one ſingle Inſtance.

(2.) The Certainty of this is to be conſidered in Relation to the Method of the Trial, and the Matter to be put in Iſſue.

And as to that, greater Latitude hath always been allowed in the Trial of ſpiritual Cauſes than in thoſe tried in the temporal Courts; therefore thoſe who argued againſt the Plea in Specot's Caſe, ſaid, That criminoſus and perjurus was not good without ſhewing the Particular Cauſe wherein, &c. which the Lord Anderſon held to be true, but took this Difference, becauſe thoſe Acts were triable at the Common Law; and Matters, which are iſſuable there, ought to be particularly alledged: But where the Action is once well commenced, and Literature which is the Subſtance of the Plea comes in incidentally, tho' the Trial is to be by Eccleſiaſticks, yet the temporal Courts ſhall proceed to give Judgment upon their Certificates. Hob. 296.

The Biſhop of Norwich's Caſe cannot with any Reaſon be objected to this Matter: It was in a Quare impedit, where he pleaded, that all the while he had been Biſhop, &c. the Preſentee was a Common Haunter of Taverns, and of Dyer 254. 2 Roll. Abr. 355.

unlawful Games, ob quod & diverſa conſimilia crimina, he was criminoſus, &c. 'Tis true this was held an ill Plea, but not from the Uncertainty of it; 'twas becauſe the Matters of which he was accuſed were not evil in themſelves, but were Offences only prohibited by particular Laws, and ſo no juſt Cauſe of his Refuſal.

The only Caſe which can be objected with any Colour is Specott's Caſe in the 5th Report, where it was held, That the Biſhop ought to ſhew the particular Schiſm, &c.

But this Plea might be diſtinguiſhed from that Judgment ſeveral ways.

Firſt, Becauſe in that Caſe there was a Poſſibility to ſet out the particular Schiſm; but the Inſufficiency of Learning cannot be ſet forth, becauſe (as hath been ſaid) it depends upon ſuch Variety of Queſtions and Anſwers, and doth not conſiſt in any particular Thing, ſo as to work a general Diſability.

If one ſingle Inſtance had been ſufficient for that Purpoſe, the Biſhop might have returned this, viz. The Act of Uniformity having prohibited Preaching without a Licence from the Ordinary, and enjoined the Reading the 39 Articles in his Preſence, and declaring the Perſons Aſſent thereunto: It was done thus, viz. 13 & 14 Car. 2 cap. 4.

Ego ſubſcribo ad tricena novena articulorum fiderum.

In the next Place the Statute of Articuli Cleri provides, That Perſons who are ſpiritual, ſhall not be under Examination of Lay-men if the Biſhop ſhould refuſe them for want of Learning, or other reaſonable Cauſe: Now Schiſm comes under that general Clauſe, which may be one Reaſon why it ought to be particularly ſet forth; becauſe 'tis traverſable, but the Sufficiency of Learning cannot be traverſed, 'tis only inducing to the Diſability of the Clerk.

And then laſtly, the Plea in Bar in Specot's Caſe was in the Affirmative; therefore it ought to have been ſet forth, wherein he was a Schiſmatick; but in this Caſe 'tis in the Negative, and ſo the Defendant need not ſhew wherein the Clerk was unlearned.

Another Queſtion was raiſed, viz. Whether Hele the Patron had ſufficient Notice in this Caſe to preſent his Clerk? And it was ſaid he had not, becauſe the ſix Months ſhall commence from the Time of Notice of the Refuſal, and the Biſhop had collated within that Time, ſo that till ſuch Notice 5 Rep. *Manſer's* Caſe.

was given the Biſhop was a Diſturber; and therefore in the Pleadings the Notice is generally alledged to be the ſame Day with the Refuſal: But however there ought to be a convenient Time.

But it was anſwered, and ſo is the Law, That in Caſe of Refuſal for Inability the ſix Months ſhall commence from the Time of the Death of the laſt Incumbent; becauſe the Patron ought to preſent a Clerk that is qualified, otherwiſe his Preſentation is void, and ſhall not prevent the Lapſe.

Kelw. 50. b. Dyer 327. Degg 8.

Cro. Eliz. 119. 1 Leon. 31.

'Tis true, it has been the Opinion of this Court, That Notice of the Refuſal ought to be given to the Patron immediately, or within convenient Speed as may be: Thoſe are the Words of the Book; but 'tis to be obſerved, that it was in a particular Caſe, where the Patron did not preſent 'till ſixteen days within the ſix Months after the Avoidance; ſo that the Time expiring, the Biſhop refuſed the Clerk, but gave no Notice to the Patron till three Days after the Months were expired, and then collated: Now this was held (and with good Reaſon) too long a Time for the Biſhop to delay the Notice, it was purely a Deſign to prevent the Patron of his Preſentation: For, if he had given Notice before the ſix Months had been expired, the Patron might have preſented another qualified.

Beſides, in the Caſe at Bar, the Patron had four Months Time to preſent after Notice, &c.

But upon the Uncertainty of the Pleading, Judgment was given in the Common Pleas for the Plaintiff, and affirmed upon Error in B. R. but afterwards reverſed in Parliament.

Bagnell *verſus* Abnett.

In the Common Pleas.

IN a ſpecial Verdict in Ejectment the Caſe was thus:

John Herbert was ſeized in Fee of the Tenements in queſtion, and had Iſſue two Daughters;

Margaret, married to one Lander, and Elizabeth.

Margaret had Iſſue John and James, &c. and the ſaid John Herbert being ſo ſeized of the Tenements aforeſaid, called by the Names of Upper and Lower Houſe Tenements, one of which the Jury found to be of the yearly Value of 30 l. per Annum, and

the other of 40 l. deviſed them in theſe Words, viz. I deviſe All my Meſſuages in Milwich, Corton, and Fraſdale (to Truſtees, &c. naming them) upon ſpecial Truſt for Payment of Debts, until my Grandſon John Lander attain the Age of 21 Years; and from thenceforth I give All my ſaid Meſſuages, Lands and Tenements in Milwich, Corton, and Fraſdale, as followeth; Videlicet Two Parts of the Neither Houſe Tenement (the Whole in three to be divided) for the raiſing of 200 l. &c. the Remainder to John Lander and the Heirs of his Body, Remainder to James, and the Heirs of his Body, Remainder to the right Heirs of the Deviſor; the other third Part after ſome Truſts, &c. he deviſed to John and James ut ſupra, but did not mention the Upper-Houſe Tenements.

John Herbert died, and John Lander alſo died without Iſſue, &c. and James the ſecond Son of Margaret was Leſſor of the Plaintiff.

The Queſtion was, Whether the Videlicet, and the Clauſe which follows ſhall relate only to reſtrain the Deviſe to the Neither Houſe alone, or whether the whole Eſtate is not by general Words deviſed to the Grandſon; for if not, it muſt come to the Daughters?

The Clauſe coming after the Viz. doth not reſtrain this Deviſe to the Nether-Houſe Tenements; but upon the whole Conſtruction of the Will, both the Tenements paſs to the Leſſor of the Plaintiff; for the general Words comprehend the whole Eſtate, and the Viz. is only directive how Part of it ſhall go, and if it be not thus expounded 'tis repugnant.

Econtra. The Upper-Houſe Tenements do not paſs, for both are diſtinct Parts of the Teſtator's Eſtate, and diſtinctly deviſed; therefore 'tis againſt the Rules of Law, That one ſhould paſs by the Deviſe of the other, eſpecially in this Caſe, where the Teſtator himſelf diſtinguiſhed them by his Will.

Agreeable with this was a Reſolution in this Court, Hillary, 11 Car. viz. A Man was ſeized of a Corner-Houſe, and another contiguous in the Occupation of ſeveral Tenants, and deviſed the Corner-Houſe, reciting it to be in the Occupation of the proper Tenant, and of him who was likewiſe Tenant to the other Houſe: Now they would have that other Houſe paſs by that Deviſe, becauſe the Tenant of it was named; but it was held, that it ſhould not, for nothing paſſed but what was particularly expreſſed, which was the Corner-houſe, and that the miſtaken Addition

Cro. Car. 447. 1 Roll. 614. Jones 379

dition of a wrong Tenant, should not make that void, which was sufficiently made certain by the Name of a Corner-house.

Cro Eliz. 15. 2 Leon. 226. 3 Leon. 130. Moor 123. 124. Where-ever any Land is expressly devised, no Implication, tho' never so strong, shall carry it otherwise; as if a Man have a Farm called by a particular Name, Part whereof was let, and Part used by the Owner himself, who devised all his Farm (naming it) and the Lands thereunto belonging (in the Tenure of his Tenant) to his Wife for Life, and that it and all the rest of his Lands shall remain to R. after the Death of his Wife; these Words shall not carry it by Implication to the Wife, because there was an express Devise to her before of the other part.

Dyer 261. b. Many more Proofs might be brought of this Nature, the Books are full of them, both modern and ancient, viz. as where a Man having Lands in a Hill and in two Hamlets in the same Hill, devised all his Lands in the Hill, and in one Hamlet by particular Name; it was held, that no more passed than what was expressed, and that the Lands in the upper Hamlet did not pass.

Cro. Eliz. 674. But the Case which comes nearest to this in Question, is where the Testator had a Farm which extended to two Hills, which Farm was called Heylands, and the Devise was of all his Land (in one Hill, naming it) called Heylands, &c. nothing passed but what was in that Hill; and the Reason given was, because nothing more shall be intended than what was expressed by the Testator.

1 And. 123. There is yet a stronger Case than this at Bar; it was, viz. a Man had an House in Oxfordshire, and House and Lands in Hertfordshire; and the Will was, viz. I bequeath all that my House in L. in Oxfordshire, with all other my Lands, Meadows and Pastures &c. in Watford in the County of Hertford &c. Now it was adjudged, that the House in Watford did not pass, because it was in a Will which must be construed according to the express Words and Intent of the Devisor; if it had been in a Grant, then the House would have passed as well as the Lands; for every Man's Grant must be taken in the strongest Sense against the Grantor himself; and of this Opinion was the Court in the principal Case, viz. that the Adverb videlicet was distributive here, and shewed what the Devisee should have; so the Plaintiff had Judgment nisi.

Whittington

Whittingham *verſus* Andrews.

ERror of a Judgment in Ejectment in the County Palatine of Durham; the Declaration was de Mineris carbonum in Gateſide. 1 Show. 364.

It was objected, that this was very incertain; for the Plaintiff ſhould have named how many Mines, becauſe in that County ſeveral Men have many Mines in one Place.

This is as uncertain as an Ejectment of three Acres of Meadow and Paſture, not ſhewing how much of either.

So an Ejectment of a Meſſuage and ten Acres of Land, twenty of Paſture, and twenty of Meadow per nomen of a Meſſuage and ten Acres of Meadow more or leſs. Now the Words more or leſs, could never be intended to extend to forty Acres more, there being only ten Acres demiſed, and for this Incertainty a Judgment was reverſed. Yelv. 166.

It will not lie of a Cloſe, but it muſt be of a certain Number of Acres, and the Number of the Acres muſt be particularly ſet forth; and this was Savill's Caſe. 2 Roll. Rep. 166. Style 193. 202. Yelv. 118.

Econtra. No greater Certainty is required than that the Sheriff might know of what to deliver Poſſeſſion, which is done here, for the Words de Mineris carbonum aſcertain the Nature of the Thing in Demand. Cro Car. 573. 11 Rep.

'Tis true an Ejectment de omnibus & omnimodis decimis is not good, becauſe of the Incertainty of what Nature the Tithes are; but if the Word Fœni or Lanæ is added, 'tis well enough, becauſe the Nature of it is then made certain.

This Action is in the Nature of Treſpaſs, becauſe of the Damages which are to be recovered; and one may bring an Action of Treſpaſs for a Piece of Land without any other Certainty. Owen. 19. 1 Gold. 172. 173. Cro. Eliz. 584.

It cannot be denied, but that many Judgments have been reverſed for the Incertainty of the Demand; but this Caſe was not ſo incertain that Execution could not be had of the Judgment. Moore pl. 587. pl. 976. contra.

The Exception is, that 'tis de Mineris carbonum; if it had been de Minera, that is admitted to be certain enough.

Now the Nature of the Thing will admit of no other Certainty, for a Mine of Coals runs through many Lands; and though 'tis but one Mine, yet when 'tis opened they uſually make

make ſeveral Shafts to let in the Air; and if the Plaintiff had declared but for one Mine, he could have recovered but one Shaft.

'Tis Uſage muſt ſupport this Ejectment: If 'tis brought of fifty Acres in Ireland, though ſuch a Declaration would be uncertain here, yet this Court would not reverſe a Judgment given there without writing thither to know the Uſage; and of this Opinion was the Court, That it may be good by Cuſtom of the Country; and therefore the Judgment was affirmed.

Rex & Regina *verſus* Marriot.

2 Lev. 221. By the Statute of 5 & 6 Ed. 6. 'tis enacted. That no Perſon ſhall keep an Alehouſe, but ſuch who ſhall be admitted thereunto, and allowed in open Seſſions of the Peace, or elſe by two Juſtices of the Peace, *Quorum unus*, &c. under the Penalty of three Days Impriſonment without Bail, and not to be diſcharged without giving a Recognizance with two Sureties to do ſo no more.

The Defendant was indicted for keeping of an Alehouſe without a Licence; and it was objected, that it would not lie, becauſe it was not an Offence at the Common Law, but made ſo by this Statute, which gives Power to the Juſtices of Peace in their Seſſions to make Enquiry into
Palm. 388. 2 Roll. Rep. 398. theſe Offences by Preſentment, Information or otherwiſe, &c.

But an Indictment is another ſort of Puniſhment which
7 Rep 36. is not provided for by this or any other Statute: Now where a Law makes an Offence, and appoints the Method of Proſecution, it muſt be puniſhed according to ſuch Method, and no otherwiſe.

This was the Opinion of the Court in Caſtle's Caſe, who
2 Cro. 643. 2 Roll. Rep. 247. was indicted for taking upon him the Office of a Juſtice of the Peace, not having 20 l. per Annum, and ſending out of
8 H. 6. cap. 11. a Warrant by Virtue of his Commiſſion; the Penalty appointed by the Statute, is 20 l. a Moiety to the King, and the other to the Informer, to be recovered by Action of Debt at the Common Law, and therefore not to be indicted.

Econtra. The Party may proceed by way of Indictment, tho' 'tis in a Caſe where a new Offence is created by a particular Law; and where the Penalty is directed to be recovered by Bill, Plaint or Information, for thoſe are affir-

mative Words, and shall not take away the general Method of Proceeding according to the Course of the Common Law

The Thing prohibited is of publick Concernment, and an Indictment will lie against the Offender, if there are no negative Words to restrain that way of Proceeding. 1 Mod. 36.

Chief Justice. An Indictment being a summary Way of Proceeding, is more beneficial for the Subject, and therefore it seems reasonable that such a Method should be pursued.

To convey a Maid from her Parents under the Age of sixteen Years, is no Offence at the Common Law, 'tis made so by a particular Statute, and Authority is given to the Star-chamber by Information, and to the Justices of Assize by Indictment to determine these Offences, but yet the B. R. is not excluded; and so it hath been constantly held since the making of the Law. 4 & 5 P. & M.

'Tis prohibited by the Statute of 22 Car. 2. to travel with more than five Horses at length; this is a new Law and a new Offence, and yet it was held, that an Indictment would lie in B. R. against the Offender, tho' a particular Punishment is directed by that Statute.

But Dolben and Eyre Justices, were of a different Opinion; they never heard of an Indictment before for keeping an unlicenced Alehouse; and this seems to be the Judgment of the Parliament in 30 Car. 2. that an Indictment would not lie, because the Conviction is to be upon View by the chief Officer within his Limits, or by Confession of the Party, or by Oath of two Witnesses, and then the Penalty is to be levied by Distress, &c. 3 Car. ca. 3.

White *versus* England.

By the Statute of 5 Eliz. 'tis enacted, that none which hath not served an Apprenticeship seven Years in any Art or Mystery then used, shall use the same, &c. upon Pain to forfeit 40 s. per Month.

An Action of Debt was brought upon this Statute against the Defendant for using the Trade of a Tiler, not having served an Apprenticeship for seven Years.

The Defendant pleaded, That his Father was a Freeman of London, and that he was his eldest Son, and that jure patrimonii he might use that Trade.

Upon a Demurrer to this Plea the Counſel did not rely upon it, but took Exceptions to the Declaration, becauſe 'tis not ſhewed that the Trade of a Tiler was an Art or Myſtery uſed in England at the Time of the Making of the Statute.

To which it was anſwered, that it was a Trade mentioned in the Statute, and ſo by Conſequence muſt be then uſed; but the Plaintiff was adviſed to wave his Demurrer, which he did, and paid Coſts.

Howard *verſus* Tremain.

1 Salk. 278. 1 Show. 363.

ON the ſixth Day of June 1681. a Bill was exhibited in Chancery, and a Commiſſion prayed to examine Witneſſes in perpetuam rei memoriam.

In Trinity Term following the Defendant had a Commiſſion to anſwer, and the Plaintiff examined his Witneſſes de bene eſſe, but no Anſwer came in till two Years afterwards, in which time two of the Witneſſes died; and the Queſtion now was, Whether theſe Depoſitions could be read in Evidence at a Trial at Bar.

It was ſaid, that it was the uſual Practice in Chancery to examine Witneſſes de bene eſſe, and that if they died before they are examined in Chief, their Evidence is good; but if ſuch Evidence ſhould not be allowed at Law, it would be a Means to enlarge the Juriſdiction of that Court, and the Party grieved would have a new Equity.

Nothing is more neceſſary than that the Examination of Witneſſes ſhould be in the proper Court where the Cauſe is depending; and this is the Means to do it, viz. to examine them de bene eſſe; if the Defendant ſhould be obſtinate, and refuſe to anſwer, he may ſtand out in Contempt of the Court, and ſo prevent the Plaintiff from perpetuating his Evidence; and this is no Inconvenience to the Defendant otherwiſe than by puniſhing his Perſon by Impriſonment; for after his Anſwer comes in, he hath the ſame Advantage in every Reſpect, as he had before he was in Contempt.

'Tis no Objection to ſay, that Iſſue was not joined in Chancery, becauſe where Depoſitions taken in that Court, are given in Evidence at Law, there is no Proof but of Bill and Anſwer filed in the Cauſe.

And

And therefore in the Case of Ford and Gay Depositions, tho' exemplified, were refused by my Lord Ch. Justice Pollexfen to be given in Evidence, because there was no Proof of an Answer.

Econtra. There can be no Examination of Witnesses upon a Bill alone, and the Fault is in the Plaintiff for not compelling the Defendant to put in his Answer in two Years after the Bill filed.

Now when his Answer was filed, those Depositions which were taken de bene esse are of no Use; for suppose a Bill is brought against Husband and Wife for something which the Man claimeth in Right of his Wife, and Witnesses are examined de bene esse, and then the Husband puts in his Answer, this shall not prejudice the Wife without her Answer.

This Court will not allow Depositions taken before Commissioners of Bankrupts to be given in Evidence here, nor Depositions taken in the Ecclesiastical Courts, and yet those Courts have the King's Authority to examine Witnesses.

Curia. Nothing can make it Evidence but the Necessity of the Thing; 'tis true, in Cases of Wills it may be necessary to examine Witnesses to perpetuate their Testimony, but in this Case the Plaintiff was nonsuited upon Evidence viva voce, and afterwards exhibited a Bill, and obtained these Depositions upon Examination of his own Witnesses, which is but Paper-evidence at the Best, and therefore they enclined not to allow it: Tamen quære.

These Depositions by the Opinion of the whole Court were allowed to be given in Evidence, which was done accordingly.

Rex & Regina *versus* Bullock.

BY the Statute of 33 H. 8. 'tis enacted, that none shall shoot, or keep in his House a Cross-bow, Hand-gun, &c. unless he hath Lands to the Value of 100 l. per Annum in pain to forfeit 10 l. for every Offence; and that any Person may carry the Offender before the next Justice of Peace, who upon due Examination and Proof hath Power to commit him till he pay the Penalty: Justices in Sessions and Stewards of Leets have Power to hear and determine these Offences. 33 H. 8. c. 6.

The Defendant not having the 100 l. per Annum, did shoot in a Gun in February, and in March following was brought before a Justice of the Peace, and by him was convicted of this Offence.

And now a Motion was made to quash this Conviction, because it was before a single Justice, who had not Power by the Statute to proceed in a summary Way, unless the Party is brought before him instanter upon View of the Offence committed, which was not done in this Case, and therefore the Prosecutor was ordered to shew Cause why it should not be quashed.

Anonymus.

NOta, an Order was made at a Mineral Court held at Mendipp in the County of Somerset, that the Defendant should forfeit his mineral Tools and Goods, and be banished from Mendipp-hills for ever.

This Order being returned, it was moved to quash it, and the Court held it to be an Order against Law, and not to be supported but by some special Custom.

Anonymus.

THere was a Libel in the Spiritual Court against the Defendant for not paying of a Rate towards the Repair of a Church, &c.

He suggested that the Lands were in the Occupation of his Tenant, and that he was not an Inhabitant in the Parish where this Church was, &c. And this was held a good Suggestion; for 'tis contrary to Law to charge the Person with Repairs who doth not live in the Parish; the Tenant of the Land should be charged, and not the Owner.

2 Roll. 228. If a Man take a Lease of a Stall in a Market-town, where he useth once a Week to sell his Wares, but liveth in another Parish, he shall not be charged towards the Repairs of the Church in that Market-town.

DE

Term. Sanct. Mich.

Anno 4 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1692.

Barker *& al' verſus* Lade.

ERror of a Judgment in the Common Pleas in Replevin wherein the Defendant Baker made Conuſance as Bailiff to Nicholas Marſh, &c. and ſets forth, That before the taking the Cattle, one Robert Lade was ſeized in Fee of the Place where, &c. who in Conſideration of 100 l. &c. did by Deed grant to Nicholas Marſh Grandfather to the Avowant, a Rent of 8 l. per Annum in Fee, Exeun' de omni illo Capitali meſſuagio ſive tenemento cum pertinentiis in Barham & de omnibus terris & hæreditamentis præd. meſſuagio ſpectan. tunc in occupatione præd. Roberti Lade unde præd. locus in quo, &c. eſt & præd. tempore quo, &c. fuit parcel' &c. with a Clauſe of Diſtreſs. Vide *The Pleadings in* 2 Vent. 145. 3 Lev. 291.

That by Virtue thereof the ſaid Nicholas Marſh became ſeized of the Rent, who deviſed it to Richard Marſh, and his Heirs &c. who by Deed, &c. pro & in conſideratione naturalis amoris & affectionis quæ geſſit prædicto Nicholao modo defend. filio ſuo & ſummæ quinque librarum, to be paid to the Grantor yearly during his Life, Dedit conceſſit aſſignavit & tranſpoſuit to the Defendant, the ſaid Rent, to have and to hold to him and his Heirs for ever, by Virtue whereof, and of the Statute for transferring of Uſes into Poſſeſſion, the Defendant was ſeized in Dominico ſuo ut de feodo, &c. and for ſix Years Rent, &c. diſtrained; and ſo Marſh in

in jure ſuo proprio bene advocat & Baker ut Ballivus of the ſaid Marſh bene cognovit the Taking, &c.

To this the Plaintiff demurred, and the Defendants joined in Demurrer.

(1.) The firſt Objection to this Pleading was that the Place where, &c. was not plainly and ſufficiently alledged to be charged with this Rent at the Time of the Grant thereof made to Nicholas Marſh the Grandfather, for it ſhould have been ſhewed, that the Place, &c. did belong to the ſaid Meſſuage, or that it was in the Occupation of the Grantor at the Time of the Grant, as well as tempore quo, &c. the Diſtreſs was taken.

(2.) The ſecond Objection was, That this was pleaded as a Grant at the Common Law by the Words conceſſit aſſignavit, &c. without Attornment or Enrollment, it being in Conſideration of Money paid, &c. and for this Reaſon the Plea was not good; and of this Opinion was Pollexfen Chief Juſtice: But the other Juſtices contra; for they held, That the Conſideration of the Grant being as well for natural Affection as Money, it would amount to a Covenant to ſtand ſeized, &c. and might be pleaded without an Enrollment.

Upon this Judgment a Writ of Error was brought, and it was now argued, That admitting this Deed did enure as a Covenant to ſtand ſeized, &c. it ought not to have been pleaded by the Words dedit & conceſſit, &c. but as it operates by Law, viz. Conceſſit & agreavit quod ſeiſitus exiſtet.

Many Inſtances may be given to prove this Matter: One Jointenant maketh a Feoffment to the other; this cannot make a good Deed at the Common Law; for he cannot make Livery and Seiſin, becauſe the other is jointly ſeized with him, yet this Deed ſhall enure by way of Confirmation, and muſt be ſo pleaded, and not literally as the Deed is worded.

Br. Abr. tit. confirmation. placit. 11. Plowd. Com. 156. b.

So the Word dimiſit is not only applicable to an Eſtate for Life or Years; but to an Eſtate-tail or in Fee, but then it muſt be pleaded as ſuch.

My Ld. Coke in his Comment upon Littleton ſaith, That dedi or conceſſi may amount to a Grant, to a Feoffment, to a Gift, Leaſe, Releaſe, Confirmation or Surrender; and that 'tis in the Election of the Party to uſe it, to which of theſe Purpoſes is moſt agreable with his Intereſt, and therefore he may plead it as either, which ſhews that the Pleading muſt be as the Deed doth enure

1 Inſt. 301. b.

and

and operate, and not as the Words are in the Deed it ſelf.

And therefore if one Joint-tenant plead, That the other Conceſſit to him, &c. this Plea is ill, becauſe a Grant is not a proper Conveyance from one Joint-tenant to another, it muſt be by Releaſe; but if a Jury had found quod conceſſit, that being the Saying of the Lay Gents, would have been helped by the Court, and adjudged to be quod relaxavit. 2 Saund. 96.

If Tenant for Life grant his Eſtate to him in Reverſion, this is a Surrender, and it muſt be pleaded according to the Operation it hath in Law; and for this Reaſon chiefly the Judgment was reverſed.

Carter *verſus* Firmin.

By the Statute for rebuilding the City of London, 'tis enacted, That no Building or Houſe ſhall be erected within the Limits of the City but ſuch as ſhall be purſuant to the Scantlings mentioned in the ſaid Act; and if any Perſon ſhall do contrary, being convicted upon the Oaths of two Witneſſes, then the Houſe ſo built ſhall be deemed a Common Nuſance, &c. 19 Car. 2. cap. 8.

And 'tis further enacted, That all Differences ariſing between Builders concerning placing and ſtopping up Lights, ſhall be heard and determined by the Alderman of the Ward; and if he is Party or cannot determine it, then by the Mayor and Court of Aldermen.

Mr. Carter was poſſeſſed of a Houſe in Three King-Court in Fenchchurch-ſtreet and Mr. Firmin had a Houſe contiguous; there was a Party-Wall ſet between both theſe Houſes by the City Surveyor, and both built above 20 Years ſince.

And now Mr. Carter would build a Stable upon a void Piece of Ground which was never built on before; upon which the other complained to the Court of Aldermen, who ſent two Surveyors, being City Officers, to view this Building; upon whoſe Report that Court hinder'd any farther Building till the Right of the Thing ſhould be determined.

And now Mr. Carter moved for a Prohibition to the Court of Aldermen, and by his Counſel alledged, That they had no Juriſdiction over this Matter: For their Houſes were built 20 Years ſince according to the Rules preſcribed by the Act; that the Authority of that Court was limited to the Builders of Houſes upon the Foundations of thoſe which

which were deſtroy'd by the Fire, and did not extend to ſuch Perſons who built upon new Foundations: So that the Houſes being built, their Juriſdiction was determined; it was temporary only, and ſhall not be continued afterwards: And of this Opinion was the Court, and therefore enclined to grant the Motion.

But at another Day this Matter being ſtirred again, it was ſaid by the Court, that there might be a Cuſtom in the City to regulate Lights, and for the Uniformity of Buildings, but not to determine Mens Rights.

This was ſaid, becauſe the Attorney General inſiſted that the City-Surveyors were Officers as ancient as any Records of the Corporation; that their Oath is in the Book of Oaths, which is likewiſe a very ancient Book; that theſe Officers have in all Times paſt been appointed to make particular Reports to the Court of Aldermen, to which the Parties concerned have always complied; and that it would be very inconvenient if a Prohibition ſhould go contrary to ſuch an ancient Cuſtom.

Therefore it was ordered that the Plaintiff ſhould declare upon a Prohibition; and that the Defendant might (if he ſaw Cauſe) plead this Cuſtom, that ſo the Court might be judicially appriſed of the Matter.

Carter *verſus* Calthorp.

Hill. 3 Willielmi, *Rot.* 308.

3 Lev. 345. 1 Show. 366.

ERror to reverſe a Judgment given in the Court of Hull, in an Action on the Caſe, where the Plaintiff declared, That he was ſeized of a Meſſuage, &c. and that the Defendant built another near it, and continued the ſaid Building from ſuch a Day to the Time of the Levying of the Plaint, by Reaſon whereof he ſtopped up his Lights & adhuc obſtupavit.

There was Judgment for the Plaintiff, and entire Damages given; and now the Error aſſigned was, That by Reaſon of the Words adhuc obſtupavit, Damages were given for ſomething after the Plaint levied.

To which it was anſwered, That the Word Adhuc doth refer only to the Time of bringing the Plaint, and not to any Thing which happens afterwards; it is to ſhew, That the Defendant hath not abated the Nuſance: They are Words only of Form, and uſed in moſt Declarations,

viz. Solvere contradixit & adhuc contradicit, &c. and ſo are the Pleadings in the Entries in this very Caſe, viz. That the Defendant built a new Houſe, by Reaſon whereof the greateſt part of the Plaintiff's Houſe Magna tenebritate obſcurata fuit & adhuc exiſtit; and for this Reaſon the Plaintiff had Judgment. Vid. Mich. 1 Jac. 2. Rot. 425. Hext verſus Burton in C. B.

Davis *verſus* Speed.

Hill. 3 Willielmi. *Rot.* 261.

IN a ſpecial Verdict in Ejectment for Lands in the County of Southampton; the Caſe appeared to be thus. Caſes in Parliament. 104. 5 Mod. 143. 2 Salk. 675.

A Feme-ſole being ſeized in Fee of the Lands now in Queſtion, afterwards did marry William Horn.

That the ſaid William Horn and Ann his Wife did by Deed indented covenant to levy a Fine thereof to Jollop and Stanly, and their Heirs, &c. to the Uſes following, viz.

To the Uſe of the Heirs of the ſaid William Horn lawfully begotten, or to be begotten upon the Body of the ſaid Ann, Remainder to the right Heirs of the Husband.

The Fine was levied, they had Iſſue one Son, who died in the Life-time of his Father and Mother without Iſſue; then Ann died, and afterwards William Horn died without Iſſue.

That Frances Cockey who was the Leſſor of the Plaintiff was Siſter and Heir of William Horn, and that the Siſters and Co-heirs of Ann had conveyed their Intereſt to the Defendant Speed.

So that the Queſtion was, Whether the Heirs of the Wife ſhould have this Land?

The Objection why the right Heirs of the Husband ſhould not have it was, becauſe there was no particular Eſtate for Life limited in this Conveyance to ſupport the contingent Remainders which are therefore void, and the old Uſe remains to the Heirs of the Wife.

But it was argued in his Behalf that this was a Settlement by way of Uſe, which like a Will was to be conſtrued according to the Intent of the Parties; and that for this Purpoſe the Law would raiſe an Eſtate for Life in him by Implication, which being united with that Eſtate he

had by the Settlement it ſelf, would create an Eſtate-tail in him, and ſo the Remainders would be good.

1 Mod. 160. And to prove this the Caſe of Pybus and Mitford was cited, viz. Mitford being ſeized in Fee, had Iſſue Robert by a firſt Venter, and Ralph and Jane by his ſecond Wife; he covenanted to ſtand ſeized, &c. to the Uſe of his Heirs Males begotten on the Body of Jane, Reverſion to his own right Heirs; the Father died, the eldeſt Son entred, whoſe Title the Plaintiff had, and the Queſtion was, Whether any Uſe did ariſe to the ſecond Son?

Three Judges againſt the Opinion of Juſtice Twyſden held, That an Eſtate for Life did ariſe to Mitford by Implication, becauſe a Limitation to the Heirs of his Body carries the Uſe to himſelf, in whom his Heirs are all included, and the old Eſtate in Fee which was left in him is then qualified and turned into an Eſtate-tail.

Roll. Rep. 1. p. 240. 1 Inſt. 22. b. This was the Opinion of my Ld. Coke in Lane and Pannell's Caſe, where he ſaid, if a Feoffment be made to the Uſe of the Heirs of the Body, &c. 'tis an Eſtate-tail executed in him, becauſe he hath an Eſtate for Life by Implication.

'Tis not material to object, That an Uſe cannot ariſe in this Caſe by Implication, becauſe the Husband hath no Eſtate but in Right of his Wife; for an Uſe may ariſe as well to a Stranger as to the Feoffor, becauſe they both joined in the Deed as well as in the Fine: Beſides, he hath an Eſtate for his own Life as Tenant by the Courteſy, and whenever the Husband hath an Eſtate in Right of his Wife, in Pleading 'tis always ſaid, That ſeiſit. fuer. in dominico ſuo ut de feodo, &c.

But if no Eſtate for Life doth ariſe immediately by Implication, then this may be good by Way of a ſpringing or contingent Uſe to the Heirs of the Husband, and that till that Contingency ſhall happen by his Death, the Uſe muſt ſtill remain in the Woman and her Heirs.

Econtra. There muſt be a particular Eſtate found out to ſupport theſe Remainders, or otherwiſe they are void, and the Eſtate is as it was before the Fine levyed, which operates for the Benefit of her, who had the old Eſtate in her before.

If this had been a Conveyance at the Common Law, there could have been no Queſtion made, becauſe the Freehold (if any) cannot be put in Abeyance; and 'tis plain 'tis

27 H. 8. in Abeyance here, becauſe there can be no right Heir of William Horn whilſt he is living.

'Tis true, this is a Conveyance by Way of Uſe, which before the Statute was conſidered only as a Truſt; But now

by uniting the Poſſeſſion to thoſe Uſes, they are governed by the known Rules of the Common Law; for an Uſe is an Eſtate, and muſt take Place either in Poſſeſſion or in futuro, as 'tis limited; and therefore where a Fine was levied to the Uſe of B. for Life, and afterwards to the Uſe of the Children of C. procreatis, this Limitation ſhall extend to none of his Children born afterward, becauſe no future Uſe was limited to them. Cro. Eliz 334.

In this Caſe an Uſe was intended to be raiſed in præſenti to the Heirs of William Horne; now they could not take as Heirs during his Life; therefore there being no Perſon capable of taking it muſt be void.

If it was deſigned to operate in futuro, then there muſt be a particular Eſtate ſomewhere to ſupport the Remainder till the Contingency happens, which Eſtate muſt be either expreſſed or implied.

'Tis plain that here was no particular Eſtate expreſſed; then if it ſhould ariſe by Implication, it cannot be in the Husband, becauſe there are no Words, which ſhew any ſuch Intent.

But if an implied Eſtate for Life ſhould ariſe by Conſtruction of Law, it muſt be in the Wife, and then ſhe dying before her Husband, that Eſtate was determined before the Remainder to his Heirs could take Place, and therefore ſhall never ariſe; neither could any Eſtate remain in the Feoffees; for by one Branch of the Statute the Poſſeſſion is given to the Ceſtui que uſe; and by another Branch all the Right is taken out of the Feoffees, and given to the Ceſtui que uſe; ſo that nothing remains in them; and it would be a very abſurd Thing if it ſhould; for if a Feoffment be to the Uſe of himſelf and his Heirs, till a third Perſon pay 100 l. and then that he will be ſeiſed to the Uſe of that Perſon and his Heirs: Now if any thing ſhould remain in the Feoffees before the Payment of the 100 l. it muſt be a Fee-ſimple, and then there would be two Fee-ſimples of the ſame Land; to avoid which the Statute muſt be conſtrued to take the whole Eſtate out of them, and fix it upon the Land, which by Operation of the Statute ſhall give the Uſe to every Perſon in his Turn according to the Limitation of the Parties 1 Leon. 258.

And therefore it was agreed in Chudleigh's Caſe, That the Statute doth not transfer the Poſſeſſion to any Uſe, but ſuch as is in Being; becauſe it cannot be executed to a bare Poſſibility of an Uſe, neither can it be limited againſt the known Rules of the Common Law. Vid. 2 Roll. Abr. 796. Cro. Eliz. 321. 1 Rep.

Curia. This is a future Uſe and no particular Eſtate to ſupport it; and no ſuch Eſtate could ariſe until the Wife died without Iſſue, and ſo the Remainder is void.

And afterward in Eaſter Term Judgment was given for the Defendant Speed accordingly.

That no Eſtate ſhall ariſe by Implication to the Husband; ſuch a Thing was never thought on in a Deed, nor in a Will, but of Neceſſity.

Caſes Adj. 104 There was a Writ of Error brought upon this Judgment in Parliament, but it was affirmed.

Buckley *verſus* Collier.

1 Salk. 114. The Husband and Wife brought an Action on the Caſe for work done by the Wife during the Coverture, and the Queſtion was, whether they could join in this Action.

Cro. Eliz. 96. In Treſpaſs they may join for entring on the Land, & herbam ipſorum ibidem creſcen. aſportavit, &c.

Cro. Car. 434. So likewiſe where the Husband hath Land in the Right of his Wife, as a Jointure by a former Husband, and ſhe is to have the Lops and Shrowds of the Trees growing thereon, and he who hath the Inheritance cuts them down; they may join in an Action to recover Damages, becauſe it ſurvives to her after his Death.

But the Court was of Opinion, that in the principal Caſe the Declaration was not good, becauſe the Action was brought for a perſonal Thing which would not ſurvive, and in Perſonal Actions the Law is clear that they cannot join. Cro. Eliz. 133.

Cook *verſus* Boſinger.

IN Trover the Plaintiff declared, That he was poſſeſſed de bonis & catallis ſequen. ut de bonis & catallis ſuis propriis, videlicet de uno ſcripto obligatorio & una warrantia, &c.

The Defendant pleaded in Abatement that the Bond and Warrant were not Chattels; and upon a Demurrer to this Plea it was ſaid, that neither the Bond or the Value thereof can be demanded by ſuch Names, as Bona & catalla, becauſe (as the Opinion is in Yelverton) a Bond will not paſs by ſuch general Names.

Yel. 68.

In Detinue the Thing it ſelf muſt by ſpecially named, becauſe it is to be recovered in ſpecie: The ſame Reaſon may govern this Caſe.

But it was anſwered, that by a Gift of all his Goods and Chattels a Bond would paſs; and this was the Opinion of Fitzherbert in Dyer, and to his Opinion the Court now enclined. Dyer 5. b.

Rudd *verſus* Foſter.

IN Replevin for taking of a Gelding, the Defendant juſtified by Vertue of the Statute of the Queen, for Money due upon the Poor Tax. 43 Eliz. c. 2. 2 Salk. 501.

The Parties being at Iſſue, it was tried at the Bar, and the Queſtion was, Whether the Hill of Stratton was in the Pariſh of Biggleſwade in Bedfordſhire, or not?

The Poors Rate was admitted.

And the Evidence to prove it to be in that Pariſh, was, that there were but two Churchwardens and two Overſeers of the Poor, and that Marriages, Burials and Chriſtnings, and all other Parochial Rites were done at Biggleſwade, and that the Inhabitants of the Hill of Stratton did contribute to the Repairs of the Church of Biggleſwade.

On the other Side, to prove that Stratton was a reputed Pariſh by it ſelf at the Time of the making of this Statute, this Evidence was given, viz.

In the Reign of Edward III. there was a publick Chapel there where the People went to hear Maſs, and that Divine Service was read in that Chapel at the Time of the making of this Statute.

Then it was proved that a Rate was made there in the Year 1654. and that formerly they had diſtinct Conſtables, and repaired their own Highways till the Year 1634. and then the Difference between them was ſettled by the Judges in their Circuit.

They would have this like the Caſe between the Pariſh of Tateridge and Hatfield, which was a ſpecial Verdict upon this Statute; the Plaintiff lived in Tateridge and had no Lands in Hatfield, but had Lands where he lived; he was rated to the Poor of Hatfield, but becauſe at the Time of the making the Statute, Tateridge was a reputative Pariſh, and had diſtinct Conſtables, Churchwardens and Overſeers of the Poor, and made their own Rates Cro. Cor. 394.

and

and Aſſeſſments, which were levied by their own Officers; for this Reaſon that was held to a diſtinct Pariſh from Hatfield.

But Stratton was not ſo much as a Pariſh in Reputation at the Time of the making of the Act, and ſo not like that Caſe; for all that was proved, was that they had made Rates ſince the Statute, and had a Chapel before; but making Rates will not make it a Pariſh without all other Parochial Rights, and therefore it was held to be a Vill in the Pariſh of Biggleſwade.

Hoyle *verſus* Pitt.

Appeal of Murder.

Serjeant Pemberton moved, that the Appellee having pleaded a Conviction of Manſlaughter at the Gaol-delivery at the Old Baily, and that he was allowed his Clergy; but not ſhewing by what Authority that Court was held, that therefore the Plea might be amended, it being before Iſſue joyned or Demurrer.

But the Court doubted whether this could be done by Law; for the Appellant could not amend, and therefore there was no Reaſon why the Appellee ſhould have that Liberty.

In this Caſe if you amend, you make a new Roll; 'tis not like other Caſes of Amendments where all is in Paper, and warranted by the Uſage of the Court, for this is all upon the Plea-Roll.

No Statute extends to Amendments of either Side in an Appeal, and 'tis not warranted by the Courſe of the Court.

Rex & Regina *verſus* Hicks.

An Information was brought againſt Marmaduke Hicks, and it was laid in Middleſex in the Name of Sir Samuel Aſtry, for Exerciſing the Trade of a Grocer by the Space of three Months, not having ſerved as an Apprentice for ſeven Years to that Trade, contra formam * Statuti, &c.

* 5 Eliz.

The Defendant did not live in Middleſex, nor uſe the Trade there, but in another County.

And upon a Demurrer, the Defendant had Judgment, becauſe this Information being grounded upon a Penal Law, it ought to be laid in the proper County where the

Offence was committed and not elsewhere by the express Words of the Statute of 21 Jacobi c. 4.

'Tis true, an Action of Debt will lie upon the Statute of 5 Eliz. in Middlesex, though the Offence was done in Cumberland, because the Statute of King James did not intend to deprive the Courts of Westminster of such Actions, but only of those which might be brought before Justices of Assize, or of the Peace; now Informations may be brought before them as well as in this Court; but Debt cannot. Sid. 303, 400.

Bennet *versus* Preston.

APpeal of Murder, the Writ was concluded thus, viz. Et habeas ibi tunc hoc Breve.

The Count was, that the Deceased was at the Parish of Clapham in the Peace of the King such a Day and Year, and that ante meridiem ejusdem diei ven. præd. Will'us Preston & quidem Daniel Scholy, &c.

The first Exception was taken to the Writ because of the Word tunc, which is never used in an original Writ.

To which it was answered, That if that Word had been left out, it might have been very well understood, for habeas ibi hoc breve is well enough, and tunc is but Surplusage.

In an Audita querela it was set forth, that the Plaintiff captus fuit virtute brevis nostri judicialis, which Word is not in the Register, and therefore it was held Surplusage, and the Writ good. 1 Leon. 73.

(2.) The second Objection was made to the Count, viz. 'Tis said, that ante meridiem ejusdem diei the Appellee came, &c. and doth not mention what Hour; now the Statute of Gloucester requires the Certainty both of the Day and Hour, &c.

The Answer was, that the Year and Day shall be accounted from the Day of his Death, and the Hour is not material; for if it had been circa horam octavam, it had been good.

(3.) Another Objection was, that 'tis said ven. prædicti Will'us Preston & quidem Daniel Scholy, &c. which was insensible and false Latin; for to say prædicti when there was but one mentioned before must be naught, and cannot be Surplusage in an Appeal; for if the Word be wholly rejected, then non constat which of them killed the Person; and if 'tis not rejected, then there is an Adjective to a Substantive not named before, and quidem for quidam is false Latin; so that this Count is neither Sense nor Grammar.

But

But it was answered, that false Latin will not vitiate Indictments, neither shall it be allowed to make void Declarations in Appeals; it may abate an Original Writ, but shall not make any judicial Writ, Count or Pleading vitious; so is the second Resolution in Osborn's Case.

20 Rep. 133. a.

'Tis true, in an Assize the Writ was, that the Sheriff should summon the Tenants quod sint coram præfat. Justiciariis apud Westm', and no Justices were mentioned before, but the Writ was not abated for this Omission; the Judgment was only stay'd a little upon the first Opening of the Fault, but it doth not appear that it was made void for that Reason.

Plow. Com. 415.

DE

DE

Term. Sanct. Hill.

Anno 4 & 5 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1693.

Weſterne *verſus* Creſwick.

THE Plaintiff Weſterne had obtained a Judgment againſt the Defendant upon a Bond, and by Virtue thereof had levied Part of his Debt upon ſome of his Cattle and ſold them.

This Judgment was afterwards ſet aſide, and now Serjeant Tremaine moved, that ſince Reſtitution was awarded to the Defendant, that the Money for which the Cattle were actually ſold, might be brought into Court for the Benefit of the Defendant, who was then a Priſoner in the King's Bench. This being diſallowed, then he offered to pay the Defendant as much Money as the Cattle were ſold for; but that was denied likewiſe, becauſe they might be ſold for leſs than really they were worth; and if the Defendant brings his Action of Treſpaſs, he will recover the full Value, and therefore the Plaintiff muſt agree with him to prevent ſuch an Action.

Patiſon *verſus* Milton.

THE Declaration was thus, Willielmus Patiſon queritur de Willielmo Milton in Cuſtod. Mar. Mareſcal. &c. pro eo videlt. qd. cum Willielmus Patiſon (inſtead of Milton) indebitatus fuit Willielmo Patiſon, &c.

After a Verdict for the Plaintiff, it was moved that it might be amended, for it was a plain Miſtake of the Clerk to make the Plaintiff to be indebted to himſelf: And the Court ordered that it ſhould be amended accordingly without the Help of the Statute; as where an Action on the Caſe was brought againſt an Executor upon the Promiſe of the Teſtator who pleaded Non aſſumpſit, and ſaid nothing as to any Promiſe of the Teſtator, this was held to be good enough after Verdict.

Latch. 125. Noy 38. 3 Cro 435, 904.

Juſtice Dolben ſaid, that quidam tamen Johnſon, &c. without naming his Chriſtian Name, was held good; for as Juſtice Twyſden ſaid he would intend his Name to be quidam.

But a Declaration in the Common Pleas was (viz.) that the Plaintiff cognoviſſet ſe indebitatum fore to himſelf; and after Verdict for the Plaintiff, this was moved, and (as it was affirmed at the Bar) he could never get Judgment in that Court.

Rex & Regina *verſus* Tucker.

ERror to reverſe an Attainder in High Treaſon committed in the Weſt of England.

Caſes in Parl. 186. 3 Lev. 396.

The Indictment was, that the Defendant and another, not having the Fear of God in their Hearts, nor conſidering the Duty of their Allegiance, but being ſeduced, &c. proditorie compaſſaverunt to kill their Supreme and natural Lord, and that they waged War proditorie againſt the King their Supream Right Natural and Undoubted Lord, &c. contra pacem, &c. Et contra formam Statut. &c.

Upon this Indictment they were arraigned, Et per Curiam allocut. what they had to ſay, &c. ſeparatim dicunt, &c.

Then the Judgment was thus, ducantur, & uterq; eorum ducatur uſq; ad Goalam, &c. & abinde uſq; ad locum executionis trahantur, &c. & ſuper furcam ibidem per collum ſuſpendantur, &c. & interiora ſua extra ventres eorum & utriuſq; eorum capiantur, ipſiſq; viventibus comburantur, &c. Quodq; corpora eorum & utriuſq; eorum in quatuor partes dividantur, &c.

This Cauſe depended many Terms before it received any Determination by reaſon of the many Exceptions which were made both to the Indictment, and to the Judgment.

And firſt as to the Judgment.

(1.) It was, that they should be drawn to the Place of Execution, and doth not say super Hurdellum; and so is the Case in Staundford, and in 1 H. 7. fol. 29. Pleas of the Crown 182.

To which it was answered, That most of the Precedents are otherwise; 'tis left out in the third Institutes, where the form of the Judgment is set down by my Lord Coke, whose Authority may be opposed to that of Justice Staundford. 3 Inst 210.

(2.) It was a Judgment against two Defendants, and 'tis said per collum suspendantur; and doth not say uterq; eorum per collum suspendatur; 'tis also said, that corpora eorum in quatuor partes dividantur, without these Words, viz. Et corpus utriusq; eorum, for otherwise 'tis not Sense, and it shall not be taken reddendo singula singulis. But this was an Exception only mentioned, and not insisted on.

(3.) Quod secreta membra amputentur. This part of the Judgment was left out. It was pronounced by my Lord Chancellor Finch in my Lord Stafford's Case upon Debate with the Judges what Judgment must be given for a Peer. Staund. 182. Dalton 335. Bolton 38.

But as to that, it was said it was omitted in almost all the Entries and ancient Records; and that it was well comprehended in this Judgment by the Word interiora, and that it was not in any Judgment till the Judgments against the Regicides.

(4.) Upon the Arraignment 'tis per Curiam allocut', &c. what they had to say, and doth not say quilibet eorum separatim allocut.

This Objection was likewise thus answered, That the Defendants were indicted for a joint Offence, and having pleaded severally, it ought now to be taken that they were severally asked the Question, which in its very Nature doth intend a several Demand.

But the chiefest and most material Exception was to the Indictment, and that it did not conclude contra Ligeantiæ suæ debitum.

And as to that, those who argued to support it, said, that some formal Parts were requisite to an Indictment; but if the Body of it contain what is essential and comprehensive of the Fact, 'tis sufficient.

Now here the Fact is sufficiently set forth in the Body of the Indictment, there are several Acts of Treason charged in it, and 'tis laid throughout to be proditorie, which must be against his natural Allegiance, for an Alien Enemy cannot be thus indicted.

'Tis true, the Law will not ſuffer Facts to be made out by any ſtrained Conſtructions of Words or Inferences; but that cannot be objected here, becauſe 'tis ſaid, that he not weighing the Duty of his Allegiance, did levy War againſt his undoubted and true Lord contra formam Statuti, which are Words enough to ſupply the Omiſſion of the other, and to make it plainly appear that it was againſt the Duty of his Allegiance.

This was enforced from ſome Authorities which had ſome Reſemblance of this Matter.

4 Rep. 41, 42. As in an Indictment for Murder it was omitted that the Perſon ſlain was in pace Dei, for it might be that he was in the Fault; yet it was held good.

2 Roll. Abr. 82. So for a Riot, contra coronam was omitted in the Indictment, yet it was not quaſhed, becauſe theſe and ſuch like Words are only in Aggravation of the Offence, and not of abſolute Neceſſity to be uſed in ſuch Proceedings.

Dyer 68, 69. 1 Bulſt. 93. So likewiſe ex malitia ſua præcogitata was left out of an Indictment for Murder, but 'twas not quaſhed for that Reaſon, becauſe the Word murdravit in that Caſe, as well as proditorie in this, implies, that one was done out of Malice, and the other againſt his Allegiance.

Beſides, this is an Indictment grounded upon a Statute which doth not preſcribe any Form: And the Defendant being found guilty, and Judgment againſt him, it ſhall be intended, that what he did, was contra formam Statuti, and by Conſequence contrary to his Allegiance.

But this was denied, becauſe the Offence in the Indictment was Treaſon at the Common Law of which the Statute was only declaratory, and therefore the concluding contra formam Statuti will not make it contra ligeantiæ debitum.

Then it was inſiſted, that there have been many Precedents without theſe Words, and inſtanced in Sir Henry Vane's Caſe, and in Cotton and Meſſenger's Caſe, and many more, and yet the Indictments were good; for if thoſe Words had been inſerted, it had been only a formal Concluſion from the Premiſes in the Indictment, and therefore ſhall not vitiate it being omitted.

Sid. 358.

Serjeant Pemberton contra. There was never yet any Caſe wherein this Point was conteſted and ſettled.

The doing a Thing againſt his Allegiance, is the very Foundation of this Indictment, and yet it doth not appear that any Thing was done contrary to it.

'Tis true, this Indictment sets forth, that the Defendants not considering the Duty of their Allegiance, did levy War contra naturalem suum Dominum: Now this may be intended as well against the King in his Politick as in his natural Capacity.

There is a Loyal as well as a Natural Allegiance, and therefore if an Alien Amy come hither and commits Treason, the Indictment must conclude, contra ligeantiæ suæ debitum; but an Alien Enemy cannot be tried by the Common Law, but by special Commission to the Constable or Marshal; and this was Perkin Warbeck's Case who was never under the King's Protection, and therefore his Indictment could not conclude contra ligeantiæ debitum; which shews that these are Words of Substance, and cannot be supplied by any Intendment whatsoever; for if 'tis Treason, it must be against Allegiance, and ought to be so expressed in the Indictment.

This is agreeable to the Opinion of my Lord Hobert in Courteen's Case, viz. That an Alien in Amity with us, and living here, is under the Protection of the King, who is Dominus suus, tho' not naturalis; and if such an Alien commit Treason, the Indictment must conclude contra debitam Alliegeantiam. Hob. 271. 7 Rep. 6. b. 11. b.

And if 'tis so in the Case of an Alien Amy, a fortiori it ought to be so in that of a natural Subject. 1 Inst. 129.

The Conclusion of an Indictment goes to all, and therefore agreeable to this is the Reason of the Law in other Cases, as in Felony, if contra pacem is left out, the Indictment is never good.

So in Burglary, tho' there is sufficient in the Indictment to imply the Fact done to be Burglary; yet if the word Burglariter is left out, the Indictment is naught.

To say furatus est equum will not imply Felonice, neither will carnaliter cognovit supply the Word rapuit, for these are Terms of Art adapted by the Policy of the Law to particular Offences, and cannot be supplied by Intendment. Stamf. 96. 37 H. 8. ca.

Before the Statute of 37 H. 8. the Words vi & armis were so material in Indictments, that many were reversed where those Words were omitted; and tho' they were only formal Words, and not so material as these, yet they could not be left out without the Authority of a Parliament.

To say that murdravit will supply ex malitia sua præcogitata, cannot be Law; and therefore the Print in Dyer is false.

Lastly, Here are no Words in this Indictment to supply the Defect of these Words, contra ligeantiæ suæ debitum. the

Word

Word proditorie will not do it, because a Man may be treacherous, and not act any Thing against his Allegiance; and as for the Clause, viz. contra naturalem suum Dominum, the Indictment had been good contra Regem only, without those Words, so as the Conclusion had been contra Ligeantiæ suæ debitum; therefore those Words cannot supply this Omission, because it would be very absurd to say, what is necessary shall be supplied by that which is not.

Upon the whole Matter it would be dangerous to admit Innovations in Indictments; and therefore the usual Form being to conclude after this Manner, it must not be omitted, especially considering the Reason of the Thing; for Allegiance and Protection are Correlatives, and do mutuo se tolli & ponere.

Curia. That for Want of Concluding the Indictment with these Words, contra Ligeantiæ suæ debitum, 'tis erroneous; and that such an Omission will make it so, tho' there are Words in the Body of the Indictment, which tantamount, because a Man may levy War, and not be guilty of the Offence as laid here; for he may be an Alien Enemy; and that was the Reason in Calvin's Case why that Indictment was not concluded contra Ligeantiæ debitum.

But there are no Words in this Indictment to supply this Omission.

For debitum Ligeantiæ suæ minime ponderans will not do it, because a Man may not consider the Duty of his Allegiance, and yet do nothing which is contrary to it.

Then contra Dominum Regem supremum verum & naturalem Dominum suum, &c. will not help it, because those Words are not always essential in an Indictment, they signifie no more than to shew that the Offender was born in England; they are Words superabundant, and were added to Indictments in latter Times; for the old Way was to set forth the Offence to be contra Dominum Regem only; so that Words which are not necessary in an Indictment, shall never be construed to supply the Omission of those which are absolutely necessary.

Cro. Car. 120. The very Offence of Treason is because 'tis committed contra Ligeantiæ debitum, the other Words are but an Aggravation of the Offence, and the Omission of that Clause can be no more supplied by the Adverb proditorie, than the Word felonice could supply contra pacem.

It would be very ſtrange if the Omiſſion of contra pacem in an Indictment at the Common Law, and contra formam Statuti, for an Offence committed againſt a particular Statute, ſhould be Error, and yet an Omiſſion of theſe Words ſhould be none.

'Tis probable this may be a Reaſon for the making of the Statute of 29 Eliz. by which 'tis enacted, That no Record of Attainder of Treaſon ſhall be reverſed where the Party attainted is executed for the ſame Offence, 29 Eliz. c. 2.

For before that Statute there were few Precedents which have theſe Words, and ſince the Statute there are few or none beſides this wherein they are omitted.

'Tis true, there are ſeveral Indictments in the Reign of H. 8. againſt Offenders for High Treaſon, which was made ſo by ſome new Statutes in thoſe Days; as denying his Supremacy &c. in which Indictments theſe Words were omitted, but the Reaſon was becauſe they were new Treſons created by particular Acts of Parliament, and 'tis probable that the Proceedings in thoſe Caſes begat this Error.

And for theſe Reaſons in Eaſter Term of 6 Willielmi & Mariæ the Judgment was reverſed, which Reverſal was afterwards in Hillary Term 7 Willielmi affirmed in Parliament. Caſes Adj. 186.

Harcourt *verſus* Fox.

By the Statute 37 H. 8. cap. 1. 'tis enacted, That none ſhall be Cuſtos Rotulorum but ſuch who ſhall have a Bill ſigned by the King for the ſame, which ſhall be a Warrant for the Lord Chancellor or Keeper to put and continue him in the Commiſſion to be Cuſtos Rotulorum, until the King ſhall appoint another; and by this Statute the Cuſtos hath Power to appoint the Clerk of the Peace, who may execute that Office by a Deputy to be approved by the Cuſtos. Caſes in Parliament, 158. 1 Show. 416. ...l. 293

By the Statute 3 & 4 Ed. 6. cap. 1. The Lord Chancellor or Keeper ſhall appoint the Cuſtos Rotulorum in every County, &c. who may execute his Office by himſelf or Deputy.

By the Statute of 1 Willielmi & Mariæ the Nominating and Appointing the Cuſtos Rotulorum, ſhall be as directed by the Statute of 37 H. 8. and he is to appoint and nominate the Clerk of the Peace when void, &c. who may execute it by himſelf or Deputy for ſo long Time only as he ſhall demean himſelf well, &c.

It

If ſuch Clerk ſhall misdemean himſelf, &c. the Juſtices in their Quarter-Seſſions upon Complaint to them in Writing, and upon Examination and Proof, may ſuſpend or diſcharge him; and the Cuſtos may appoint another reſiding within the County; and if the Cuſtos neglect or refuſe ſo to do before the next Seſſions after ſuch Refuſal, then the Juſtices may at their Seſſions appoint one.

The Cuſtos ſhall not ſell the Office of Clerk of the Peace upon Penalty of both being diſabled to hold their reſpective Offices, and forfeiting double the Value of the Money ſo given and taken, to be recovered by him who will ſue for the ſame by Action of Debt, &c. to his own Uſe, and the Clerk of the Peace before he enters upon his Office is to make Oath in open Seſſions that he hath, nor will not pay any Money, or Reward for the ſame.

The foregoing Paragraphs are the Subſtance of the ſeveral Statutes relating to the Caſe following, viz.

An Indebitatus aſſumpſit was brought againſt the Defendant for receiving 40 s. Fees belonging to the Office of the Clerk of the Peace of Middleſex.

Upon Non aſſumpſit pleaded the Jury found a ſpecial Verdict in which the aforeſaid Statutes 37 H. 8. and 1 Willielmi, &c were found.

Then they find that the Earl of Clare was Anno 1 Willielmi & Mariæ, conſtituted by the King and Queen to be Cuſtos Rotulorum for that County, and that the Office of Clerk of the Peace, being void the ſaid Earl did by a Writing under his Hand and Seal appoint the Plaintiff Mr. Harcourt to be Clerk for ſo long as he ſhould demean himſelf well, &c. and that he was duly qualified, &c.

They find that in Anno 3 Willielmi & Mariæ, the ſaid Cuſtos was removed from his Office, and that William Earl of Bedford by Letters Patents, &c. was made Cuſtos in his Room, who by writing under his Hand and Seal, did conſtitute the Defendant John Fox to be Clerk of the Peace of the ſaid County, during the Time the Earl ſhould enjoy the Office of Cuſtos, and ſo as he well demean himſelf, &c. that he was likewiſe duly qualified, and that he took upon him the Execution of the ſaid Office, and received the Fees, &c.

The Queſtion upon this ſpecial Verdict was, Whether the Plaintiff being Clerk of the Peace by John Earl of Clare, had a good

good Title to hold that Office during Life, or whether it was dependent upon the Custos and determined by his Removal?

And as to that it was considered how this Office stood at the Common Law before the making of those Statutes of H. 8. and Ed. 6. and how it stands at this Time upon the new Act of this King.

At the Common Law all Officers of Justice had Estates in their respective Offices during Life, and could not be removed but for Misdemeanors: So was the Clerk of the Crown in B. R. and in Chancery; so are the Clerks in the Exchequer and the Filacers of the Common Pleas; and in this respect, the Wisdom and Policy of the Law was very great, because when Men held their Offices for Life, it was an Encouragement to the faithful Execution of their Duties; it was then also they endeavoured to acquire Knowledge and Experience in their Employments, having a durable and fixed Estate therein, and not liable to be displaced at the Pleasure of those who put them in.

Now tho' it cannot be said that the Clerk of the Peace is an Officer at the Common Law, yet he shall have an Estate for Life in his Office, because of the Uniformity between him and Officers of superior Courts; for his being nominated by the Custos doth not make him dependent on that Officer any more than the Clerk of Assize, who is appointed by a Judge, but hath an Estate for Life, and no Dependence upon that Judge who made him.

Neither is the Clerk of the Peace a Clerk to the Custos, but to the Justices in their Sessions; he hath his Fees and Wages allotted out of the Fines and Amerciaments arising in their Courts, he is incorporated by a Statute; for in a Robbery the Hundred shall be sued in his Name: In 2 H. 7. fol. 1. he is called Attornatus Domini Regis; he joins Issue upon Traverses; joins in Demurrers, and in many other Instances he is in the Court of Sessions as the Clerk of the Crown is in B. R. 12 R. 2. cap. 10. 25 Eliz. cap. 8.

Thus it stood before the making of the Statute of 37 H. 8. the Custos at that Time being entirely at the Nomination of the Lord Chancellor; but by that Law he is restrained sub modo; that is, he shall still make a Custos, but not without a Bill signed by the King, appointing the Person; and by this Statute the Clerk of the Peace was made dependent on the Custos, who could grant that Office but only to continue during the Time he was Custos; so that when he was removed, the other was determined.

But it was found by Experience to be very inconvenient, that upon every Death or Removal of a Custos, the King should be troubled by Petition to sign a Bill, &c. therefore

by the Statute of Ed. 6. the Cuſtos is reſtored to his former Right, viz. to be appointed by the Lord Chancellor, as if that Act had never been made; but it doth not mention the Clerk of the Peace, ſo that he remained as before.

But then by the Statute of 1 W. & M. he is likewiſe reſtored to his former Right: For now the Statute of Ed. 6. is repealed, and the Cuſtos is to be as directed by the Statute of H. 8. and ſo far 'tis a Reviver of that Law; but then it ſettles in what Manner he ſhall appoint a Clerk of the Peace, viz. Not for ſo long Time as he ſhall continue Cuſtos; but for ſo long Time ONLY as the Clerk by him named ſhall behave himſelf well in the Office; and ſo far 'tis introductive of a new Law, or rather reſtoring the Clerk of the Peace to that antient Right which he had to this Office during his Life, before the making of any of theſe Statutes.

Now it ſeems that the Parliament intended him an Eſtate for Life; for the Words, viz. So long as he ſhall behave himſelf well, do naturally import as much: Beſides, 'tis made unlawful to buy or ſell this Office, and an Oath enjoined this Officer before he enters upon the Execution of it; the Meaning of which muſt be, that when he is in he hath an Eſtate for Life: For what Need is there of ſo much Care if he was to be removed at Pleaſure, or had any Dependence upon the Cuſtos?

And as to that 'tis plain, that by the Frame and Penning of this Act he hath no Relation to or Dependence upon the Cuſtos, when once he is in his Office; for his Miſbehaviour is not to be puniſhed by the Cuſtos, but by the Juſtices, who may ſuſpend or diſcharge him, which they could not do before this Act, for it was then wholly in the Power of the Cuſtos: He is now to be reſident in the County, which was not enjoined before; he may make a Deputy without the Approbation of the Cuſtos, which he could not by the Statute of H. 8. ſo that now there is another ſort of Power and Juriſdiction over him which was not before.

And as there is another Juriſdiction over him, ſo he hath another Intereſt veſted in him by this new Law, which he had not by that Statute; for as to the Appointment to this Office both theſe Acts are penned alike, viz. it ſhall be by the Cuſtos; but then the Act of H. 8. limits his Eſtate only, during the Continuance of the Cuſtos in his Office; and this new Act leaves out that Clauſe, and limits it for ſo long Time only as he ſhall demean himſelf well: So that both theſe Laws are in the Affirmative, and becauſe they both concern the ſame Office, and the latter is introductive of a

new Law, therefore that muſt be obſerved, and 'tis as abſolute a Repeal of the former, as if there had been negative Words for that Purpoſe.

Laſtly, to ſhew that the Clerk of the Peace hath no Manner of Dependence upon the Cuſtos this new Statute provides, That upon the Neglect or Refuſal of the Cuſtos the greateſt Part of the Juſtices in their Seſſions ſhall appoint one: And if that be done as it may, then no Man will ſay, that ſuch Clerk can depend upon the Cuſtos: And if his Office ſhall continue during Life as it certainly will, what Reaſon can be ſhewn why one appointed by the Cuſtos ſhould not enjoy it in like Manner?

Econtra. Whatever the Common Law was in Relation to Offices and Officers, it can be nothing to this Purpoſe; for this Caſe depends only as the Law now ſtands upon the Penning of theſe ſeveral Statutes,

Juſtices of Peace were made by the Statute of 1 Ed. 3. but that Office is not mentioned there, neither was there any ſuch Officer in the ſucceeding Reign of R. 2. 'Tis very probable that the Cuſtos himſelf was then the Clerk to the Juſtices, and afterwards when the Office of Cuſtos came to be honorary, a more inferior Perſon was appointed to be their Clerk, and from that Time this Officer was called Clerk of he Peace, but ſtill he was but as a Deputy or Servant to the Cuſtos, and removable at his Pleaſure, as the Cuſtos himſelf was at the Pleaſure of the Chancellor. 1 Ed 3. cap. 16.

Afterwards ſome Chancellors did enlarge their Power by undertaking to make a Cuſtos during Life; and he likewiſe did enlarge his Authority by appointing a Clerk of the Peace to hold that Office during Life: Complaint was made of this Matter to the Parliament of H. 8. and then in the 37th Year of his Reign this Law was made, which gives the Clerk of the Peace no longer Title to his Office, but at Will; it was to depend on the Cuſtos, who likewiſe was to continue in his Office but till the King ſhould appoint another.

It was not the Ignorance or Incapacity of the Clerk, of which the Complaint was in thoſe Days; but only the Duration of his being an Officer; the Complaint was, That he had an Eſtate for Life, which was to pervert the old Inſtitution, and therefore he was made to depend merely on the Cuſtos.

In Ed. 6. Reign, part of the Statnte of H. 8. was repealed, but that Parliament did not meddle with the Clerk of

the Peace; he still remained as before; so that what Alteration is made relating to him must be by this new Law, or none at all.

It has been said that this Law of 1 W. & M. vests him with a new and more durable Estate than he had before, viz. by enlarging it to continue for so long Time only as he shall demean himself well.

But these Words cannot be construed to enlarge his Estate; they are rather restrictive, and are only to express what was implied before: For 'tis a Condition which the Law annexes to all Officers, that they shall behave themselves well in their respective Offices, or otherwise 'tis a Forfeiture.

The Custos is still to be removed at Pleasure: Now if it would be very absurd to say that the Person appointed by him to be Clerk of the Peace should have a more fixed and continuing Estate than he himself; so that by Reason of the Incapacity of the Grantor he cannot have an Estate for Life; for in Construction of Grants there is always a great Regard to be had to the Estate and Power of the Grantor: As, if a Tenant in Tail make a Lease for Life, it shall be intended for the Life of Tenant in Tail; but if a Tenant in Fee maketh a Lease for Life, it shall be for the Life of the Lessee; and the Reason is because of the different Capacities of those two Persons; for the one could make a Lease for no longer than his own Life, and the other may make a Lease for a longer Term.

If there had been any seeming Contradiction between these two Acts, then certainly the last would have repealed the other; but here is no such Thing: for by the Statute of H. 8. the Clerk of the Peace is to hold his Office no longer then the Custos continues to be so; and by this new Law he is to enjoy it, for so long Time only as he shall demean himself well: Now there is no Contradiction in the Limitation of the Estate by both these Laws; for suppose it had been put all together in the same Act, viz. for so long Time as the Custos shall continue, and so long only as he demeans himself well, this would have been very consistent.

Curia. As to the Beginning of this Officer we are much in the Dark, for we can only make some probable Conjectures about it; and as to his Continuance in his Office, 'tis not to be collected out of any of the Law-books before the Statute of 37 H. 8.

'Tis plain, that it was not an Office Time immemorial because the Commission of the Peace is not so.

In 1 Ed. 3. Justices of the Peace were made, which at the Common Law were called Conservators, and the first Beginning

ning of a Cuſtos was in the 34th Year of that King, and the Reaſon why he was then appointed, and not before, was, becauſe the Juſtices could not then agree amongſt themſelves who ſhould keep the Records; and upon Application made to the King concerning this Matter, he (to prevent all Diſputes) appointed a fit Perſon to keep them, and gave him the Cuſtody of the Records in every County; ſo that tho' legally they may be ſaid to be in the Cuſtody of the Juſtices of Peace, becauſe all Writs of Error and Certiorari's are directed to them, yet they are actually in the Poſſeſſion of the Cuſtos.

Afterwards it became incident to the Office of the Lord Keeper to nominate the Cuſtos Rotulorum; and then becauſe of the Neceſſity of one to make Entries, and join Iſſues, the Cuſtos appointed a Clerk for that Purpoſe, who is now called Clerk of the Peace; and this ſeems very agreeable to the Statute of W. 2. by which it appears that ſuch Officers and Clerks who are to enter and enroll Pleas, were always appointed by the Judge or chief Miniſter of the ſame Court. W. 2. cap. 30. 2 Inſt. 425.

Then as to the Caſe in Queſtion, viz. By the Statute of 1 W. & M. the Cuſtos hath Power to appoint a Perſon to execute this Office by himſelf or Deputy, for ſo long time ONLY as he ſhall demean himſelf well, &c. which Words do plainly import an Eſtate for Life; and the Caſe would have been the ſame if the Word ONLY had been left out; for if the Power is given to a Tenant for Life to make a Leaſe for 21 Years only, this would ſignify for ſo many Years abſolutely.

If this Clauſe hath not a Conſtruction to give him an Eſtate for Life, it ſignifies nothing; for if the Caſe is taken to be no otherwiſe then as it ſtood upon the Statute of 37 H. 8. then this Clauſe is of no Uſe; but 'tis plain that the Words in that Act relating to this Matter are omitted in this new Law, viz. That he ſhall continue ſo long as the other is Cuſtos; and a better and more fixed Eſtate is given, viz. quam diu ſe bene geſſerit, &c.

The Statute of 1 W. & M. revives that of H. 8. as to the Nomination of a Cuſtos, but makes ſeveral Alterations from it when it mentions the Clerk of the Peace, as has been well obſerved at the Bar; ſo that the Deſign of this later Act was to abridge the Power of the Cuſtos, and enlarge the Eſtate of the Clerk, and ſo to ſettle him therein that he might go on cheerfully in his Buſineſs: For when places depend upon Contingencies, it occaſions Imbezlling Records and Neglect in Offices, and for this Reaſon my Ld.

Hobart

Hob. 153. Hobart was of Opinion, that the Chief Juſtice cannot grant theſe Offices which are in his Gift for leſs Time than for Life.

Therefore the Clerk of the Peace being in this Office by Vertue of this Act, for ſo long Time as he ſhall demean himſelf well; thoſe Words ſhall be conſtrued moſt favourably to anſwer the Intent of the Law-makers, whoſe Deſign was to have the Office well ſupplied by a Man able and well skilled in the Laws, which will be effected when the Officer hath an Eſtate for Life; and for theſe Reaſons Judgment was given in Trinity Term following for the Plaintiff, and afterwards affirmed in Parliament.

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Term. Sanct. Paſch.

Anno 5 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1693.

Hill *verſus* Gallop.

THE Plaintiff brought an Action on the Caſe for a Diſturbance in a Common, and declared, That he was poſſeſſed of a Meſſuage and ſo many Acres of Land with the Appurtenances in, &c. for a certain Term of Years, yet to come and unexpired, and that per totum idem tempus habuiſſet & gaudere debuiſſet communiam paſturæ pro omnibus averiis levan. & cuban. &c.

Upon Not guilty pleaded, the Cauſe was at Iſſue, and the Plaintiff had a Verdict, and Serj. Tremaine moved in Arreſt of Judgment, becauſe the Plaintiff had not ſhewn any Title in himſelf, either by Grant or Preſcription, Sed non allocatur.

Chief Juſtice. This might be a good Exception upon a Demurrer, but 'tis cured by a Verdict.

Sands

Sands *verſus* Child.

Trin. 4 Willielmi, *Rot.* 129.

3 Lev. 351. ERror of a Judgment in the Common Bench in an Action on the Caſe brought by the Plaintiff Sands, for proſecuting of him in the Admiralty contrary to an Act of Parliament; in which there was a ſpecial Verdict found, and Judgment for the Plaintiff, and Damages to 1500 l.

13 R. 2. cap 5. The Caſe upon the Pleadings was, viz. The Declaration ſets forth the Statute of 13 R. 2 That the Admiralty and their Deputies ſhall not meddle with any Thing, but what is done upon the Sea, &c. then it recites the Statute of 2 H. 4. which

2 H. 4. cap. 11. takes Notice of the former Act, and ordains, That the Common Law ſhall be put in Execution againſt Proſecutors in the Admiralty by an Action on the Caſe, and the Party grieved ſhall recover double Damages, and the Proſecutor being attainted, ſhall forfeit 10 l. to the King.

That on the 13th Day of December, 34 Car. 2. Mr. Sands was going to the Maderas in the Ship called the Expectation laden with divers Goods to trade there, and being about to ſail, the now Plaintiff Child did cauſe a Plaint to be levied againſt him in the Admiralty-Court, and thereupon Proceſs did iſſue out of the ſaid Court to ſtop the ſaid Ship from a Voyage to Infidels without the King's Licenſe, and the Ship was arreſted till Mr. Sands ſhould give Security that he would not ſail into any part of the Limits of the Eaſt-India Company, which he refuſed to do.

They find that King Charles II. did grant to the Governour and Company of Eaſt-India, &c. a Patent, by which they were incorporated, and had the whole Trade to the Indies, prohibiting all other Perſons to trade within their Limits, and the Places in the ſaid Patent contained, upon the Forfeiture of Ship and Goods: That Mr. Sands had prepared this Ship to ſail for the Maderas, and from thence to a certain Place in the Indies, within the Limits of the Company, to trade with the Infidels, to prevent which, the Plaintiff Child and others delivered a Petition to the King in Council (which was found in hæc verba) praying that the Ship might be ſtayed till Security was given not to trade within the Limits of the Company; and thereupon an * Order of Council was made, directRaym 489. ing the Court of Admiralty to iſſue out Proceſs againſt the Ship till Security ſhould be given to the ſaid Court that the

Ship ſhall not trade with Infidels within the Limits of the Charter, and that the Plaintiff Child, and Leech as Agent to the Company, did obtain a Warrant upon this Order againſt the Ship, by Force whereof ſhe was ſtopped.

There was a Judgment for the Plaintiff Sands in the C. B. and Damages in duplo to 1500 l. and a Writ of Error now brought, and the Error aſſigned was in point of the Judgment given, viz. Whether the Matter upon the whole Record is ſufficient to charge the Defendant Child? And as to that the Argument was upon theſe two Points;

(1.) That what was done by him was lawful.

(2.) That he hath not incurred the Penalty of the Statute, becauſe this was not a Proſecution within the Meaning thereof.

As to the firſt Point, it will not be denied, but that the King by his Prerogative may ſtop the Ship of any Subject, and ſhut up the Ports of the Kingdom at his Pleaſure, eſpecially where the Safety of the Nation is concerned, viz. in Time of an imminent Danger; this is confirmed by daily Experience of Embargo's laid on outward-bound Ships.

And as he may ſtop Ships, ſo he may reſtrain the Perſons of his Subjects from departing the Kingdom leſt they ſhould aſſiſt his Enemies; and for this Purpoſe was the Writ Ne exeat regno framed: And after ſuch an expreſs Prohibition, 'tis a Contempt of the King's Authority to depart out of the Realm, and finable by Law. Dyer. 165. b. 296. a.

Now to prevent ſuch Departure of Ships the Method is, and always hath been, to inform the King of the Matter by Petition, who thereupon uſually directs his Advocate or Proctor to require Caution that the Maſter ſhall not trade with Infidels, who are perpetui inimici, and thereupon Proceſs iſſues out of the Admiralty, and the Ship is arreſted; and this is in Conformity to the Common Law of the Land, as may appear by the Writ de ſecuritate invenienda quod ſe non divertat ad partes exteras ſine licentia Regis; and my Lord Coke hath affirmed that he had ſeen ſuch a Licence in the Time of Edward III. F. N. B. 95. Dyer 296. a.

(2) This is not a Proſecution intended by either of the aforeſaid Acts which reſtrain the Juriſdiction of the Admiral; and this will appear, if it be conſidered upon what Complaints and Petitions thoſe Laws were made.

For the Statute of 13 R. 2. was made upon the Petition of ſeveral Lords of Franchiſes complaining that the Admirals and their Deputies had kept their Seſſions within their Liberties, and ſo had encroached upon their Rights.

The other Statute of 15. R. 2. was made upon the like Complaint; but then alſo divers Cities and Burroughs petitioned againſt the Encroachment of the Admirals, by holding Pleas of Contracts, Wrecks, Nuſances, &c. and for ſummoning of People at great Charge and Expence to attend their Courts at London, and impriſoning them upon Refuſal.

Now the Cauſe for which this Ship was ſtopped, was not for doing any Thing prohibited by either of theſe Statutes, or for any Thing contained in the Petition upon which the Order was made; 'tis only that the People ſhould not trade with Infidels without the King's Licence, leſt they ſhould decline from their Faith and Religion; ſo that it was not for doing any Thing, but only a Caution to prevent a Thing from being done.

Then as to the Statute of 2 H. 4. which gives an Action on the Caſe to the Party grieved by a Proſecution in the Admiralty; the Meaning muſt be, when he is grieved by a 2 Cro. 133. vexatious Suit brought in their Court to abridge the Power of the Courts at the Common Law, which was not done by the Defendant, becauſe the Court of Admiralty had a Juriſdiction over this Matter.

Beſides, this laſt Statute which gives the Action againſt the Proſecutor in the Admiralty, doth likewiſe give the King 10l. upon his Attainder: But this Proceeding being by Order from the King himſelf in Council, it can never be intended that he ſhall have any Forfeiture for a Proſecution made by his expreſs Direction, which is a Reaſon why this is not ſuch a Proſecution as is intended by the Act.

But really this was no Suit at all; for there was neither Plaintiff or Defendant, or any Thing in Demand; here was no Libel on which to ground a Prohibition, and ſo by Conſequence no Cauſe for an Action againſt the Plaintiffs in Error, who were only Agents to the Eaſt India Company; ſo that if an Action muſt be brought, it ought not to be by Mr. Sands alone without his Partners, and it ought to be againſt the Company; for theſe Perſons only as their Agents petitioned the King in Council, and required Caution, &c. the King directed the Method; ſo that if this is a Godb. 385. Suit, and if 'tis a Proſecution, it was for the Benefit of the 1 Roll. Abr. Company, And the Action ought to be brought againſt them, 29. and it being upon a Penal Law ought not by Equity to be

extended to the Agents; for they are not to be puniſhed by ſuch a Law, unleſs named; and therefore in the Statute of Præmunire and other Statutes they are expreſly named. 16 R. 2.

Econtra: (1.) The Stopping of this Ship was illegal.

At the Common Law no Man is prohibited to travel out of the Realm; the Seas are open, and he might go whither he would, without any Reſtraint upon his Perſon or Goods, whether he traded with Infidels or not; and this appears by the Statute of 26 H. 8. cap. 10. which gave the King Power (during his Life) to reſtrain Trading beyond Sea, to particular Places; which had been to little purpoſe, if he could have done it by his Letters Patents without the Help of an Act of Parliament; and the Common Law being reſtored by the Expiration of that Act, no Force or Reſtraint can now be put upon any Man's Property without a Breach of the Peace. Lit. Red. 27. Noy 182.

No Inference can be made from Embargo's, or from the Writ Ne exeat regno, to extenuate what was done in this Caſe; for the one is never laid upon Ships but in Time of War; 'tis a Prohibition of State by Advice of the Council, and not at the Proſecution of Parties, as this was, under the Pretence of Trading to Infidels; for both Mr. Sands and his Ship's-Crew might have gone to any Infidels, ſo that they would refrain from thoſe of the Company. 2 Inſt. 54.

Then as to the Writ Ne exeat regno, 'tis only granted, and that very rarely too, upon particular Reaſons, and for particular Purpoſes, to prohibit a ſingle Perſon from departing the Kingdom, and not ſo many Men as were going this Voyage to trade beyond the Seas.

(2.) The Defendant in this Action might as well have impounded a Man's Cattle till he give Security not to commit a Treſpaſs; he might as well have levied Money before Judgment, or ſeized before a Trial or Conviction, which is very like this Caſe, ſo that what he did cannot be lawful; and the finding of the Charter is not material, for if by that they had any Power to ſtop the Ship, then there had been no need of petitioning the Council.

Neither can it be doubted whether this is a proſecution within the Meaning of the Act, for the Preferring of a Petition was intermedling with a Thing not done upon the high Sea; there was an Advocate and Proctor; there was an Allegation and Surmiſe of the Matter of Complaint; then a Prayer that the Court would make a Decree againſt the Ship; then there was a Judgment and

a Warrant upon it, which was executed; and can it be doubted, after all this, whether it was a Judicial Proſecution or not?

But a Proſecution it is, and that which is within the Meaning of the Statute; for the Arreſting of the Ship infra corpus Comitatus, where the Admiral can have no Juriſdiction, is ſuch a Proſecution as 'tis clearly againſt the Statute; for the Property of Goods, tho confiſcated, ſhall not be tried by him, but by the Common Law; and therefore Cornero a Spaniard having committed ſeveral Crimes in Spain, by which he had incurred the Forfeiture of his Goods, brought them into England, and ſold them to Sir John Watts, againſt whom Don Alonſo de Velaſco libelled in the Admiralty, and prayed an Attachment of the Goods in the Hands of Sir John; but a Prohibition was granted.

Hob. 212.

'Tis a weak Objection to ſay that this cannot be a Proſecution, becauſe there was no Defendant; for the Proceedings in the Court of Admiralty are againſt the Ship, and the Owners uſually come in pro intereſſe ſuo; and 'tis yet a weaker Objection that Mr. Sands is not a Party grieved, for the Damages are direct, and not conſequential; the Taking of the Ship out of his Poſſeſſion is the Cauſe of the Action; neither are all conſequential Damages rejected by the Law, but ſuch only which are far off, and ſuch of which there is no Certainty whether they may happen or not.

Laſtly, Mr. Sands alone may bring this Action, becauſe he had the Ship in his Poſſeſſion, and therefore was the Principal; and tho' the Property of the Goods was in ſeveral Men, yet none had a Right to the Ship beſides himſelf: 'Tis true Merchants have a ſeveral Intereſt in their Goods, and may therefore have ſeveral Remedies, but the Maſter alone hath a Right to the Ship.

1 & 2 Phil. & Ma. c. 12.

By the Statute of 1 & 2 of Philip and Mary the Penalty of 5 l. is given where a Diſtreſs is taken, and driven above three Miles out of the Hundred; if the Cattle of three Men are diſtrained, and drove out of the Hundred, &c. each of them ſhall have an Action for 5 l.

Dyer 159. b.

The Caſe of Dominſo Bylota doth ſomething reſemble this, viz. Two Men bought a Ship of him at Land, and ſued him upon the Contract in the Admiralty Court, and for this Offence he brought an Action againſt one alone, and it was held good; but that of Swanton and Willett there cited, is directly to the Point, which was viz. Two Men ſued in the Admiralty for a Cauſe ariſing at Land, the King and

one of the Perſons grieved brought an Action againſt one of the Proſecutors, without ſhewing the Death of his Companion; and the Judgment was, that the Party grieved recuperet dampnum & quod Defend. pœnam 10. erga Regem per Statut. prædict. incurrat & capiatur, & quod Dominus Rex recuperet verſus Defend' 10. l. & capiatur. In which Caſe both the Coſts and Damages are doubled. 1 Leon. 282. 8 Rep. 115. 3 Cro. 582.

But 'tis in no ſort like the Caſe lately adjudged in the B. R. between * Boſon and Standford, which was this; an Action was brought againſt the Defendant, for that he and ſeven other Perſons were Proprietors of a Veſſel which uſed to carry Goods for Hire, and that the Plaintiffs Goods were dampnified by the Negligence of the Defendant, who was one of the Proprietors, againſt whom alone the Action was brought: There it was held, that tho' there was no actual Contract between the Plaintiff and the Part-owners, yet they all having an equal Benefit, and the Ground of the Action ariſing upon a Truſt which ſuppoſes a Contract, the Action ought not to be brought againſt one, but all. *3 Mod. 321.

But this Action ariſes upon a Treſpaſs, and not upon a Contract, in which one may ſue alone without joyning of his Partners, and in which conſequential Damages may be given, as loſs of Time, &c. As, if an Action of Battery ſhould be brought for Breaking of a Leg, 'tis not neceſſary to give in Evidence that the Party cannot go, becauſe 'tis the Conſequence of breaking; therefore ſuch Damages which were given here, are of immediate Conſequence, and within the Statute, for which the Party ought to be relieved, as well as for the Taking of the Ship.

Then as to the Action being brought againſt the Agents, and not againſt the Company, 'tis well enough, becauſe 'tis impoſſible to ſue the Company; for it doth not appear that they were concerned in this Proſecution, or that it was done by their Order. And tho' they acted as Agents or Attornies, yet they muſt take Care to do what is lawful; and here even the Company it ſelf could not juſtifie this Proſecution, neither ſhall their Attorney or Agent.

Afterwards in Michaelmas Term the Judgment was affirmed: But per Curiam, the Partners ought to have been joyned with the Plaintiff in this Action; which not being done, the Defendant might have pleaded it in Abatement, and averred that they were living at the Time of the Action brought, which had been a good Plea; but this likewiſe was omitted, and therefore the Plaintiff had his Judgment.

Hinks

Hinks *verſus* Harris.

The Defendant married one Siſter, who died, and afterwards he married the other, by whom he had Iſſue; he was proſecuted in the Arch-Deacons Court of Litchfeild for an Inceſtuous Marriage; pending that Suit his ſecond Wife also died, ſo that according to * Kenn's Caſe, all Proſecution in the Eccleſiaſtical Court ought to ceaſe; for after the Death of either of the Parties before a Divorce, they cannot proceed there to declare the Marriage void, and baſtardize the Iſſue.

* 7 Rep. 44. b.

But notwithſtandnig that Authority, Sentence was given in this Caſe declaring the Marriage to be void; and upon a Motion in B. R. for a Prohibition, Cauſe was ſhewed why it ſhould not go, viz. becauſe this was an Offence of Eccleſiaſtical Cognizance, and that Court had the proper Juriſdiction over it.

Kenn's Caſe is, That no Proceedings ſhall be in order toa Divorce, where both Parties are dead; but here is one living who may defend the Suit.

Econtra. There is no Occaſion for a Divorce when the Death of one of the Parties hath determined the Marriage; but the Conſequence of this Proceeding is to baſtardize the Iſſue.

The Inceſt may ſtill be determinable in that Court, but then the Marriage muſt not be declared void; let the Party be puniſhed if the Marriage was inceſtuous, but quoad the Sentence of Divorce a Prohibition was prayed, which was granted niſi.

Dixon *verſus* Terry.

Hill. 4 Rot. 848.

IN Treſpaſs, Aſſault and Battery the Defendant pleaded a General Releaſe of all Actions, &c. from the Beginning of the World uſque ad diem datus of the ſaid Releaſe; and it happened that the Battery was done upon that very Day in which the Releaſe was dated, ſo that it was held that this Action was not diſcharged, for the Releaſe did not include that Day: The Defendant ſhould have traverſed all, &c. after the Day of the Date of the Releaſe.

Owen 50.

De la Baſtide *verſus* Reynell & Ux'.

Upon a Writ de homine replegiando, the Sheriff returned elongavit; thereupon a Capias in Withernam iſſued forth; then the Defendants entred an Appearance with the Philazer, and a Motion was made for a Superſedeas to the Withernam, and that they would plead non ceperunt; for they are not to be concluded by the Return of the Sheriff, which was traverſable.

This was oppoſed, unleſs they would give Bail to deliver the Perſon in Caſe the Iſſue ſhould be found againſt them.

Curia. There is no Difference between a common Replevin and an Homine replegiando as to this matter; neither is there any other Return to this Writ than Elongavit, which is, that the Party cannot be found.

If the Defendants had claimed any Property, then they are to gage deliverance; but that is not done, for they ſay they have not the Perſon, therefore let them plead non ceperunt, and put in Bail to appear de die in diem.

Wharton *verſus* Liſle.

Hill. 3. Rot. 56.

TRover and Converſion for taking of 20 Cart-Loads of Flax, Oats and Wheat, &c. 3 Lev. 365.

Upon not guilty pleaded, the Jury find as to the Oats and Wheat, Not guilty; and as to the Flax they find ſpecially, viz. That the Plaintiff was Impropriator of the Pariſh-Church of Thorp in the County of Eſſex, and that all great Tithes ariſing there have been uſually paid to him; that the Defendant was Vicar there, and had all the ſmall Tithes in the ſaid Pariſh; that in the year 1691. there were 650. Acres of arable Land ſown in the ſaid Pariſh with all ſorts of Grain, whereof 20 Acres were ſown with Flax, that on the 5th of June 3 Willielmi the Lands being ſo ſown, and the Tithes ſet out, the Defendant carried them away, &c.

The Queſtion was, Whether the Tithes of Flax were great or ſmall Tithes?

Serjeant

Serjeant Rotheram for the Plaintiff, That theſe are great Tithes. At the Common Law there is no ſuch Perſon known as a Vicar, the Parſon had all the Tithes, and Vicaridges began in the Reign of H. 3. by a Conſtitution of Pope Urban the Eight, and afterwards the Vicars became Spiritual Perſons; and before the Statute of W. 2. a Quare impedit would not lie for diſturbing of a Patron to preſent to a Vicaridge; and till the Statute of 14 E. 3. a Vicar could not maintain a Juris utrum againſt the Patron.

W. 2. c. 5.
14 Ed. 3. c. 7.
2 Roll. Rep. 97.

When he is entitled to Tithes, it muſt be by Endowment or Preſcription; it cannot be by Endowment in this Caſe, becauſe the Jury have not found it ſo: Beſides, Flax was not ſown in England at the Time when the firſt Statutes were made for Endowing of Vicaridges.

15 R. 2. c. 6.
4 H. 4. c. 12.

Neither can this Vicar preſcribe to have theſe Tithes, becauſe the Parſon had them one Year, and the Vicar for 7 Years paſt.

Now admitting that the Tithes of Flax are in themſelves minutæ decimæ, yet when 'tis ſown in great Fields, and in large Quantities, it loſes that Quality, and ſavours of the Nature of great Tithes.

Econtra. Flax is an Herb in its Nature, and ſo it was adjudged in Noah Webb's Caſe.

1 Roll. Abr. 643.

The Quantity of Land on which 'tis ſown, cannot alter the Nature of the Thing either to make it great or ſmall Tithes; for if a whole Field ſhould be ſown with Saffron, the Tithes thereof would be but minutæ decimæ, for it grows in the Nature of an Herb, and 'tis that which together with Cuſtom and Uſage, and not by the Husbandry of the Land, Makes it ſmall Tythes.

Cro. Car. 28.

Dolben Juſtice. If Wheat is ſown in a Garden the Parſon ſhall have Tithes, and not the Vicar; and if Flax is ſowed in a Field, the Vicar ſhall have the Tithes, becauſe of the Nature of the Thing, quod fuit negatum per alios; for Peaſe and Beans when ſown in a Garden, yield only ſmall Tithes, but when in large Fields 'tis otherwiſe; and upon this Difference, viz. when a little Land, or great part of a Parish is ſown with things of this Nature, the Tithes from thence ariſing are either great or ſmall; and 'tis upon this Reaſon that Hops in Kent have altered the Quality of the Thing, becauſe they are planted there in great Quantities.

Afterwards in Trinity Term Judgment was given for the Defendant by three Judges, abſente C. J. who was of Opinion, that the Sowing of Flax in large Fields, makes the Tithes thereof great Tithes.

Barkſdale *verſus* Morgan.
In the Common Pleas.

IN Covenant a ſpecial Verdict was found in which the Caſe was as followeth, viz.

In Conſideration of 20 Guineas paid by the Plaintiff to the Defendant on ſuch a Day, &c. he did covenant, &c. upon Payment of 500 l. more within one Month next following, upon Notice to transfer to him certain Shares in the East-India Company, and the Plaintiff did aver that he did tender the 500 l. within a Month, &c.

The Defendant pleaded, that the Plaintiff did not tender the 500 l. within a Month, for that before ſuch Tender 28 Days were paſt from the Day of the Date of the Agreement.

The Truth was, he did tender the 500 l. after the 28 Days, but within a Calendar Month, and it was ſo found by the Jury; ſo that the Queſtion was, What ſhall be intended a Month within this Agreement?

Thoſe who argued for a Kalendar Month, inſiſted, that the Statute of H. 4. gives the Juſtices Power within one Month next after a Riot committed, to enquire into the ſame, and that it hath been held they may make ſuch Enquiry after the 28 Days; which ſhews that the Parliament intended a Kalendar Month. 13 H. 4. ca. 7. Sid. 186.

And as ſuch a Month was intended by them, ſo this Court may judicially take Notice of ſuch a Month; and therefore a Judgment being obtained in an inferior Court, the Error aſſigned was, that it was given at a Court held on the 16th Day of February, which was Sunday, and the Queſtion being, Whether this Matter ſhould be tried by a Jury, or by the Almanacks of the Year? it was held ſufficient to examine it by Almanacks; and the Court was informed by them. Cro. Eliz. 227. 1 Leon. 242. Id.

Econtra. viz. The Words in this Agreement, viz. to pay 500 l. within a Month next following, ſhall be accounted the next, or neareſt Time to the Day of the Agreement, which muſt be 28 Days.

So it is in a Bond dated primo Maii, with a Condition to pay Money on the 15th Day of May next enſuing; theſe laſt Words ſhall refer to the 15th Day of the ſame Month, and not to the Month it ſelf, which would be a Year afterwards, and regularly a Month is accounted no more 2 Cro. 646. 1 Inſt. 135. Yelv. 100. 2 Cro. 166.

than 28 Days, unless 'tis in a Quare Impedit, and there a few Days more are allowed on purpose to save a Lapse.

'Tis likewise so in a Lease rendring Rent at the two most usual Feasts in the Year, or within a Month after; and if 'tis behind by the Space of eight Weeks, then, &c. these eight Weeks shall be reckoned according to 28 Days.

Dyer 142. a.

Curia. In common Parlance the Month is taken to be 28 Days in all Cases but in a Quare Impedit, and therefore it must be so many Days according to the common and known Acceptation of the Word; and to prove this some Cases were offered, viz. If I promise to deliver an Indenture before the End of Trinity Term next ensuing, and this Promise happens to be made on the 5th. of June the Term began two Days after, but the Essoin-day was two Days before the Promise made; now tho' that Day in Law is the first Day of the Term, and so the Delivery of the Indenture was not to be till Trinity Term a Year afterwards, yet in common Speech the first Day of the Term is when the Judges sit, and so the Delivery of the Indenture was adjudged to be made that very Trinity Term in which the Promise was made.

Cro. Eliz. 219.

And as Words and Phrases of Speech are to be expounded and construed as they are generally understood, so 'tis likewise in particular Places; and therefore if I covenant to convey to another an Acre of Land in Cornwall, the common Acceptation of the Word Acre there amounts to as much as an hundred of other Counties; so a Perch in Staffordshire is as much as twenty Perches in some other Places, therefore such Words must be governed by the common and known Acceptation of the People.

By the Statute of 2 Ed. 6. the Suggestion on a Prohibition ought to be proved within six Months next after the Prohibition granted, the Computation must be after the Rate of 28 Days to the Month; and so it was held in this Case.

Lit. Rep. 19. Cro. Eliz. 835. 2 Cro. 529. Manw. Forest Law 92.

Smith *versus* Kemp.

2 Salk. 637.

Trespass was brought against the Defendant, who was the Owner of the Soil, quare vi & armis clausum ipsius (the Plaintiff) fregit & intravit & liberam piscariam piscatus fuit, & pisces retibus cepit, &c.

There was a Verdict for the Plaintiff and a Motion was made in Arrest of Judgment, and these Exceptions taken.

4 (1.) That

(1.) That an Action of Treſpaſs, quare vi & armis, &c. would not lie againſt the Owner of the Soil.
(2.) It doth not lie for taking Fiſhes in Libera Piſcaria.

Firſt, It was compared to a free Warren in the Soil of another, quare vi & armis in libera warrena ſua latibula ejuſdem warrenæ proſtravit will not lie: The proper Remedy is a ſpecial Action on the Caſe for the Wrong done, and ſo it ought to have been here. 2 Roll. Abr. 550.

2. To fiſh in libera piſcaria is the ſame Thing as to fiſh in Communi Piſcaria; and a Commoner cannot bring an Action of Treſpaſs for any Treſpaſs done upon the Common.

Curia. In 46 E. 3. the like Action was brought for fiſhing in libera Piſcaria; and it doth not appear by the Book but the Action was maintainable; but if 'tis a Fault, 'tis cured by the Verdict; and it ſhall now be intended that they were the Plaintiff's own Fiſh. 46 Ed. 3. 11.

Bowden *verſus* Shaw.

TWyford was indebted to the Plaintiff Bowden in 70 l. for which he was arreſted, and being in Cuſtody of Aſhby, a Serjeant of the Mace in London, was diſcharged at the Inſtance of the Defendant Shaw, by giving a Bond to the ſaid Aſhby for the Uſe of the Plaintiff; That Twiford ſhould either render himſelf, or put in Bail at the Return of the Writ, or pay the Plaintiff 70 l. which not being done, the Plaintiff now brought an Action of Debt againſt Shaw upon this Bond.

The Defendant pleaded, That the Officer took the Bond colore officii, abſq; hoc, &c. That Tywford was at large at that Time; and upon a Demurrer it was ſaid, this was an immaterial Traverſe.

But admitting it to be ſo, the Plaintiff ſhall take no Advantage of it upon a general Demurrer; he ought to have demurred ſpecially, and ſhewed it for Cauſe.

Then as to the Matter it was held, That the Officer having taken ſuch a Bond to enlarge a Perſon without the Privity of the Plaintiff, who had Power either to confine or let him go, 'tis void; and tho it be taken to his Uſe, 'tis within Cro Eliz. 190.

within the Equity of the Statute; but it might be otherwiſe if the Bond had been made to the Plaintiff himſelf.

Knight *verſus* Keech.

Paſch. 3 Willielmi, *Rot.* 374.

3 Lev. 319. THE Caſe was, viz. There were mutual Promiſes and Agreements between the Plaintiff and Defendant, which were ſpecially ſet forth in the Declaration, in which the Plaintiff alledged generally that the Defendant non performavit agreamentum ſuum prædictum, without ſhewing a particular Breach.

There was a Verdict and Judgment for the Plaintiff in the Common Pleas, and now a Writ of Error brought, and it was aſſigned for Error that the Breach was too general, which being Matter of Subſtance the Right of the Action could not be tried; and therefore 'tis not within any of the Statutes of Jeofails; and to prove this many Caſes were cited, which reſembled this, viz. That non performavit agreamentum could not be good without ſhewing wherein.

Cro. Eliz. 292. As in Conſideration that he would relinquiſh Rent due, a Promiſe was made to pay 30 l. And an Allegation in facto that he did relinquiſh the Rent, but becauſe he did not ſhew how, the Judgment was arreſted.

Hob. 57. So where a Horſe was bought for a Piece of Gold in Hand, and 11 l. more to be paid at the Death or Marriage of the Plaintiff; for which he was to be bound with ſufficient Sureties; and thereupon the Defendant promiſed to deliver the Horſe; the Plaintiff offered to be bound, but becauſe he did not averr that he tendered a Bond ready ſealed, &c. that ſo it might appear that both he and his Sureties were bound in a competent Sum, the Judgment was likewiſe arreſted.

Many more Inſtances may be given where the Plaintiff muſt ſhew the preciſe Conſideration agreed on to be performed: as, if a Promiſe ſhould be made, that in caſe the 2 Cro. 503. Plaintiff would acquit a Man of 100 l. due, the Defendant promiſed to pay the Money: Now tho' he alledged in facto that he did acquit him, 'tis not ſufficient without ſhewing how.

So a Promiſe to pay Money before the Plaintiff began his next Journey to London, and he alledged, That he began his Journey on ſuch a Day; but becauſe he did not aver that to be the next Journey after the Promiſe, nil capiat per billam.

Econtra. There is no Form in the Regiſter preſcribed to an Action on the Caſe; for if there is ſufficient Matter diſcloſed in the Declaration, to which the Defendant ought to anſwer, 'tis well enough.

This is a Negative, viz. Non performavit; and ſo not like thoſe Caſes of affirmative Promiſes or Covenants where the Breach muſt be averred: Beſides, in this Caſe the Plaintiff could not have a Verdict, if the Non-performance of the Agreement had not been fully proved.

Goods were delivered to a Perſon, and the Defendant promiſed that he would Warrant all the Money that was owing for them; the Breach was for Non-payment of the Money; and although it was objected it ſhould be for not warranting, yet it was held well enough. Sid. 178.

Likewiſe if a Promiſe is of 1000 l. to ſave another harmleſs from an Eſcape, the Breach aſſigned was for not ſaving harmleſs, which is the Giſt of the Action, without ſaying that he had not paid the 1000 l.

At another Day the Judgment was affirmed upon theſe Authorities following, viz.

In 3 H. 6. 8. Debt was brought upon a Leaſe, in which the Defendant was bound to perform ſeveral Covenants, or otherwiſe to forfeit ſo much, &c. the Breach aſſigned was, That he had broke all the Covenants, and did not ſhew any particular Breach, which is a harder Caſe than this, and yet it was held good. Dyer 297. b.

If Promiſes are executory on both ſides, Performance need not be averred, becauſe 'tis the Counter-promiſe and not the Performance that raiſes the Conſideration; and therefore where the Plaintiff promiſed to deliver a Cow to the Defendant, and he promiſed to pay him 50 s. the Plaintiff need not aver the Delivery of the Cow, becauſe without ſuch Averment a Promiſe againſt a Promiſe made at one and the ſame Time is a ſufficient Ground for an Action. Hob. 88. 106. Cro. Eliz. 543.

And for a latter Authority this Caſe was remembred, viz. There was an Agreement between the Plaintiff and Defendant, That the Plaintiff ſhould pull down old Walls, and build a Malt-houſe, and that the Defendant would pay him 8 l. pro labore ſuo; The Plaintiff averred, that after the Agreement, paratus fuit & obtulit performare, &c. he had a Verdict, and this was held good enough after a Verdict, without avering Performance of the Work. 2 Saund. 351.

And therefore upon theſe Authorities, and for that the Promiſes in this Caſe were mutual, the Breach was held to be well aſſigned, and thereupon Judgment was given for the Plaintiff.

The

The King and Queen *verſus* Biſhop of *London* and Dr. *Lancaſter*.

Middleſex ſſ.

HEnricus Epiſcopus London & Willielmus Lancaſter ſacræ Theologiæ Profeſſor ſummoniti fuer. ad reſpondend. Dno. Regi & Dnæ. Reginæ nunc de placito quod permittant ipſos Dominum Regem & Dnam. Reginam præſentare idoneam perſonam ad vicariam Eccleſiæ Sancti Martini in Campis quæ vacat & ad ſuam ſpectat donationem &c. Et unde Johannes Sommers Miles Attorn. dictorum Dni. Reg. & Dnæ. Reginæ nunc Generalis qui pro eiſd. Dno. Rege & Dna. Regina ſequitur pro eiſdem Dno. Rege & Domina Regina dicit quod quidam Humfridus nuper Epiſc. London fuit ſeiſit. de advocatione vicariæ Eccleſiæ paroch. Sancti Martini in Campis præd. ut de uno groſſo per ſe ut de feodo & jure in jure Epiſcop. ſui prædict. Et ſic inde ſeiſit. exiſten. ipſe predict. nuper Epiſcopus eo quod eadem vicaria fuit in Dioceſ. ſua London eandem vicariam vacantem contulit Thomæ Lamplugh Sacræ Theologiæ profeſſori Clerico ſuo qui virtute Collationis illius in corporal. poſſeſſion. ejuſdem vicariæ poſit. fuit tempore pacis tempore Domini Caroli Secundi nuper Regis Angl. &c. eodemque Thoma vicar. vicariæ præd. ut prefertur exiſten. idem Thomas Lamplugh poſtea in Epiſcopum Epſcopatus Exon. rite & canonice creat. & conſecrat. fuit & vicaria præd. vacavit per promotionem dicti Thomæ Lamplugh ad præd. Epiſcopat. Exon. per quod ad eundem nuper Regem Carolum ſecundum ratione prærogativæ ſuæ Regiæ Coronæ ſuæ Angliæ annex. idoneam perſonam ad vicariam præd. ſic vacantem pertinuit præſentare per quod præd. nuper Rex Carolus Secundus ratione prærogativæ ſuæ Regiæ præd. ad vicariam præd. tunc ſic vacantem præſentavit Willielmum Lloyd Sacræ Theologiæ profeſſorem Clericum ſuum qui ad eandem præſentationem ipſius nuper Regis fuit admiſſus inſtitut. & induct. in eadem tempore pacis tempore dicti nuper Regis eodemque Willielmo Lloyd vicario vicariæ præd. ut præfertut exiſten. idem Williel. Lloyd poſtea in Epiſcopum Epiſcopat. Aſaphen. rite & canonice creat. & conſecrat. fuit & vicaria præd. vacavit per promotionem præd. Willielmi Lloyd ad pred. Epiſcopat. Aſaphen. per quod ad eundem nuper

Quare impedit.

The Parſon made a Biſhop.

The King grants by his Prerogative to another.

The late Biſhop of London *ſeized,* Ut de uno groſſo jure Epiſcopatus.

Who was inſtituted and inducted.

And collated.

Which Parſon preſented was afterwards made a Biſhop.

per Regem Carolum Secundum ratione prærogativæ ſuæ Regiæ Coronæ ſuæ Angliæ annex. idoneam perſonam ad vicariam præd. ſic vacantem pertinuit præſentare per quod præd. nuper Rex Carolus Secundus ratione prærogativæ ſuæ Regiæ præd. ad vicariam præd. ſic tunc vacantem præſentavit Thomam Tenniſon Sacræ Theologiæ profeſſorem clericum ſuum qui ad eandem præſentationem ipſius nuper Regis fuit admiſſus inſtitut. & induct. in eadem tempore pacis tempore dicti nuper Regis eodemq; Thoma Tenniſon vicario vicariæ præd. ut prefertur exiſten. idem Thomas Tenniſon poſtea in Epiſcopum Epiſcop. Lincoln. rite & canonice creat. & conſecrat. fuit & vicaria præd. vacavit per promotionem dicti Thomæ Tenniſon ad præd. Epiſcop. Lincoln. & adhuc vacans exiſtit per quod ad ipſos Dominum Regem & Dominam Reginam nunc ratione prærogativæ ſuæ Regiæ predictæ idoneam perſonam ad vicariam præd. ſic vacantem ad præſens pertinet præſentare & prædict. Henricus Epiſcopus London & Willielmus Lancaſter ipſos Dom. Regem & Dominam Reginam nunc injuſte impediunt ad damnum ipſorum Dni. Regis & Dnæ. Reginæ nunc quingentarum librarum & hoc idem Attorn. dictorum Dni. Regis & Dnæ. Reginæ nunc Generalis qui &c. pro eiſdem Dno. Rege & Domina Regina parat. eſt verificare &c.

And the King preſented another.

Who was inſtituted and inducted.

Which Perſon was afterwards made a Biſhop.

And the King was hindred in his Preſentation.

Et præd. Henricus Epiſcopus London & Willielmus Lancaſter per Adam. Baynes Attorn. ſuum ven. & defend. vim & injur. &c. & petunt auditum brevis pred. & eis legitur in hæc verba ſcilicet Guilielmus & Maria Dei Gratia Angl. Scotiæ Franciæ & Hiberniæ Rex & Regina fidei defenſor. &c. vic. Middleſex ſalut. præcipe Henrico Epiſc. London & Willielmo Lancaſter Sacræ Theologiæ Profeſſori quod juſte & ſine dilatione permittant nos præſentare idoneam perſonam ad vicariam Eccleſiæ Sancti Martini in Campis quæ vacat & ad noſtram ſpectat donationem & unde præd. Epiſcopus & Willielmus nos injuſte impediunt ut dicitur & niſi fecerint ſum' per bonos ſum. præd. Epiſcopum & Willielmum quod ſint coram nobis a die Sancti Michaelis in tres ſeptimanas ubicunq; tunc fuerimus in Angl oſtenſ. quare non fecerint & habeas ibi ſum' & hoc breve Teſte nobis ipſis apud Weſtm. 26 die Septembris Anno Regni noſtri quarto Cæſar quo lecto & audito iidem Epiſcopus & Willielmus petunt judicium de brevi & narratione præd. quia dicunt quod inter breve & narration. pred. materialis habetur variatio in hoc videlicet

Placitum.

The Defendants pray Oyer of the Writ.

And plead a Variance between the Writ and Count.

videlicet quod ubi per breve præd. prædicti Dominus Rex & Domina Regina intitulant ſe ad donationem præd. vicariæ Eccleſiæ Sancti Martini in Campis pleno jure tamen per narration. præd. iidem Dominus Rex & Domina Regina intitulant ſe ad donationem ejuſdem vicariæ ratione prærogativæ ſuæ Regiæ Coronæ ſuæ Angliæ unde pro variatione præd. inter breve & narration. præd. iidem Epiſcopus & Willielmus petunt judicium de brevi & narration. præd. & quod breve ill' caſſetur, &c.

Moratio in lege ad placitum.

Et præd. Attorn. dictorum Dni. Regis & Dominæ Reginæ nunc General. qui pro eiſdem Domino Rege & Domina Regina nunc ſequitur pro eiſdem Domino Rege & Domina Regina dicit quod præd. placitum præd. Henrici Epiſcopi London & Willielmi Lancaſter in caſſatione brevis. præd. ſuperius placitat. materiaq; in eodem content. minus ſufficien. in lege exiſtunt ad breve præd. caſſand. quodq; ipſe idem Attorn. general. &c. pro eiſdem Domino Rege & Domina Regina ad placitum illud modo & forma præd. placitat. neceſſe non habet nec per legem terræ tenetur reſpondere & hoc idem Attorn. General. &c. pro eiſdem Domino Rege & Dna. Regina parat. eſt verificare unde pro defectu ſufficien. reſponſ. ipſorum Epiſcopi & Willielmi in hac parte idem Attorn. Generalis &c. pro eiſdem Domino Rege & Domina Regina pet. judicium & quod breve præd. bonum adjudicetur & breve Epiſcopo &c.

Et præd. Henricus Epiſcopus London. & Willielmus Lancaſter dicunt quod præd. placitum ipſorum Henrici Epiſcopi London & Willielmi Lancaſter in caſſation. brevis præd. ſuperius placitat. materiaq; in eodem content. bonum & ſufficien. in lege exiſtunt ad breve præd. caſſand. unde ex quo præd. Attorn. dict. Domini Regis & Dominæ Reginæ nunc General. ad placitum illud non reſpond. nec ill. aliqualiter dedic. iidem Henricus Epiſcopus London. & Willielmus Lancaſter (ut prius) petunt judicium de brevi & narration. prædict. & quod breve illud caſſetur &c. ſed quia Curia dictorum Domini Regis & Dominæ Reginæ nunc hic de judicio ſuo de & ſuper præmiſſis reddend. nondum adviſatur dies inde dat. eſt tam præfat. Attorn. General. &c. quam præfat. Henrico Epiſcopo London & Willielmo Lancaſter coram Domino Rege & Domina Regina uſq; a die Paſchæ in quinque ſeptimanas ubicunq; &c. de judicio ſuo de & ſuper præmiſſis ill. audiend. eo quod Curia dictorum Domini Regis & Dominæ Reginæ nunc hic inde nondum

Junctio in Moration.

&c.

&c. ad quem diem coram Domino Rege & Domina Regina apud Weſtm. ven. tam Edwardus Ward Ar. modo Attorn. Domini Regis & Dnæ. Reginæ nunc general. qui pro eiſdem Domino Rege & Domina Regina in hac parte ſequitur in propria perſona ſua quam predict. Henricus Epiſcopus London & Willielmus Lancaſter per Attorn. ſuum præd. ſuper quo viſis & per Curiam dict. Domini Regis & Dominæ Reginæ nunc hic plenius intellectis omnibus & ſingulis præmiſſis maturaq; deliberatione inde habita pro eo quod videtur Curiæ dict. Domini Regis & Dominæ Reginæ nunc hic qd. præd. placit. præd. Henr. Epiſc. Lond. & Willielmi Lancaſter in caſſation. brevis præd. ſuperius placitat. materiaq; in eodem content. minus ſufficien. in lege exiſtunt ad breve predict. caſſand. conſideratum eſt quod predict. Henricus Epiſcopus London & Willielmus Lancaſter ad breve predict. reſpond. &c. ſuper quo prædict. Henricus Epiſcopus London. & Willielmus Lancaſter per prædict. Adam Baynes Attorn. ſuum ven. & defend. vim & injur. quando &c. & dicunt quod prædict. Dominus Rex & Domina Regina actionem ſuam præd. inde verſus eos habere ſeu manutenere non debent quia idem Epiſcopus dicit quod narratio præd. materiaq; in eadem content. minus ſufficien. in lege exiſtunt ad ipſos Dominum Regem & Dominam Reginam ad actionem ſuam præd. inde verſus ipſum Epiſcopum habend. manutenend. quodq; ipſe ad narrationem præd. neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere & hoc parat. eſt verificare unde pro defectu ſufficien narrationis in hac parte idem Henricus Epiſcopus London petit judicium & quod præd. Dominus Rex & Domina Regina ab actione ſua præd. verſus ipſum Epiſcopum habend. præcludantur, &c.

Judgment quod Reſp ouſter.

Epiſcopus moratur in lege ad Narr.

Et præd. Willielmus Lancaſter dicit quod ipſe eſt vicarius vicariæ Sancti Martini in Campis ex collatione præd. Henrici Epiſcopi London. quodq; dict. Dominus Rex & Domina Regina action. ſuam præd. inde verſus eum habere non debent quia dicit quod bene & verum eſt quod præd. Humfridus nuper Epiſcopus London in narratione præd. nominat. fuit ſeiſit. de advocatione vicariæ Eccleſiæ Parochialis Sancti Martini in Campis præd. ut de uno groſſo per ſe ut de feodo & jure in jure Epiſcopat. ſui præd. & ſic inde ſeiſit. exiſten. ipſe præd. nuper Epiſcopus eo qd. eadem vicaria fuit in Dioceſi ſua London eandem vicariam vacan. contulit Thome Lamplugh Sacræ Theogloiæ profeſſor. Clerico ſuo qui virtute collationis illius in corporal. poſ-

L'auter *Defendant pleads* Ouſter.

Confeſs the Seiſin of the late Biſhop.

And the Collation.

ſeſſion. ejuſdem vicariæ poſit. fuit tempore pacis tempore Domini Caroli Secundi nuper Regis Angliæ &c. eodemque Thoma vicar. Vicariæ præd. ut præfertur exiſten. idem Thomas Lamplugh poſtea in Epiſcopum Epiſcopat. Exon. rite & cannonice creat. & conſecrat. fuit & vicaria præd. vacavit per promotionem dicti Thomæ Lamplugh ad præd. Epiſcopatum Exon. quodq; præd. nuper Rex Carolus Secundus ad vicariam præd. tunc ſic vacan. præſentavit Willielmum Lloyd Sacræ Theologiæ profeſſorem Clericum ſuum qui ad eandem præſentationem ipſius nuper Regis fuit admiſſus inſtitut. & inductus in eandem tempore pacis tempore dicti nuper Regis eodemq; Willielmo Lloyd vicar. vicariæ prædict. ut præfertur exiſten. idem Willielmus Lloyd poſtea in Epiſcopum Epiſcopat. Aſaphen. rite & canonice creat. & conſecrat. fuit & vicaria prædict. vacavit per promotionem præd. Willielmi Lloyd ad præd. Epiſcopat. Aſaphen. quodq; præd. nuper Rex Carolus Secundus ad vicariam præd. ſic tunc vacan. præſentavit Thomam Tenniſon Sacræ Theologiæ profeſſorum Clericum ſuum qui ad eandem præſentationem ipſius nuper Regis fuit admiſſus inſtitut. & inductus in eandem tempore pacis tempore dicti nuper Regis Caroli Secundi modo & forma prout per narration. præd. ſuperius ſupponitur ſed idem Willielmus ulterius dicit quod per quendam actum in Parliamento Domini Henrici nuper Regis Angliæ octavi apud Weſtm. præd. 15 die Januarii Anno Regni ſui 25. tent. edit. inter alia inactitat. fuit authoritate ejuſdem Parliamenti quod neque dictus nuper Rex hæredes neque Succeſſores ſui Reges hujus Regni nec aliquis ſubditus (Here recite the Statute of 25 H. 8. cap. 21. from the 3d to the 7th Paragraph) prout per eundem actum inter alia plenius apparet & idem Willielmus ulterius dicit quod poſt conſectionem Actus præd. & diu ante impetration. brevis Originalis præd. prædict Henr. modo Def. rite & canonice creat. & conſecrat fuit in Epiſcopum Epiſcopat. London. ſcilicet apud Weſtm. prædict. quodq; poſtea & ante impetracion. ejuſdem brevis ſcilicet 20 die Decembris Anno Dni. 1691. præd. Thomas Tenniſon rite & debito modo electus fuit in Epiſcopum Epiſcopat. Lincoln videlicet apud Weſtm. prædict. quodq; Johannes providentia divina Cantuar. Archiepiſcopus totius Angliæ primas & metropolitan. poſt edition. actus prædict. & ante impetration. brevis prædict. ſcilicet 22 die Decembris Anno Domini ultimo ſupradicto poſt debitam examinationem per Archiepiſcopum hic de cauſis & qualitatibus

And the making of the Perſon collated a Biſhop.

And the King's Preſentation of the others with their Inſtitution and Induction.

And pleads the Statute of 25 H. 8.

The Biſhop rite & debite Electus.

A Diſpenſation by the Archbiſhop.

tibus præd. Epiſcopi Elect' per quaſdam literas ſuas diſpenſation. ſcript. ſecundum formam præd. ſtatuti ſupra recitat. edit. ſub nomine ipſius Archiepiſcopi confect' ac ſigillo ipſius Archiepiſcopi ſigillat. ac in Curiæ Cancellaria dictorum Regis & Reginæ nunc apud Weſtm' præd' debito modo irrotulat' ac idem Thomæ Tenniſon Sacræ Theologiæ doctori & Epiſcopo Lincoln.

The Diſpenſation ſet forth.

elect' direct' recitan' per eaſdem literas diſpenſation' quod ex parte dict' Epiſcopi Lincoln' elect' dict' Archiepiſcopo ſignificat' fuit quodE piſcopat. Lincoln præd' fructus redditus & proventus adeo tenues & exiles & diminut' fuer' ut dignitati ſuæ Epiſcopal' iſtis præſertim temporibus nullo modo ſufficerunt unde dictus Epiſcopus Lincoln elect' dicto Archiepiſcopo humiliter ſupplicari feciſſet quatenus ei de opportuno aliquo ſublevamine in præmiſſis provideri dict' Archiepiſc' de gratia ſua ſpeciali dignaretur petitioni præd' obſecundare volens cum præd. Thoma Tenniſon Epiſcopo Lincoln' elect' (juxta voluntarem Sereniſſimi Dni' noſtri Regis Gulielmi dicto Archiepiſcopo in hac parte ſignificat') ut una cum Epiſcopat. Lincoln' vicariam perpetuam Eccleſiæ paroch' ſancti Martini in Campis & Rectoriam Eccleſiæ parochialis Sancti Jacobi Weſtm' in Com. Middleſex & Dioceſ. London quas tunc dictus Epiſcopus Lincoln' elect. poſſidebat uſq; primum diem menſis Julii tunc prox' a dat. præd. literarum diſpenſation. retinere gaudere habere & in commendam tenere in tam amplis modo & forma quibus antetunc uſq; tempus confection' literarum diſpenſation' præd' dictus Epiſcopus Lincoln. electus retinebat & poſſidebat eorumq; fructus proventus aliaq; proficua inde provenientia in ejus proprios uſus & utilitates convertere applicare & de eiſdem diſponere dictus Epiſcopus Lincoln. elect. libere & licite valeret & poſſet etiamſi in dictis vicaria & Rectoria præd. non reſideret nec ullam moram ibidem traxit legitimam dicto Thomæ Tenniſon Sacræ Theologiæ doctori Epiſcopo Lincoln. elect. facultatem & Authoritat. dedit & conceſſit (quantum in dicto Archiepiſcopo fuit & jura Regni patiebantur) & tenore dictarum literarum diſpenſation. gratioſe diſpenſavit canonicis inſtitutis quibuſcunq; in contrarium non obſtan' proviſo ſemper quod vicaria perpetua Eccleſiæ parochialis ſancti Martini in Camp. & Rectoria Eccleſiæ paroch. Sancti Jacobi Weſtm. pred debit. non fraudarentur obſequiis & animarum curæ in eiſdem uullatenus negligerentur ſed eorundem congrue ſupportentur onera debita & conſueta proviſo etiam

To hold in comandam.

Proviſo.

ſemper quod dict. literæ diſpenſation. eidem Epiſcopo Lincoln. elect. non proficerent niſi per literas patentes regiarum majeſtatum forent confirmat. prout per eaſdem literas diſpenſation. plene liquet Et idem Willielmus ulterius dicit quod Dominus Rex & Domina Regina nunc poſtea ſcilicet 23 die Decembris Anno Regni ſui tertio apud Weſtm. præd. per literas ſuas Patentes ſub Magno ſigillo ſuo Angliæ ſigillat. geren. dat. eiſdem die & Anno & in Curia ipſorum Dom. Regis & Dom. Reginæ cancellariæ apud Weſtm. præd. ſecundum formam ſtatuti debito modo de recordo irrotulat. præd. literas diſpenſationis & ſingula in eis content. juxta præd. actum Parliamenti confirmaver. & pro ſeipſis hæredibus & ſucceſſoribus ſuis ratificaver. approbaver. & confirmaver. ita quod dictus reverendus in Chriſto pater Thomas Epiſcopus Lincoln elect. in dictis literis diſpenſationis nominat. omnibus & ſingulis in eiſdem ſpecificat. uti frui & potiri valeret & poſſet libere & quiete impune & licite ſecundum vim formam & effectum earundem abſq; impedimento quocunq; eo quod expreſſa mentio de certitudine præmiſſorum aut de aliis donis ſive conceſſionibus per præd. Dominum Regem & Dnam. Reginam antetunc fact. in dictis literis patentibus minime fact. exiſtit. aut aliqua re cauſa vel materia quacunq; in aliquo non obſtan. prout per eaſdem literas patentes plenius apparet Et idem Willielmus Lancaſter ulterius dicit quod prædict. cauſa pro qua prædict. literæ diſpenſation. per præd. Archiepiſcopum & literæ patentes per prædict. dominos Regem & Reginam nunc ſic ut prefertur fact. fuer. non eſt Contrarium ſive repugnans ſacræ Scripturæ & legibus Dei quodq; hujuſmodi literæ diſpenſationis pro ſimilibus cauſis ante editionem prædict. actus Parliamenti uſitat. & conſuet. fuiſſent haberi per hujuſmodi Epiſcopos ſubditos dicti Domini nuper Regis Henrici octavi apud prædict. ſedem Romanam quodq; poſtea ſcilicet 25 die Decembris Anno Dni. 1691. ſupradict. præd. Thomas Tenniſon rite & canonice creat. & conſecrat. fuit Epiſcopus Epiſcopatus Lincoln. prædict. videlicet apud Weſtm. præd. quodq; prædictus Thomas Epiſcopus Lincoln prædict. vigore premiſſorum habuit & in ſuos proprios uſus & utilitates convertit applicavit & diſpoſuit omnes & omnimodos fructus proventus aliaq; proficua præd. vicariæ Eccleſiæ parochial. ſancti Martini in Campis præd. in Com. Middleſex uſq; præd. primum diem menſis Julii tunc prox. a dat. dict. literarum diſpenſation. præd. videlicet apud parochi-

The King's Confirmation of the Commendam by Letters Patents.

am præd. in Com. præd. ad quem quidem diem vicaria illa Eccleſiæ præd. ſecundum limitationem in prædictis literis diſpenſationis mentionat. vigore præmiſſorum vacavit ſcilicet apud Weſtm. præd. per quod idem Henricus Epiſcopus London vicariam illam ſic vacantem contulit eidem Guilielmo Lancaſter Clerico ſuo & eum in corporali poſſeſſione ejuſdem vicariæ poni fecit tempore pacis tempore Domini Regis & Dominæ Reginæ nunc ſcilicet apud Weſtm. præd. idemq; Guilielvicar. vicariæ præd. ex collatione præd. Henrici Epiſcopi London diu ante impetration. brevis originalis præd. fuit & adhuc exiſtit & hoc idem Willielmus parat. eſt verificare unde petit judicium ſi dicti Dominus Rex & Domina Regina actionem ſuam præd. verſus ipſum Guilielmum habere debeant &c. Cum hoc quod præd Guilielmus verificare vult quod præd. Thomas Tenniſon in narratione prædicta ſuperius nominat. & præd. Thomas Tenniſon in literis diſpenſation. præd. ſuperius nominat. ſunt una & eadem perſona & non alia neque diverſa quodq vicaria Eccleſiæ Sancti Martini in Campis in brevi & narratione præd. ſuperius nominat. necnon vicaria perpetua Eccleſiæ parochialis Sancti Martini in Campis in literis diſpenſationis præd. ſuperius mentionat. ſunt una & eadem & non alia neque diverſa.

Collation of the Defendant.

Averment of Una & eadem perſona.

Et præd. Edwardus Ward Armiger modo Attorn. dictorum Domini Regis & Dominæ Reginæ nunc general. qui pro eiſdem Domino Rege & Domina Regina ſequitur quoad præd. placitum præd. Epiſcopi London pro dict. Domino Rege & Domina Regina dicit quod dict. Dominus Rex & Domina Regina per aliqua per præd. Henricum Epiſcopum London ſuperius placitando allegat. ab actione ſua præd. inde verſus ipſum Epiſcopum London habend. præcludi non debent quia dicit quod narratio prædict. materiaq; in eadem content. bona & ſufficiens in lege exiſtunt ad ipſos Dnum. Regem & Dnam. Reginam ad actionem ſuam præd. verſus præfat. Epiſcopum London habend. mauutenend. quam quidem narrationem materiamq; in eadem content idem Attorn. general. pro eiſdem Domino Rege & Domina Regina parat. eſt verificare & probare prout Cur. &c. Et quia præd. Epiſc. London ad narration. illam non reſpondet nec illam hucuſq; aliqualiter dedic. idem Attorn. General. pro eiſdem Dom. Rege & Dom. Regina petit judicium verſus præd. Epiſcopum London & breve metropolitano &c. eo quod præd. Epiſcopus London eſt

Demurrer to one of the Pleas.

eſt pars & nominat. in brevi originali ipſorum Regis & Reginæ ſibi adjudicati, &c.

Demurrer to the other. Et quoad præd. placit præd. Guilielmi Lancaſter per ipſum Guilielmum ſuperius in barram placitat. idem Attorn. General. pro eiſdem Domino Rege & Domina Regina dicit quod dict. Dominus Rex & Domina Regina per aliqua per præd. Willielmum Lancaſter ſuperius placitando allegat. ab actione ſua præd. inde verſus ipſum Willielmum habend. precludi non debent quia dicit quod placitum illud materiaq; in eodem content. minus ſufficien. in lege exiſtunt ad ipſos Dominum Regem & Dominam Reginam ab actione ſua prædicta verſus præfat. Guilielmum Lancaſter habend. præcludend. quodq; ipſe pro ipſis Domino Rege & Domina Regina adplacitum illud modo & forma præd. ſuperius placitat. neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere & hoc idem Attorn. General. pro eiſdem Domino Rege & Domina Regina parat. eſt verificare unde pro defectu ſufficien. placiri præd. Willielmi Lancaſter in hac parte idem Attorn. General. pro eiſdem Domino Rege & Domina Regina pet. judicium verſus ipſum Willielmum & breve Metropolitano, &c.

Et præd. Willielmus Lancaſter dicit quod placitum præd. per ipſum Willielmum modo & forma præd. ſuperius placitat. materiaq; in eodem content. bon. & ſufficien. in lege exiſtunt. ad ipſos Dominum Regem & Dominam Reginam ab actione ſua præd. verſus prædictum Willielmum hend. precludend. quod quidem placitum materiamq; in eodem content. ipſe idem Willielmus parat. eſt verificare & probare prout Cur. &c. Et quia præd. Attorn. General. pro eiſdem Domino Rege & Domina Regina ad placitum ill. non reſpondet nec ill. hucuſque aliqualiter dedicit ipſe idem Willielmus (ut prius) pet. Judicium & quod prædict. Dominus Rex & Dna. Regina ab actione ſua præd. inde verſus ipſum Willielmum habend. præcludantur, &c. ſed quia Cur. dict. Dom. Regis & Dominæ Reginæ nunc hic de Judicio ſuo de & ſuper præmiſſis reddend. nondum adviſatur dies inde dat. eſt tam præfat. Attorn. General. Dom. Regis & Dominæ Reginæ qui &c. quam præd. Epiſcopo London. & præd. Willielmo coram Domino Rege & Domina Regina uſq; in craſtino Sanctæ Trinitatis ubicunq; &c. de Judicio ſuo de & ſuper præmiſſis illis inde audiend. eo quod Cur. dict. Dom. Regis & Dominæ Reginæ nunc hic inde nondum &c. ad quem quidem Craſtin. Sanctæ Trinitatis coram Dno.

Rege & Domina Regina apud Weſtm. ven. tam præd. Edwardus Ward Attorn. dict .Dom. Regis & Dominæ Reginæ nunc general. qui &c. in propria perſona ſua quam præd. Henricus Epiſcop. London & Willielmus Lancaſter per Attorn. ſuum præd. Et ſic Continuat. uſq; ad Octab. Sancti Hill. ad quas quidem Octab. Sancti Hill. coram Domino Rege & Domina Regina apud Weſtm ven. tam præd. Edwardus Ward Attorn. dict. Dom. Regis & Dominæ Reginæ nunc general. qui &c. quam præd. Henricus Epiſcopus London & Willielmus Lancaſter per Attorn. ſuum præd. & ſuper hoc viſis & per Cur. dict Dom. Regis & Dominæ Reginæ nunc hic plenius intellectis omnibus & ſingulis præmiſſis maturaq; deliberatione ſuperinde habita videtur Cur. Domini Regis & Dominæ Reginæ nunc hic quod narratio præd. materiaq; in eadem content. bon. & ſufficien. in lege exiſtunt ad ipſos Dom. Regem & Dominam Reginam ad actionem ſuam prædictam verſus præfat. Henricum Epiſcopum London habend. manutenend. quodq; prædict. placitum præd. Guilielmi Lancaſter ſuperius in barram placitat. materiaq; in eodem content. minus ſufficien. in lege exiſt. ad ipſos Dominum Regem & Dnam. Reginam ab actione ſua præd. verſus præd. Willielmum Lancaſter habend. præcludend. prout præd. Edwardus Ward qui &c. ſuperius allegavit——Ideo conſideratum eſt quod iidem Dominus Rex & Dna. Regina nunc recuperent verſus præfat. Henricum Epiſcopum London & Willielmum Lancaſter præſentation. ſuam ad Vicariam præd. & quod habeant breve Johanni Cantuar. Epiſcopo totius Angliæ Primat. & Metropolitan. Eo quod præd. Hen. Epiſcopus London eſt pars & nominatur in breve præd. quod non obſtan. reclamatione ipſius Epiſcopi & præd. Guilielmi Lancaſt. licet Vicaria præd. eidem Willielmo Lancaſter collat. eſt & ipſe in Corporali poſſeſſione ejuſdem Vicariæ poſit. exiſtit. ipſum Willielmum ab eadem Vicaria amoveat & ad Vicariam præd. ad preſentation. dict. Dom. Regis & Dominæ Reginæ nunc idoneam perſonam admittat & præd. Henricus Epiſcop. London & Willielmus Lancaſter in miſericordia &c.

Attorney

Attorney General *verſus* Henry *Lord Biſhop of* London *and Dr.* Lancaſter, *and Dr.* Birch.

Dr. Lancaſter's Caſe. 3 Lev. 377, 382. Caſe in Parl. 164. 2 Salk. 559. 1 Show. 441.

QUare Impedit for the Vicarage of St. Martin in the Fields, in the County of Middleſex, ſetting forth, that Humfrey late Biſhop of London, was ſeiſed of the Advowſon thereof in Fee in the Right of his Biſhoprick: Which Vicarage being void, he collated Dr. Lamplugh thereunto, who being afterwards made Biſhop of Exeter, and the Vicarage being void by his Promotion, King Charles the Second by vertue of his Prerogative, did preſent Dr. Lloyd thereunto, who was afterwards made Biſhop of St Aſaph; and the ſaid Vicaridge being again void by his Promotion, the ſaid King thereupon preſented Dr Tenniſon who was afterwards made Biſhop of Lincoln; ſo that the ſaid Vicarage being now void by his Promotion, it belonged to the King and Queen to preſent ratione Prærogativæ ſuæ Regiæ, but were hindred by the Defendants.

The Defendants crave Oyer of the Writ, which was read in hæc verba, by which it was recited, that the Church was void, & ad noſtram ſpectat donationem, and then they plead in Abatement, and ſhew this Variance between the Declaration and the Writ, viz. That by the Declaration the King's Title was ſet forth to preſent ratione prærogativæ, and by the Writ 'tis pleno jure; ſo for this Variance they pray that the Writ may be quaſhed.

To this Plea the Attorney General demurred, and the Defendants joined in Demurrer, and thereupon there was a Reſpondeas ouſter awarded; upon which the Biſhop demurred generally to the Declaration, and the Attorney General joined in Demurrer.

Dr. Lancaſter pleaded in Bar, and confeſſed the Seiſin of the late Biſhop of London, as laid in the Declaration, and all the Preſentations and Conſecrations, &c. then he pleaded thoſe Clauſes in the Statute of H. 8. by which 25 H. 8. c. 21 Power is given to the Archbiſhop of Canterbury to grant Diſpenſations as the Pope did formerly; that after the ſaid Statute, and before the Writ purchaſed, the Defendant was conſecrated Biſhop of London, and that Dr. Tenniſon was elected Biſhop of Lincoln on the 25th Day of December, 1691. but before his Conſecration the Archbiſhop granted a Diſpenſation to hold the Vicaridge of St. Martin, and

the Rectory of St James in Commendam with the Biſhoprick of Lincoln, until the firſt of July next after the Date of the ſaid Diſpenſation, that the King by Letters Patents under the Great Seal did confirm the ſaid Diſpenſation purſuant to the ſaid Statute of H. 8.

That Dr. Tenniſon was conſecrated Biſhop of Lincoln, and held the ſaid Vicaridge and Rectory in Commendam till the ſaid firſt Day of July, and then the ſaid Church of St. Martin became void by his Promotion, and the Biſhop of London preſented the Defendant Dr. Lancaſter, &c.

Dr Birch pleaded the ſame Plea mutatis mutandis as to the Rectory of St. James.

To both which Pleas the Attorney General demurred, and the Defendants joyned in Demurrer.

First, It was ſaid, that there could not be a more material Variance than between this Writ and Declaration; the one was general, and the other ſpecial, and founded upon different Rights; and therefore according to all the Authorities in the Books the Writ ought to be abated.

Then the Queſtions on the Pleadings were;

(1.) Whether the King had a Prerogative to preſent upon an avoidance by Ceſſion?

(2.) If he hath ſuch Prerogative, then whether this Diſpenſation in commendam retinere hath not ſatisfied his Turn?

As to the firſt Point, the common Uſage for above 100 Years ſupported by ſolemn Judgments, hath ſettled that part of the Prerogative, viz. that where an Avoidance happens by Ceſſion, the King may preſent ratione prærogativæ ſuæ; this my Lord Vaughan in arguing Dr. Eade's Caſe, took for granted.

'Tis true, there may be ſome old Books which deny this Prerogative, but my Lord Rolle was of Opinion, that the Law is otherwiſe at this Day, and to prove it, he cited Holland's Caſe, where the Law was not only taken to be ſo now, but thoſe old Books were denied to be Law, becauſe the Opinion in that Caſe was, that the King had ſuch a Prerogative at the Common Law. 2 Roll. Abr. 343. pl. 3. Cro. Eliz. 542.

But to make this a little more plain, there are two ſolemn Judgments upon this very Point; the one is reported in Moor, which was thus, viz. The Incumbent of the Vicaridge of Barnham was made Biſhop of St. Aſaph, and the Queen preſented one Randal, who was inſtituted and inducted; and the Patron brought a Quare Impedit; there Moor 399. *Wright's* Caſe.

was a Plea in Bar, and a Demurrer to that Plea; the Queſtion was, Whether the Queen could preſent by Virtue of her Prerogative? And upon Peruſal of many Precedents and a great Deliberation had, at laſt Judgment was given for the Queen.

2 Cro. 691. *Woodley's* Caſe. About 30 Years afterwards the ſame Queſtion came to be debated again; it was in a Quare Impedit brought for the Church of Tedlin in Devonſhire, the Incumbent being made a Biſhop in Ireland, and the like Judgment given as before againſt the Grantee of the next Avoidance.

Dyer 228. b. There is a ſingle Opinion of one Judge in the 6th Year of the Queen, that the Crown had not ſuch a Prerogative; but the Opinion of one Man cannot in Reaſon or Juſtice be oppoſed to ſolemn and deliberate Judgments; beſides, 'tis probable that ſome of the old Books might induce that Judge to be of that Opinion, not becauſe they ſay the King had no ſuch Prerogative, but becauſe when ſuch Actions were brought to recover Preſentations, as in the Reign of Ed. 3. and H. 4. pro hac vice tantum, there is no Mention of this Prerogative, and from thence it might be inferred he had none.

Bro. Abr. tit. Preſentment al Egliſe pl. 61. But my Lord Brooke in his Abridgment mentions a Preſentment to the Church by King Ed. 3. ratione prærogativæ, which the Biſhop of Ely had ſeen, and it was where the Church was void by Ceſſion, as in this Caſe.

It muſt be admitted, that until the Reign of H. 8. the Books are not very clear in this Point, but the Reaſon is plain, 'tis becauſe before that Time the Avoidance of a Benefice by Promotion could not properly be ſaid to be the Act of the King, but of the Pope.

2. This Title is not hurt by the Diſpenſation in Commendam retinere, or by any other Matter appearing upon the Record; for the Diſpenſation coming after the Election, and before the Conſecration, doth ſuſpend and prevent the Avoidance, and by Vertue thereof the Incumbent is ſtill in his Living per vim prioris tituli; and this appears plainly Dyer 228. b. in Sir Henry Sidney's Caſe reported by my Lord Dyer; for Parkhurſt, who was the laſt Incumbent of the Living, had a Diſpenſation to hold it for three Years before he was made Biſhop of Norwich; afterwards he was made a Biſhop and reſigned his Living within the three Years: Upon this the Queen preſented, ſuppoſing ſhe had a Title by Ceſſion; but it was adjudged for the Patron, that the Living was void by Reſignation, which proves that the Biſhop of Norwich, notwithſtanding his Conſecration, was ſtill Incumbent of the Living.

And as a farther Evidence of this Matter, if after ſuch Diſpenſation in Commendam retinere, the Patron ſhould preſent another to the ſame Living, the Biſhop may have a Writ of Spoliation, which will not properly lie but by one Incumbent againſt another. Vaug. 24.

The King's Confirmation in this Caſe doth not give any new, or other Right to the Incumbent than what he had before; 'tis only a formal Thing to compleat the Act of the Archbiſhop, which otherwiſe would be void.

This is a temporary Proviſion for the Church, and but a few Days more than a Commenda ſemeſtris, which my Lord Hobart tells us, did grow out of a natural Equity, that the Church ſhould not be without a Paſtor, during that Time wherein the Patron is allowed by the Law to preſent, and it being ſo ſmall a Portion of Time, ought not to be regarded; for de minimis non curat Lex.

Econtra. Moſt of the Prerogatives of the Crown were conferred upon our Kings by the Common Law, ſuch only excepted which are given by particular Acts of Parliament; but neither by the Common or Statute Law hath he any Prerogative to preſent upon an Avoidance by Ceſſion where the Patronage is in another. And therefore in Woodley's Caſe it was the Opinion of Juſtice Hutton, that where the King himſelf is not Patron of the Living, he ſhall not preſent, tho' he makes the Incumbent a Biſhop.

As to what hath been cited out of my Lord Brooke's Abridgment, 'tis little to this Purpoſe, 'tis only what the Biſhop of Ely told the Chief Juſtice; there was no judicial Determination of the Matter; and he begins and ends the Caſe with a Nota of Admiration, that there ſhould be ſuch a Preſentment ſeen ratione prærogativæ in the Reign of Ed. 3. upon an Avoidance by Ceſſion.

'Tis true, Preſentments have been made to ſeveral Churches by former Kings, where the Incumbents have been made Biſhops, not by Virtue of any Prerogative, but becauſe the Perſon promoted was Patron of the Church, and his Temporalties were then in the King's Hands upon his Promotion; ſo is the 41 Ed. 3. 5. b. And this was my Lord Coke's Opinion, viz. where the King had ſeiſed the Temporalties of the Biſhop of Exeter for a Contempt, and then made the Archdeacon of Cornwall a Biſhop, the King preſented to the Archdeaconry, becauſe the Temporalties of the Biſhop, who was Patron thereof, were then in the King's Hands. 4 Inſt. 356.

The Year-Book 11 H. 4. fol. 37, 38. is much againſt this Prerogative, and 'tis the moſt antient Caſe of a Commendam that is repoꝛted in our Books; it was a Quare Impedit bꝛought by the King foꝛ a Prebend of Salisbury againſt Robert Halommer Biſhop of that See, and againſt Henry Chicheley Biſhop of St David: The Declaration was, that R. Medford late Biſhop of Sarum, had collated the ſaid Henry Chicheley to the afoꝛeſaid Prebend, who died; and that the Biſhop of London was tranſlated to Sarum, and from thence to Bath and Wells, by Reaſon whereof the Temporalties of the Biſhoprick of Sarum came into the King's Hands; that Chichely was made Biſhop of St. David, ſo that the ſaid Prebend became void by his Pꝛomotion, and that it belonged to the King to pꝛeſent, who was hindꝛed, &c.

The Biſhop of Sarum pleaded that he was Patron of the ſaid Prebend in Right of his Biſhopꝛick, and tꝛaveꝛſed the Avoidance when the Temporalties of his Predeceſſoꝛ were in the King's Hands, and the Incumbent pleaded, that he was pꝛeſented by the Biſhop of Sarum, and tꝛaveꝛſed the Avoidance, ut ſupra; but the Court being of Opinion, that he being made a Biſhop, ought to ſhew ſome Title to this Prebend; he then pleaded, that befoꝛe he was conſecrated Biſhop of St. David, he had a Gꝛant from the Pope to retain his foꝛmer Beneficeſ, &c.

'Tis true, no Judgment was given upon this Pleading, but the Reaſon was, becauſe Norton the King's Serjeant did relinquiſh the King's Title as ſet foꝛth in this Count, and declared de novo upon the Statute of Pꝛoviſoꝛs, that the Pope had uſurped an Authoꝛity to diſpenſe againſt the Law, &c. which ſhews, that if the Prebend was vacant (notwithſtanding ſuch Diſpenſation) when the Temporalties were in the King's Hands, then he might pꝛeſent; but if it became void after they were granted to the ſucceeding Biſhop, then he could not pꝛeſent; ſo that 'tis plain the King's Counſel did then think he had no ſuch Prerogative, and that he had either a Right oꝛ none to pꝛeſent in that Caſe as the Temporalties happened either to be oꝛ not to be in his Hands.

Bro. Abr. tit. Preſentment al Eſgliſe pl. 14.

My Lord Brooke in abꝛidging the afoꝛeſaid Caſe agrees, that when an Incumbent is made a Biſhop, his foꝛmer Beneficeſ are void, but doubts whether the King oꝛ Patron ſhall pꝛeſent; and theꝛefoꝛe he added a Quære to the Uſage, becauſe it ſeemed unreaſonable to him that the King ſhould pꝛeſent upon any Pꝛomotion of the Incumbent, where the Right of a Patronage is in another.

This

This was a Prerogative not thought on when St. Germaine wrote; for he tells us, that when any Benefice is void by Ceſſion, the ſix Months to prevent a Lapſe, ſhall be accounted from ſuch Ceſſion; which ſhews that it was his Opinion that the Patron, and not the King, had the Right of Preſentation, becauſe if it belonged to the King, there could be no Lapſe. Dr. & Stud. 116.

The Judgment of the Court in Sir Henry Sidney's Caſe was againſt this Prerogative, and all the Precedents before the Reign of H. 8. which mention it, are nothing to the Purpoſe, becauſe they were between ſpiritual Perſons, who in thoſe Days were wholly ſubſervient to the Pope; and 'tis a weak Argument to alledge, that becauſe the Pope preſented at that Time, therefore the King ſhall now; for what the Pope did was by an abſolute Uſurpation; he had then ſuch an Authority in this Nation, that Judge Hankford affirmed in the Argument of that Caſe between the King and the Biſhop of Salisbury, quod Papa poteſt omnia; and My Lord Hobart calls him Dæmon meridianus. Hob. 146.

There was never any Exerciſe of this Prerogative in the Reigns of thoſe Kings who withſtood the Uſurpations of the Pope; ſometimes it hath been claimed, but ſtill adjudged for the Patron; ſo is 5 E. 2. where this Prerogative is not ſo much as mentioned, neither doth Staundford take any notice of it; and certainly if the King had had ſuch a Prerogative, it would not have eſcaped his Obſervation under the Title of his 8th Chapter de Eccleſiis vacantibus, quarum advocationes ſpectant ad Regem, & alii præſentaverunt ad eaſdem.

In Wright's Caſe, Williams, who then argued for this Prerogative, gave this Reaſon why the King ſhould preſent upon an Avoidance by Ceſſion (viz.) becauſe the Pope did ſo formerly before his Power was abrogated by the Statutes of H. 8. and therefore the King might do it, ſince that the Biſhop had his Preſentment gratis both from the Pope then, and from the King now, and the Patron had no Power after a Preſentment made, till the Death or Reſignation of his Clerk. The Court not being ſatisfied with this Reaſon, asked him if he could ſhew any Precedents to maintain his Argument, but he could produce only a few between ſpiritual Perſons, and therefore the Precedents were not regarded, becauſe the Perſons whom they concerned, were in abſolute Subjection to the Pope: And true it is, as Juſtice Walmſly there obſerved, that this Cuſtom began by the Uſurpation of the Pope; and he mentions the Year Book of Ed. 2. where upon ſolemn Debate this Point was adjudged for the Patron. Owen 144. Moor. 399. Cro. Eliz. 526.

(2. Point)

(2. Point) But admitting the King hath ſuch a Prerogative, then his Diſpenſation in Commendam retinere hath ſatisfied his Turn, eſpecially ſince it hath exceeded the Canon, for this was more than ſemeſtris Commenda.

Hob. 144. These Commendams were never of any Reputation either in the Common or Canon Law, 'tis quaſi comedendum; and in this Caſe 'tis neither ſemeſtris, for it was for ſix Months and nine Days; neither is it perpetua but temporanea: Now if this ſhall not be counted an Exerciſe of the Prerogative, and the Turn to preſent thereby ſatisfied, then the King may diſpenſe for 20 Years, and afterwards preſent for Life.

There are Variety of Opinions how this Commenda limitata ſhall be taken; ſome have held, that tho it is limited for a certain Time, yet the Commendator may retain the Living during his Life; others, that he ſhall have it only for the Time limited; and ſo long he muſt have it, for otherwiſe the Church would be void during that Time; but all agree that a Grant in Commendam retinere is quaſi a Preſentation, and the Church is thereby full of an Incumbent. 'Tis true, my Lord Vaughan was of another Opinion in his Argument in Dr. Eade's Caſe, that by Virtue of ſuch a Diſpenſation before the Parſon is conſecrated Biſhop, he remains Parſon of the ſame Benefice ſtill, and hath the ſame Eſtate he had therein as well after as before his Conſecration, and that Diſpenſation gave him no new Right, but only a Power to hold that which he had before; and by Conſequence there was nothing upon which the Prerogative could work ſo as to ſatisfie the King's Turn to the Preſentation; but he was of Opinion likewiſe that ſuch Diſpenſation prevented an Avoidance, and if ſo, that will defeat the Grantee of the next Avoidance to preſent; for he is to have the next Preſentation only, and that he cannot have where a Diſpenſation interpoſeth; ſo that it ſeems ſuch a Diſpenſation ſhall amount to a Preſentation upon the next Avoidance (be it by Ceſſion or otherwiſe) ſo as to be good againſt ſuch Grantee, and to make his Grant void; and what Reaſon can be given why it ſhall not likewiſe be a Preſentation by the King upon an Avoidance by Promotion; and if ſo, then his Turn muſt be ſatisfied.

2 Salk. 540. In Hillary Term afterwards Judgment was given for the King, and upon the ſame Reaſons Judgment was alſo given in Dr. Birch's Caſe, which is as followeth, viz.

Dr. *Birch's* Caſe. 3 Lev. 382. Caſes in Parl. 164. The Pariſh of St. James was newly conſtituted by Act of Parliament out of the Pariſh of St Martin, the Subſtance of which Act was, viz.

That a certain Precinct of Ground therein mentioned ſhall be the Pariſh of St. James, &c. That there ſhall be a Rector thereof, &c. That Dr. Tenniſon ſhall be the firſt Incumbent, that he and his Succeſſors, Rectors thereof, ſhall be a Corporation, &c. That the Patronage thereof, after his Deceaſe or Avoidance, ſhall be in the Biſhop of London and his Succeſſors, and in my Lord Jermyn and his Heirs by Turns.

That after the Deceaſe or Avoidance of Dr. Tenniſon the Biſhop ſhall preſent, then my Lord, and afterwards the Biſhop, &c. ſhall have two Turns, and my Lord and his Heirs one Turn.

This Act was ſet forth in the Declaration, and that Dr. Tenniſon was made Biſhop of Lincoln, that the ſaid Church of St. James became void upon his Promotion, and thereupon it belonged to the King and Queen by Virtue of their Prerogative to preſent, &c.

Dr. Birch pleaded the ſame Plea as Dr. Lancaſter did in the Caſe before-mentioned.

The Debate now was, that admitting the King had a Prerogative to preſent by Ceſſion, yet ſuch a Prerogative could not be exerciſed in this Caſe, becauſe it would be expreſly againſt ſuch an Act of Parliament, for this was a Pariſh newly created, the Church was never yet preſentative, and being now void by Ceſſion, the Preſentation muſt be in the Biſhop; for by the Words of the Act 'tis expreſly given to him after the Deceaſe or Avoidance of Dr. Tenniſon.

The King is entitled to ſeveral Prerogatives by the Common Law as a Subject is to a Preſcription or Cuſtom, but both Prerogarives, Preſcriptions and Cuſtoms may be bound by Acts of Parliament. 11 Rep. 59. a.

Concerning the firſt of which there are theſe and many more Inſtances, viz. By the Statute of Marlbridge cap. 22. 'tis enacted, That none may diſtrain his Freeholders to anſwer for their Freehold, without the King's Writ. This is a general Law, and tho' the King is not named by way of Reſtraint, yet it has been conſtrued to bind him in point of Law; for there is a Writ in the Regiſter directed to the King's Bailiffs of his Manor of, &c. commanding them not to diſtrain. 2 Inſt. 141. Reg. 171.

By the Statute of W. 1. cap. 5. the King commanded upon great Forfeitures that none ſhould diſturb Elections; he is bound by this Law. 2 Inſt. 169.

So where any Statute is made to prevent or ſuppreſs any Wrong, the King tho' not named is bound by it, becauſe

Hob. 298. cauſe he can do no Wrong, and where ever affirmative Statutes introduce a new Law (as here) ſuch Statutes do neceſſarily imply a Negative of all which is not contained in their Purview.

So that admitting this Prerogative to preſent upon the Promotion of the Patron's Preſentee, as in Dr. Lancaſter's Caſe, yet 'tis not to be exerciſed here, becauſe Dr. Tenniſon was never preſented to this Church; he firſt came in by the Donation of the Pariſh, and afterwards it became an Incumbency by the Gift of the King, Lords and Commons, ſo that this Prerogative fails becauſe the Living is a Donative by Parliament, and not by the Preſentation of the Patron; and likewiſe becauſe the King cannot preſent where the Patron could not; and here never yet was any Patron: His Prerogative is to preſent upon Promotion of the Patron's Preſentee; and the Reaſon given is, becauſe this is ſo far from being an Injury, that 'tis a Kindneſs to the Patron that the King ſhould take ſo much notice of his Clerk, as to dignify him in the Church by making him a Biſhop.

But here was no Promotion of the Patron's Preſentee, for Dr. Tenniſon was never preſented by any particular Perſon: Nay this Church was never preſentative till now, for it was but newly made a Church or Pariſh, ſo that the Reaſon of this Prerogative failing in this Caſe, that too muſt likewiſe fail.

Here is a particular Preſentation given to the Biſhop by an Act of Parliament; 'tis not yet a Patronage, becauſe there never yet was any Preſentation to the Church, there was never any Avoidance ſince its Creation; 'tis true, 'tis now void by Promotion, but 'tis not ſuch a common ordinary Avoidance, upon which this Prerogative can operate, becauſe by the Act a new Right is introduced, and expreſly given to the Biſhop for the next Preſentation.

The King cannot demand Firſt-fruits and Tenths out of this Pariſh, yet ſuch are incident to his Prerogative; but not being laved to him in the Act, that ſhall never operate here to give him any Title to them.

This Caſe therefore doth not fall under any of the Reaſons or Reſolutions which have been given to maintain the Prerogative to preſent to a Living void by Ceſſion, becauſe (as it hath been ſaid) 'tis not in the Nature of an Advowſon, but a Donative; and this is proved by the Act it ſelf, for there is a Clauſe to ſubject it to the Juriſdiction of the Biſhop, which had been in vain if he had any Authority without it.

For the Biſhop of London is not Patron of this Parish-Church, becauſe he was ſo of St Martin's, out of which 'tis derived; the Patronage is given to him after the next Avoidance, and there is a particular Clauſe in the Act, that all ſucceeding Rectors thereof ſhall be preſented, inſtituted and inducted as other Rectors are, which proves that the firſt Rector was not ſo preſented.

So that by what has been ſaid it may appear that this was not a Preſentation, but a Donative to Dr. Tenniſon; and till a Preſentation once had there is no Subject-matter for the Prerogative to work on.

Econtra. There is no Reaſon in Law which makes any Difference in the King's Prerogative to preſent upon Ceſſion to a new or old Living: For in both Caſes the Title of the King is by the Promotion of the Incumbent, who had the Care of both Pariſhes here, and the new one being erected out of the old Pariſh, participates of the ſame Nature with it, and muſt be ſubject to the ſame Rules of Law, unleſs ſome ſpecial Proviſion is made in the Act to exempt it.

Thus it was when upon the Diſſolution of Abbies after the Statute of 31 H. 8. and new Biſhoprics were erected, thoſe did participate with the ſame Nature of the moſt Antient, and all Incidents belonging to the old Biſhoprics did follow thoſe which were newly created by that King.

Now this Act hath made no Difference between the new Rectory and the old Vicaridge, it makes it preſentative in its Nature, and limits the Right of Preſentation to my Ld. Biſhop and Ld. Jermyn, not by Way of veſting any Right in either, ſo as to give away that Prerogative the King had at the Common Law; for their Title comes under the Word videlicet; ſo that the Act muſt be underſtood in the Nature of a Partition between them, and the rather becauſe 'tis an affirmative Act which will not take away any antecedent Right, and 'tis generally known that the Prerogative is not bound, if not mentioned.

'Tis no Objection to ſay, that the Biſhop ſhall loſe his Turn by this means, becauſe 'tis no more than what is allowed by Law in Caſes of the like Nature, as it was in Woodley's Caſe, where the Grantee of the next Avoidance loſt his Preſentation, becauſe upon the Promotion of the Incumbent the King had a Title by his Prerogative to preſent.

Acts of Parliament are to be conſtrued in Favour of the King's Prerogative, and therefore this ſhall be conſtrued to make an Advowſon preſently veſted in Point of Intereſt,

for which the Prerogative ſhall not ſtay till (as it hath been objected) 'tis executed once in Preſentation.

As to the Objection, that this is an affirmative Act, and ſo implies a Negative which excludes the King's Intereſt, the Law is otherwiſe; for Affirmative Acts do not exclude his Right, the Statutes of Wills are both in the Affirmative, and yet they do not take away a Cuſtom of deviſing Land.

32 H. 8. 34 H. 8.

'Tis abſurd to imagine that general Words in an Act of Parliament ſhall bind a Right which the Makers of the Law never intended to meddle withall; for their Intent here appears plainly to be only to create a Pariſh, to ſettle a Rectory, and to order the Right of Preſentation: There are no Words throughout the whole Act, from which it can be inferred, that the Prerogative was intended to be bound ſo as it might not operate upon the Avoidance of this Rectory by Ceſſion, as well as upon the like Avoidance of any other preſentative Living whatſoever.

Judicium. Afterwards in Michaelmas Term 6 Willi', &c. the Judgment was,

(1.) That the King hath a Prerogative to preſent by Ceſſion.
(2.) That this Diſpenſation in Commendam retinere had not ſatisfied the nert Turn, and ſo not barred the King of the Prerogative, &c.

Firſt, The King hath a Prerogative to preſent upon the Promotion of an Incumbent, and this is no Innovation; for there being no judicial Opinion to the Contrary is a ſufficient Evidence to prove this Right; and tho' a natural Reaſon cannot be given to ſupport it, yet it ſeems very juſt, that when the King by the Exerciſe of his Prerogative hath made a Church void, that he ſhould have a Right to fill the Vacancy; for 'tis but the Exchanging of a Life, and 'tis probable the Patron may (notwithſtanding the Change) be as near to his Preſentation as before the Avoidance by Ceſſion.

There are but few Authorities in the Books to direct ones Judgment before the Reign of Queen Elizabeth, becauſe the Pope then claimed ſuch Preſentations as belonging to his Eccleſiaſtical Juriſdiction, and the Kings of England did very ſeldom diſpute his Claim, but it doth not follow that they had no ſuch Prerogative, becauſe not claimed in many Years; and tho' a perfect Reaſon cannot be given why ſuch a Prerogative ſhould be allowed by

the Common Law, yet the King ſhall not be barred of his Right; for no Reaſon can be given for a collateral Warranty, and yet that is Law at this Day.

The Biſhopricks of England were at firſt Donative; but from the 17th of King John to the 25th of H. 8. the Biſhops were to be choſen by the Dean and Chapter, but then ſuch Election muſt have the King's Confirmation, and even the Statute of H. 8. which expreſſeth the Manner of making Biſhops, doth in ſome Meaſure reſtore the Crown to its antient Prerogative; for tho' by Licence under the Great Seal the Prior and Convent then, and the Dean and Chapter now, have Leave to elect, yet there muſt be a Letter miſſive containing the Conge d'eſſire, and the Name of the Perſon whom they ſhall chuſe. 25 H. 8. ca. 20.

The Authorities which have been cited to maintain his Prerogative, were Wright's Caſe, where the Queſtion was fully ſtated and adjudged, and afterwards was admitted to be Law in Sir Robert Baſſet's Caſe.

My Lord Dyer in Hillary Term, Anno 6 Eliz. put the Caſe of Sir Henry Sidney upon a Quare Impedit againſt the Biſhop of Glouceſter and one Reve, who was one of the Queen's Chaplains, and whom ſhe preſented to a Church, having made Parkhurſt the former Incumbent Biſhop of Norwich, ſuppoſing ſhe had a Prerogative to preſent upon an Avoidance by Ceſſion, which he did not take to be Law, and then ſaid, quod alii Socii mei non ſentiebant; but the Caſe was not adjudged upon that Reaſon, it ſeems only to be a Parentheſis, and a ſudden Opinion of the Judge.

Many Caſes may be cited where the Temporalties of Biſhops have been ſeiſed by the King, and then he hath preſented to the Church upon the Promotion of the Incumbent; from whence 'tis inferred, that ſuch Preſentations were not by Virtue of any Prerogative, but becauſe the Temporalties were in the King's Hands; this certainly muſt be a very weak Inference; for to what Purpoſe ſhould the King make Uſe of his Prerogative when he had an Intereſt in the Advowſon it ſelf, of which the Biſhop was Patron, &c. in reſpect his Temporalties were then in the King's Hands? So that the Force of this Argument muſt be (viz.) becauſe the King made Uſe of his Intereſt, therefore he had no Prerogative, which is very abſurd and inconſequential.

The Reaſon why all the Books are ſilent in this Matter, is, becauſe before the Statute of Proviſors the King was defeated of this Prerogative by the Uſurpation of the Pope: 25 Ed. 3.

Pope: And this is not only an Anſwer to what was done before the Making of that Statute, but ſince alſo; for notwithſtanding that Law, the Clergy were ſo cloſely united in Intereſt, that they did ſtill uſurp upon the Rights of the ſucceeding Kings; for the Pope did ſtill make Biſhops in England, and ſixteen Years after that Statute this Caſe did happen, viz.

41 Ed. 3. 5. John Biſhop of Salisbury being Patron in Right of his Biſhoprick, preſented W. and died, ſo that his Temporalties came to the King. W. who was the Preſentee of the Biſhop, was afterwards made Biſhop of Salisbury; and becauſe he could not be both Patron and Incumbent of the Living, the King brought a Quare Impedit. The Defendant pleaded, that after the Death of John Biſhop of Salisbury his immediate Predeceſſor, and before his Conſecration, and likewiſe before the Living was void, the King by Letters Patents (reciting his being made a Biſhop by the Pope) had granted to him the Temporalties, ſo that he ought not to preſent; and this was held a good Plea at that Time, which ſhews that the Pope did uſurp upon this Prerogative.

'Tis true, this Prerogative to preſent by Ceſſion, is not mentioned in the Statute de Prerogativa Regis, no more is the Prerogative to preſent by Lapſe, and yet this was never yet denied the King, tho' nothing was ſaid of it likewiſe in any of the old Books; 'tis mentioned in Cawdry's Caſe, that the Law was thus in the Reign of Ed. 3. viz. if the Metropolitan did not preſent within ſix Months, the King and not the Pope, ſhould provide a Paſtor; and yet no ſuch Authority can be found in that King's Time.

Preſentment al Egliſe. 61. But ever ſince that Caſe was abridged by Brooke, this Prerogative hath been enjoyed by the Kings of England, and there are no Precedents that the Patron hath preſented upon the Promotion of his Incumbent.

(2 Point) This Commendam retinere is not a ſerving the King's Turn; for 'tis not putting a Man into Poſſeſſion of a new Living without Inſtitution or Induction, 'tis only a Continuation of the old Benefice in the ſame Perſon where it was; for that which he had before, cannot be properly ſaid to be commended to him, there is no new Right transferred; 'tis true, if the Incumbent had died during the Continuance of ſuch Diſpenſation, the King might have loſt his Title to preſent.

Vaugh. 18. Winch. 91. Jones 161. Hob. 143. 2 Roll. Abr. 344.

And laſtly as this Caſe ſtands upon the Act of Parliament, the King's Prerogative is let in by making of the Church of St. James a Rectory, and by ſetling the Patronage;

nage; and 'tis no Objection to ſay, that the Prerogative ſhall not work, it being newly created and made a Pariſh: For when once 'tis eſtabliſhed, 'tis ſubject to all the Eccleſiaſtical Laws, as Non-reſidency, Deprivation, &c.

'Tis to be void by the ſame Methods which make other Rectories ſo, viz. if the Patron doth not preſent within ſix Months after the Death of the Incumbent, it ſhall lapſe to the Ordinary; ſo that the Patron is bound by the ſame Laws in this Caſe, as in all other Caſes of ancient Rectories, and the next Avoidance it ſelf may be granted over by the Act of the Party.

As to the Objection, That the preſent Rector doth not come in by Preſentation, Inſtitution, or Induction, but that 'tis a Donative by the Parliament at leaſt during his Time; and then it was affirmed, That if the Incumbent of a Donative is made a Biſhop, the King ſhall not preſent, becauſe ſuch a Promotion doth not make an Avoidance by Ceſſion; for the Incumbent is the Creature of the Founder, and is not ſubject to Ordinary and Epiſcopal Viſitation.

This muſt be admitted to be Law, but yet if an Incumbent of a Donative is made Rector by Act of Parliament, as Dr. Tenniſon was in this Caſe, then the King hath a Prerogative to preſent upon the Promotion of ſuch Rector.

The Prince's Caſe in the 8th Rep. comes near this at the Bar, for in 11 Ed. 3 the Prince was created Duke of Cornwal, Habendum & tenendum eidem Duci & filiis primogenitis ipſius & hæredum ſuorum Regum Angliæ, &c. By theſe Words the Prince had an Eſtate in Fee-ſimple in the ſaid Dukedom newly created by Act of Parliament, the Conſequence of which was, That the Prince ſhould be endowed thereof: So here, tho' this is a new Rectory created by the like Authority, viz. by Act of Parliament, yet 'tis ſubject to the ſame Laws and Rules with other Rectories more antient in Time.

Then as to the Objection that 'tis not an Advowſon preſentative during the Life of Dr. Tenniſon; for by the expreſs Words of the Act, the Preſentation doth not veſt in the Patrons till after the Death or Avoidance of the preſent Incumbent; and if ſo, the King's Prerogative cannot operate here, becauſe he is intitled to preſent when the Preſentee of the Patron is advanced to a greater Dignity in the Church, and here is no Patron yet; now admitting it to be ſo, this will not prejudice the King's Title, becauſe 'tis the Promotion of the Incumbent that entitles the King, let the Advowſon or Patronage be where it will.

But

But notwithſtanding this Objection, the Right of Patronage even in this Caſe is veſted immediately; 'tis like a Reverſion for Life granted cum acciderit poſt mortem of the Tenant for Life, which veſts an Intereſt immediately, tho' to commence in Poſſeſſion in futuro.

3 Cro. 323. 1 Saund 147.

Laſtly, It was never intended by the Parliament to deprive the King of this Prerogative, and therefore this Act muſt be conſtrued (as the Rule is in Sir Francis Barrington's Caſe) according to the Subject-matter; for which Reaſons Judgment was given for the Plaintiff, abſente Juſtice Gregory; which Judgment was afterwards affirmed in Parliament.

Gwynn *verſus* Pie.

EJectment for two Meſſuages, two Gardens, and 70 Acres of Land, 15 Acres of Meadow, and 30 Acres of Paſture in Much-Dew-Church, &c. The Plaintiff delivered Declarations to two Tenants only, and as to the Lands in their Poſſeſſion the Defendant entred into the Common Rule; but becauſe he had made ſeveral ſmall Purchaſes in that Pariſh, and the Plaintiff claimed only 20 Acres lately granted to him by Leaſe from the Biſhop of Glouceſter; therefore he moved by his Counſel, That the Plaintiff might give a Note in writing, before the firſt Day of the next Term what Lands in particular he claimed, and where ſuch Lands did lie, and in whoſe Poſſeſſion, &c. or otherwiſe that he might not proceed to a Trial at the next Aſſizes; for the Defendant not knowing what Lands the Plaintiff would claim, could not tell what Purchaſe-Deeds to produce at the Trial; ſed non allocatur.

DE

Term. Sanct. Mich.

Anno 5 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1693.

Blankard *verſus* Galdy.

Paſch. 3 Will. &c. *Rot.* 35.

Memorandum.

MEmorandum quod alias ſcilicet Termino Sancti Mich. ultimo præterit. coram Domino Rege & Domina Regina apud Weſtm. venit Johannes Blancard Ar. per Jacobum Cunningham Attorn. ſuum & protulit hic in Curia dicti Domini Regis & Dominæ Reginæ tunc ibidem quandam billam ſuam verſus Laurentium Galdy alias dict. Laurens Galdy Mar. demurent a Londres en la paroſſe de St. Pierre le penure in Cuſtod. Mar. &c. de plito debi. & ſunt pleg. de proſ. ſcilt. Johannes Doe & Richardus Roe

Debt upon a Bond.

que quidem billa ſequitur in hæc verba, ff. London ff. Johannes Blancard Ar. queritur de Laurentio Galdy alias dict. Laurens Galdi Mar. demeurent a Londres en la paroſſe de St. Pierre le penure in Cuſtodia Mar. Mareſc. Domini Regis & Dominæ Reginæ coram ipſo Rege & Regina exiſten. de plito quod reddat ei mille libras ſterling legalis monetæ Angliæ quas ei debet & injuſte detinet pro eo videlt. quod cum pred. Laurentius quinto die Januarii Anno Regni Domini Willi. & Dominæ Mariæ nunc Regis & Regnæ Angliæ, &c. tertio apud London præd. videlt. in parochia beatæ Mariæ de arcubus in warda de Cheap per quoddam ſcriptum ſuum obligatorium ſigillo ipſius Laurentii ſigillat. Curiæq; dicti

2 Salk. 411.

dicti Domini Regis & Dominæ Reginæ nunc hic oſten. cujus dat. eſt eiſdem die & anno cogn. ſe teneri & firmiter obligari præfat Johanni Blancard in præd. mille libris ſolvend. eidem Johanni cum inde requiſit. eſſet præd. tamen Laurentius licet ſepius requiſit. &c. præd mille libras præfat. Johanni nondum ſolvit ſed ill. ei hucuſque ſolvere omnino contradixit & adhuc contradicit ad dampnum ipſius Johannis viginti librarum & inde producit ſectam, &c.

Imparlance. Et modo ad hunc diem ſcilt. diem Mercurii prox. poſt quinden. Paſchæ iſto eodem termino uſque quem diem præfat. Laurentius Galdy habuit licentiam ad billam predict. inteloquend. & tunc ad reſpondend. &c. coram Domino Rege & Domina Regina apud Weſtm. venit tam prædict. John. Blancard per Attorn. ſuum prædict. quam prædict. Laurentius Galdy per Ricum. Thompſon Attorn. ſuum & idem Laurentius defend. vim & injuriam quando &c. & petit auditum ſcripti obligatorii prædict. & ei legitur in hæc verba, ſſ. Sçachent tous par ces preſentes que nous Laurens Galdy Marchant demeurant a Londres en la Paroſſe de St. Pierre le pauvre & Jaques Gowlales auſi Marchant du dit Londres demeurant en la Paroſſe de St Pierre Cornhil ſomes tenus & firmement obliges ſolidairement, viz. ſeul pour le tout a Jean Blanchard Prevoſt Mareichal del Iſle de la Jamaica demurant en paroiſſe de St. Jaques Weſtm. en Counte de Middleſex en le ſomme de mille Livres Sterlings monoie d'Anglie pour eſtre payes au dit Jean Blanchard ſes Executeurs Adminiſtrateurs ou ayant cauſe pour faire lequel payment bien & veritablement nous obligions & chachun de nous ſolidairment ſeul & pur le tout nos Heretiers Executeurs ou Adminiſtrateurs ou ayant cauſe ou les Heretiers Executeurs & Adminiſtrateurs de chacun de nous firmement per ces preſentes ſeele de nos ſeaux dat le cinquieme jour de Janvier dans le troiſieme An du reign de nos Souverains Signieur & Dame Guillam & Marie Roy & Royne d'Angle d'Ecoſſe France & Ireland Defenſeurs de la Foy, &c. Annoq; Dom. 1662. Petit etiam auditum conditionis ſcripti obligatorii præd. & ei legitur in hæc verba, ſſ. La Condition de cette Obligation eſt que ſi Laurens Galdy demeurant a Londres deſſus oblige & Louis Galdy ſon frere habitant del Iſle de Jamaica in Amerique ou tous deux ou les Heretiers Executeurs ou Adminiſtrateurs deux ou de le une tienent exercitant

Oyer of the Bond which is in French.

Oyer of the Condition.

ercitant accompliſſent & fourt bien & veritablement tous & chacuns les Clauſes Promiſſes Conditions & Plaints que de la parte de dit Laurens Galdy & Louis Galdy ou de l'une deux ou de lours Heretiers Executeurs & Adminiſtrateurs le tener executer accomplier & payer compris & ſpecifie dans certaine accord & traite dats de jour de la date des fait autretes ſus nomme Jean Blancard dune partes & de le dit Laurens Galdy tant pur luy que pur le dit Louis Galdy dautre parte ſelon veritable Sens & Intention dun accord & traite alors la preſent Obligation ſerra nulle & de nul effect autrement ſerra & demeura en la plene force & vertue. Quibus lectis & auditis idem Laurentius dicit quod præd. Johannes actionem ſuam præd. inde verſus ipſum Laurentium habere ſeu manutenere non debet quia dicit quod articul. & agreament. in Conditione præd. ſcripti obligatorii mentionat. fact. fuer apud London præd. in paroch. & warda præd. quinto die Januarii Anno Regni Domini Willielmi & Dnæ. Mariæ nunc Regis & Reginæ Angliæ &c. tertio ſupradicto inter præd. Johan. Blancard per nomen Johannis Blancard præpoſiti Mareſcal General Anglice *Provoſt Marſhal General* de inſula de Jamaica reſiden. in Parochia ſancti Jacobi Weſtm. in Com. Middleſex ex una parte & præd. Laurentium Galdy per nomen Laurentii Galdy mercatoris reſiden. in London in parochia ſancti Petri pauperis agens tam in nomine ſuo quam pro fratre ſuo Ludovico Galdy habitator. præd. inſulæ de Jamaica ex altera parte quorum quidem articulorum alteram partem ſigillo ipſius Johannis Blancard ſigillat. idem Laurentius hic in Curia profert (geren. dat. eiſdem die & anno ſupradictis) recitan. modo ſequen. videlt. in conſideratione quod Laurentius Galdy in nomine Laurentii Galdy prædict. feciſſet contract. articuli & agreament. cum præd. Johan. Blancard pro exercitio predict. oneris vel officii præpoſiti Mareſchal de Jamaica duran. termino ſeptem annorum & dimidii unius anni incipiend. a ſexto die Julii tunc proximo anno Domini 1692, ſub clauſula & conditione poſtea menconat. & quod Johannes Blancard miſiſſet novam Commiſſionem procuracon. vel deputacon. iſto die dat. cujus deliberaſſet quatuor Copias Anglice Diſpatches per ipſum ſignat. & ſigillat. in manus prædict. Laurentii Galdy præfat. Ludovico Galdy direct. cum ſpatio Anglice a Blank ad inſerend. Anglice to fill up & ponend nomen talis aliæ perſonæ habitatoris

The Defendant pleads That the Bond was made in London, *for the Exerciſe of an Office in* Jamaica.

præd. inſulæ qualis præd. Ludovicus Galdy apt. eſtimaret ad dictum Officium exercend. partes præd. agreaſſent de articulis ſequen. Et imprimis quod deputatio ſupramencionat. (iſto die dat.) non fact. fuit ſed pro exercitio dict. officii idem ad incipiend. a præd. ſexto die Julii tunc prox. ſequen. uſq; ad tempus in quo præd. Laurentius Galdy notum faceret præd. Johanni Blancard nomina perſonarum quas præd. Ludovicus Galdy convenien. eſtimaret nominare pro deputat. ſuis durante tempore quod inexpirat. remaneret de præd. ſeptem annis & dimid. unius anni & quod tam cito quam præd. nominatio & declaratio nominum deputat. præd. fact. foret præd. Johannes Blancard obligat. foret facere & mittere Anglice to paſs eis novam deputation. pro reſid. dicti termini ſeptem annorum & dimid. unius anni & quod iſta deputatio (eodem die dat.) vacua & nullius effectus remaneret Et ulterius dic. qd. præd. Laurentius Galdy tam pro ſeipſo quam pro præd. Ludovico Galdy parte ſua firmiter alteruteri & pro toto convenerunt agreaverunt & obligaverunt ſeipſos Executores & Adminiſtratores ſuos (cauſam habentes) prædicto Johanni Blancard Executoribus & Adminiſtratoribus ſuis & cauſam haben. ſolvere vel ſolvi cauſare bene & fideliter vere & de facto præd. Johanni Blancard Executoribus Adminiſtratoribus ſive Attorn. ſuis (cum cauſam haberent) ſummam quadringent. librarum ſterling pro quolibet Anno bonæ & legalis monetæ Angliæ duran. præd. termino ſeptem annorum & dimid. unius anni in eadem Civitate London. in domo ubi præd. Johannes Blancard habitavit vel habitaret ad finem terminorum ſolution. poſtea mentionat. in quatuor equal. ſolution. videlt. ſuper ſextum diem Octobris ſuper ſextum diem Januarii ſuper ſextum diem Aprilis & ſuper ſextum diem Julii cujuſlibet præd. annorum de quibus prima ſolutio facta foret ſuper ſextum diem Octobris tunc prox. ac etiam qd. Laurentius Galdy in nomine præd. firmiter obligavit ſeipſum ut præfertur defendere Anglice *to ſave harmleſs* & indempnem præſtare prædict. Johannem Blancard ab omnibus periculis prædict. officii duran. præd. termino ſeptem annorum & dimid. unius anni & a dampnis detrimentis & confiſcationibus quæ accreſcerent ab onere prædict. pro negligentia defalt. defect. mala geſtura vel malo adminiſtratione tam prædict. Ludovici Galdi quam deputatorum ſuorum vel perſonarum cum quarum nominibus ſpecificat. in prædict. deputa-

putatione inſert. foret vel quas poſtea appunctuaret pro deputat. ſuis Et quod prædict. Ludovicus Galdy vel illi quor' nomina &c. bonam & ſufficien. ſecuritatem darent gubernatori præd. inſulæ pro exercitio præd. officii in modo ſicut conſuet. eſt & in caſu placeret dictis Dom. Regi & Dnæ. Reginæ revocare literas patentes quas conceſſerunt de dicto officio præfat. Johanni Blancard quinto die Novembris Anno Dom. 1690. ſecundum poteſtatem quam reſervaverunt ſibiipſis per præd. literas vel ſi præd. Dominus Rex & Dna. Regina Offic' ceſſare cauſarent ante expirationem præd. ſeptem annorum & dimid. unius anni concluſum & agreatum fuit inter partes prædict. quod tunc iſtud agreamentum una cum prædict deputatione fact. prædict. Ludovico Galdy vel ejus Deputat. & quæ poſtea per predict. Johannem Blancard fact. foret null. & nullius effectus remaneret quaſi eadem nunquam fact. fuiſſet in quo caſu præd. Laurentius & Ludovicus Galdy non ſolverent præd. Johanni Blancard Executoribus vel Adminiſtratoribus ſuis (& cauſam haben.) pro aliquo longiore tempore quam quo gauderent & exercerent dictum officium per ipſos vel eorum deputat. & ſolummodo uſq; ad diem in quo actualiter amoti forent ab exercitio præd. officii ſecundum ratam quadringent. librarum ſterlingorum per annum &c. prout per articulos præd plenius liquet & apparet Et idem Laurentius ulterius dicit quod per quendam Actum in Parliamento Domini Edwardi ſexti nuper Regis Angliæ &c tent. apud Weſtm. in Com Middleſex per prorogationem viceſimo tertio die Januarii Anno Regni dicti Domini nuper Regis Edwardi ſexti quinto & ibidem continuat. uſq; decimum quintum diem Aprilis Anno Regni dicti nuper Regis Edwardi ſexti ſexto inter alia inactitat. fuit authoritate ejuſdem Parliamenti qd. ſi aliqua perſona vel perſonæ ad aliqd. tempus (and ſo recite the Act uſq; ad the firſt Proviſo) prout per eundem Actum inter alia plenius liquet & apparet Et idem Laurentius ulterius dicit qd. poſt præd. Actum Parliamenti ſcilt. præd. quinto die Januarii Anno Regni Domini Regis & Dominæ Reginæ tertio ſupradicto apud London prædict. in parochia & warda prædict. agreat. fuit inter prædict. Johannem Blancard & prædict. Laurentium & Ludovicum quod prædict. Johannes faceret prefato Ludovico deputation. officii prædict. præpoſiti Mar. Anglice of Provoſt Marſhal in articulis prædict. mentionat. pro prædict. termino ſeptem annorum & dimid. u-

The Act of Ed. VI. *againſt ſelling of Offices, pleaded.*

nius anni & ſub conditione & agreament. præd. in prædictis articulis mentionat. & quod præd. Ludovicus & Laurentius pro deputation. officii præd. ſic faciend. ſolverent præfat. Johanni annual. ſummam quadringent librarum ſterlingorum ſub modo & agreament. in articulis præd. mentionat. quodq; adtunc & ibidem in proſecution agreament. præd. & pro ſecuritat. ſolutionis dict. annualis ſummæ quadringent. librarum articuli præd. & ſcriptum obligatorium præd. hic in Cur. prolat. fact. fuer. & idem Laurentius ulterius dicit quod præd. officium Præpoſiti Mar. Anglice of Provoſt Marſhal in articulis præd. menconat. tangit & concernit & præd. tempore confection articulorum agreament. & ſcripti obligatorii præd. tangebat & concernebat adminiſtration. & execution. Juſticiæ infra prædict. inſulam de Jamaica exiſten. parcel. poſſeſſionum & reventionum dictorum Dom. Regis & Dnæ. Reginæ Coronæ ſuæ Angliæ & ſub eorum regimine quodque annual. reddit. vel ſumma quadringent. librarum per annum per prædict. articulos agreat. ſolvend. per prædict. Laurent. & Ludovicum Galdy eidem Johan' ſolut' fuit pro exercitio & deputatione officii præd' contra formam Statuti præd' videlt' apud London præd' in paroch' & warda præd' & ſic idem Laurentius dicit qd' ſcriptum obligatorium præd' necnon articul' præd' hic in Cur' prolat' vigore Statuti præd' penitus vacua & nullius vigoris in lege exiſtunt Et hoc parat' eſt verificare unde petit judicium ſi præd' Joh'es action' ſuam præd. inde verſus eum habere ſeu manutenere debeat, &c.

The Office concerning the Execution of Juſtice.

Et præd' Joh'es dicit quod ipſe per aliqua per præd' Laurent' ſuperius placitando allegat' ab actione ſua præd' inde verſus ipſum Laurentium habend' præcludi non debet quia proteſtando quod præd' officium Præpoſiti Mar' non tangit ſeu concernit executionem Juſtitiæ idem Joh'es pro placito dicit quod inſula præd' in partibus tranſmarinis exiſtit necnon ex antiquo habitat' & poſſeſſionat' fuit per Hiſpanos Indos & alios homines alienigenos & forinſecos inimicos hujus Regni Angliæ extra ligeantiam ſive gubernation' hujuſce Regni quodq; anno mill'mo ſexcenteſimo quinquageſimo quinto inſula præd' & inhabitant' ejuſdem inſulæ per vim' ſubditorum hujus Regni Angliæ virtute debita & ſufficien' authoritate in ea parte habita commiſſion' conqueſt' & in ſubjection' reduct' fuerunt quodq; ab inde continue poſtea hucuſq; inſula præd' necnon inhabitantes & incolæ inde per jura leges & Statuta ejuſdem inſulæ propria & non per actus parliament' ſive ſtatut' hujus Regni Angliæ regulat' & gubernat' fuit & adhuc eſt quodq;

Replication.

That the Iſland was conquered.

And are governed by their own Laws, and not by the Statutes of England.

quodq; executio officii præd. eandem inſulam & incolas inde tantumodo concernit & in ead. inſula ſolummodo executur. & non alibi & hoc idem Johannes parat. eſt verificare unde petit juditium & debitum ſuum præd. una cum dampnis ſuis occaſione detentionis debiti illius ſibi adjudicari &c.

Barthol. Shower.

Rejoynder that before the Conqueſt they were governed by their own Laws, but not ſince.

Et prædict. Laurentius dicit quod bene & verum eſt quod ante conqueſtum Inſulæ præd. in replicatione præd. Johannis ſuperius mentionat. Inſula præd. gubernat. fuit per leges & ſtatuta & jura ejuſdem Inſulæ propria ſed Inſula præd. a tempore conqueſtus præd. ſemper fuit parcell. hujus Regni Angliæ & per leges & ſtatuta hujus Regni Angliæ & non per præd. leges jura & ſtatuta Inſulæ præd. propria gubernat. & hoc parat. eſt verificare unde ut prius petit judicium & quod præd. Johannes Blancard ab actione ſua præd. inde verſus ipſum habend. præcludatur &c.

Fr. Pemberton.

To this Rejoinder there was a Demurrer, and the Defendant joined in Demurrer.

Continuancy.

Sed Quia Cur. Dom. Regis & Dom. Reginæ nunc hic de Judict. ſuo de & ſuper præmiſſis reddend. nondum adviſatur dies inde dat. eſt partibus præd. coram Dom. Rege & Dna. Regina. apud Weſtm. uſq; diem Veneris prox. poſt Craſt. Sanct. Trin. de Judicio ſuo de & ſuper præmiſſis ill. audiend. eo quod Cur. dict. Dni. Regis & Dnæ. Reginæ nunc hic inde nondum &c. (**Continuand. uſq; in Oct. Martini**) Ad quem diem coram Dno. Rege & Dna. Regina apud Weſtm. ven. partes præd. per Attorn. ſuos præd. ſuper quo vif. & per Cur. dict. Dni. Regis & Dnæ. Reginæ nunc hic plenius intellectis omnibus & ſingulis præmiſſis maturaq; deliberatione inde habita videtur Cur. dict. Dni. Reg. & Dnæ Reginæ nunc hic quod placit. præd. per præd. Laurentium modo & forma præd. ſuperius rejungendo placitat. materiaq; in eodem content. minus ſuffic, in lege exiſt. ad ipſum Johan. ab actione ſua præd. inde verſus præfat. Laur. habend. præcludend. Ideo conſ. eſt quod præd' Johan' recuperet verſus præfat' (Def') debit' ſuum præd' necnon 11 l. pro damp. ſuis quæ ſuſtin. tam occaſione detent. debiti illius quam pro miſis & cuſtag. ſuis per ipſum circa ſect. ſuam in hac parte appoſit. præd. Johan. per cur. dictor. Dni. Reg. & Dnæ. Reg. nunc hic ex aſſenſu ſuo adjudicat. & præd. Laurentius in miſericordia &c.

Blankard

Blankard *verſus* Galdy.

2 Salk. 411. THE Plaintiff was Provoſt-Marſhal of Jamaica, and by certain Articles made between him and the Defendant, he granted a Deputation of that Office to the Defendant for ſeven Years and an half, under the Yearly Rent of four hundred Pounds, and the Defendant gave Bond for the Performance of the Agreement, and now an Action of Debt was brought upon that Bond.

The Defendant pleaded the Statute of E. 6. made againſt buying and ſelling of Offices, and averred that this Office concerned the Adminiſtration of Juſtice in Jamaica, and that by Vertue of that Statute both the Bond and Articles were void.

The Plaintiff replied, That Jamaica was an Iſland inhabited formerly by the Spaniards, and governed by their own Laws ever ſince the Conqueſt thereof by the Engliſh, and that the Execution of the ſaid Office only concerned the ſaid Iſland, and the Inhabitants thereof, &c.

The Defendant rejoined and confeſſeth it to be a Conquered Nation, but that ever ſince the Conqueſt thereof it was Parcel of this Kingdom, and governed by the Laws of England, and not by their own Laws, &c.

The Plaintiff demurred to the Rejoinder, and the Defendant joined in Demurrer.

This Caſe was argued in Trinity Term by the Counſel, who drew the Pleadings; and the only Queſtion was, Whether the Laws of England were in Force in Jamaica?

It was ſaid that Acts of Parliament made in England do not bind the People of Jamaica, becauſe they have no Repreſentatives in our Parliaments; many Inſtances were given to maintain this Opinion, as, the Statute of 5 Eliz. hath no Force there, for by that Law 'tis enacted, That no Servant ſhould be retained without a Teſtimonial, that the Juſtices ſhall aſſeſs the Wages of Servants, and that no Perſon ſhall exerciſe a Trade without being Apprentice for 7 Years: Now if this ſhould be Law in Jamaica it would deſtroy all the Planters.

The Statute of Uſury doth not bind them, for they allow there more for the Loan of Money than what is permitted by that Law.

Since the Acquisition of this Place it hath been taken Notice of by several Acts of Parliament, as, by 12 Car. 2. which is an Act for prohibiting planting Tobacco in England, where 'tis called a Colony and Plantation of this Kingdom in America, and in 15 Car. 2. an Act was made for encouragement of Trade; by which it was enacted, That no Commodity of the Growth of Europe shall be transported to the King's Plantations in America, but what shall be shipped in England. 12 Car. 2. cap. 26.

By the Statute of 22 & 23 Car. 2. 'tis called an English Plantation in America, which shews that the general Laws of the Realm do not extend to it, and therefore this Place being not mentioned in the Statute of Ed. 6. that Law hath no Force there. Cap. 26.

And for a further Proof of this matter the Earl of Derby's Case was mentioned which was thus: 2 And. 116.

King H. 4. had the Isle of Man by Conquest, and by Letters Patents he granted it to Sir John Stanly in Fee, in which Grant their was a Clause, That the said Isle should be governed by the Common Law of England: Afterwards the Earl of Derby made a Conveyance thereof to Uses, &c. and by his Last Will devised it, &c. and it was adjudged that none of the Inhabitants there had any Inheritance in their Lands besides the Earl and the Bishop; for being governed by their own Laws, neither the Statute of Uses or of Wills, or any other Act of the Parliament in England did bind them without express Mention thereof.

(2.) In the next Place it was said, That this is not an Office, which concerns the Administration of Justice; it was compared to a Bailiwick of an Hundred, and as such the Sale thereof hath been adjudged not to be within the Statute of Ed. 6. Besides, 'tis not averred how, or in what matter it concerned the Execution of Justice. 4 Leon. 33.

Econtra. It was argued for the Plaintiff, that in all Places there are some Methods and Rules of Government, and that after an absolute Conquest, the People are wholly at the Will of the Conqueror, who may make new or confirm their old Laws; but untill such Laws are made, they shall not be governed by their own Laws; because by the Conquest their Properties are lost,

loſt, and their Government is diſſolved, and by Conſequence none of their Laws remain; therefore the Laws of the Conqueror muſt take Place; and 'tis very reaſonable that what they enjoy by his Permiſſion ſhould be ſubject to his Government and Laws.

But 'tis as unreaſonable that Engliſhmen ſhould loſe their Laws by a Conqueſt of a Nation, which Laws are their Birthright, and which they carry with them whereever they go: For if they ſhould, then by the Conqueſt of an Infidel Country, their Laws muſt remain, and the Engliſh Laws muſt be ſubject to thoſe of the Alchoran.

But my Ld. Coke in Calvin's Caſe tells us by what Laws Kingdoms gotten by Conqueſt ſhall be governed, where he makes a Difference as to that Purpoſe between a Chriſtian and Heathen Kingdom: For by the Conqueſt of the one, their antient Laws remain in Force till new Laws are made by the Conqueror: but by the Conqueſt of the other, viz. by Chriſtians, their Laws are wholly abrogated, becauſe the Laws of the Heathens are contrary to thoſe of God.

So that it ſeems not to be a Queſtion now by what Laws the Spaniards or Natives ſhall be governed there: For their Country being poſſeſſed by Engliſhmen, the Laws of England muſt take Place till the King ſhall think convenient to make any Alteration.

In this Caſe the Property of the Soil is gained by the Poſſeſſor; but the Dominion and Government thereof belongs to the Crown; and to prove that the Engliſh Laws are in Force there, this ſingle Inſtance was offered, viz.

A Writ of Error did lye upon a Judgment given in Ireland before that Kingdom was governed by our Laws, which ſeems to be a parallel Caſe.

As to the Objection, that they have no Repreſentatives in our Parliaments, it will ſignify very little in this Caſe, becauſe the Statute of Ed. 6. was made long before the Conqueſt of the Iſland, and therefore the want of Repreſentatives can be no reaſon why Statutes which were made before that Conqueſt ſhould not bind there.

An Engliſhman accuſed there of Theft is to be tried by a Jury, ſo are all Contracts to be tried by the ſame Method, and not by the Laws of that Heathen Country: Now this is part of the Common Law of England, and if ſuch Laws are uſed there, what Reaſon can be given why Statutes made here, ſhould not likewiſe be of Force there?

But 'tis plain that such Statutes do bind there, for the Statute of Limitations extends to all Contracts made in that Place.

The Heptarchy was subdued by the King of the West Saxons, who imposed Laws upon the conquered Nation, some whereof have obtained ever since, as likewise do those Laws which were made by William called the Conqueror, and it was a long Time before the People had any other Establishment.

In 2 R. 3. all the Judges of England met in the Exchequer-Chamber to consider whether the People in Ireland were bound by an Act of Parliament made in England; and they held they were not as to such Things which were done there: But that they were Subjects of England, and what they did out of Ireland must be conformable to the Laws of England. 7 Rep. 25

And for this Reason 'tis not material whether Jamaica is part of England or not, so long as 'tis subject to the Dominion thereof.

'Tis true there are many Statutes which are not used there, as the Statutes of Usury, and of Labourers; but these are Laws not observed here; and therefore 'tis not to be objected that they do not bind in Jamaica.

(2.) It hath been urged in the next Place that 'tis not said in what manner this Office did concern the Administration of Justice; 'tis averred in the Pleading, that it did concern Justice, but 'tis never shewed how or in what manner.

It was also said, That ex vi Termini, this cannot be called an Office, 'tis only a Gaoler; but if that was admitted, 'tis still within the Statute, for no Gaoler is excepted out of the Act, but the Marshal of the King's Bench and the Warden of the Fleet.

Cur'. The Laws by which the People were governed before the Conquest of the Island, do bind them till new Laws are given, and Acts of Parliament made here since the Conquest do not bind them, unless they are particularly named; the Reason is, because tho' a Conqueror may make new Laws, yet there is a Necessity that the former should be in Force till new are obtained, and even then some of their old Customs may remain.

By the Statute of 27 H. 8. Wales was united to England, yet some of their Customs still remain; 'tis so likwise in Ireland, which Nation, tho' conquered, yet still retained their old Customs, as in the Case of Tanistry: So that there may be a Part of the Possessions of the Crown of England (as the Isle of Man is) and yet not governed by our Laws. Cap. 27.

And therefore it was held, that Jamaica was not governed by the Laws of England after the Conquest thereof, till new Laws were made; for they had neither Sheriff or Counties, they were only an Assembly of People which are not bound by our Laws, unless particularly mentioned.

In Barbadoes all Freeholds are subject to Debts, and are esteemed as Chattels, till the Creditors are satisfied, and then the Lands descend to the Heir; but the Law is otherwise here, which shews, that tho' that Island is Parcel of the Possessions of England, yet 'tis not governed by the Laws made here, but by their own particular Laws and Customs; and for these Reasons Judgment was given for the Plaintiff.

Matthew *versus* Ollerton.

DEbt upon an Award, and a Verdict for the Plaintiff; and it was now moved in Arrest of Judgment, and the Exception taken, was, That the Matter in Difference was referred to the Plaintiff himself, who made an Award, Sed non allocatur. And the Case of Serjeant Hards was remembred by Justice Dolben, (viz.) The Serjeant took a Horse from my Lord of Canterbury's Bailiff for a Deodand, and the Archbishop brought his Action, and it coming to a Trial at the Assizes in Kent, the Serjeant by Rule of Court, referred it to the Archbishop to set the Price of the Horse, which was done accordingly; and the Serjeant afterwards moved the Court to set aside the Award for the Reason now offered; but it was denied by my Lord Hale and per totam Curiam.

Robinson *versus* Watkyns.

THE Return of a Habeas Corpus was, viz. That London was an antient City, and that there was a Custom in the said City, for the Mayor, Aldermen, &c. to make Acts of Common Council for the better Government of the City; that the Customs of London were confirmed by Act of Parliament; that the said Mayor and Aldermen, &c. being informed that the Number of Hackney Coaches in London was greatly increased, and the Trade of the City thereby impaired, did order, That the Number of those should not exceed 400, and that none should be licen-

ſed afterwards, but Stage-Coaches; that if any Perſon not licenſed ſtood to be hired, &c. the Offender ſhould forfeit 40 s. for every ſuch Offence, to be recovered by Action of Debt to be brought by the Chamberlain of the City; that before the Levying of the Plaint, whereupon the Defendant was taken, he ſtood with an unlicenſed Coach in Cornhil to be hired, per quod actio accrevit, &c. and that the Defendant was taken upon the ſaid Plaint, which is the Cauſe of his Impriſonment.

It was argued that this Act of Common Council was illegal; Firſt, By conſidering the Nature and Extent of the Cuſtom, and what Operation is made upon it by the Confirmation in Parliament: For that gave no new or farther Power, or any Thing more than what they had before by the Cuſtom, which was confirmed but not enlarged.

Acts of Common Council in London are no more than By-Laws, they are founded upon their Cuſtoms uſed in the City; now they have no Cuſtom to warrant this By-Law, and therefore 'tis void; for it being made by a Corporation for a private End, it muſt have a Cuſtom to ſupport it: But if it had been for a publick Good, as for repairing of an Highway, &c. then it might have been well without a Cuſtom. 5 Rep. 63. 8 Rep. 125.

Then as to the Reſtraining part of this Law 'tis void, becauſe 'tis againſt the Liberty of the Subject to be hindered in his lawful Occupation, and ſo it was adjudged in the Tailor of Ipſwich's Caſe. 11 Rep. 54.

In the Caſe of Norris and Stupes, the Queſtion was, If a Town Corporate having no Preſcription to exclude others, could by any particular Privilege make a Law to obſtruct all Perſons from uſing of a Trade there, having not been Apprentices in the Town? This ſeemed to be againſt the general Liberties of the People; and therefore of no Force to bind Strangers acting within the Liberties of the Place contrary to ſuch Law; but it did not receive any Determination. Hob. 211. Roll. Abr. tit. *By-Laws*, pl. 4.

King Ed. 3. by Letters Patents confirmed in Parliament, gave Power to the Mayor and Commonalty of London to make By-Laws for the better Regulating of the City, and they made a Law, that no Carman ſhould go into the City without Leave of the Wardens of a particular Hoſpital under a certain Penalty, and this was held void, becauſe it reſtrained Men from uſing of their Trades, and was in the Nature of a Monopoly. 1 Roll. Abr. 364. pl. 5.

'Tis true, in 32 Eliz. an Action of Debt was brought in London, grounded upon an Act of Common Council, viz. That if any Citizen, Freeman, or Stranger within the ſaid

City shall offer Broad Cloath to Sale there before 'tis brought to Blackwell-hall to be viewed, That he shall forfeit 6 s. 8. d. for every Cloath, and this was held a good Law to bind Strangers; but the Reason of that Judgment can have no Influence upon this Case, because that was a good Law made to prevent Frauds in selling of Cloath not vendible: Besides, it was held that they had a Power by their Custom to make such a Law, which is wanting here; and therefore it was prayed that no Procedendo might be awarded.

Econtra. The general Question is, Whether 'tis lawful to restrain the Number of Hackney-Coaches in London by an Act of Common Council, which was admitted to be no more than a By-Law? And it was argued that this By-Law was lawful.

First, It was insisted that a By-Law may be good in part, and void for the rest, and that tho' there was no particular Custom to support this Law, yet it was good as founded upon the general Custom of London to supply all Defects of good Government within the City.

8 Rep. 126. The Customs of that City are very antient, and have been greatly regarded in the Courts of Justice, they have been so far from being construed to restrain Trade within their Liberties; that they have been allowed even against Common Right, and against the Rules of Law: As, a Custom to arrest a Man for Debt before it becomes payable; this hath been held good, for 'tis to make the Defendant find better Sureties.

All By-Laws made for a publick Good, are justifiable, for as such they can be no Burden to the People: 'Tis true, * 1 Roll. Abr. 364. where they are made for private Ends, or for Gain, 'tis otherwise; but that is not this Case, because by this Law no private Benefit can accrew to the City; 'tis a Law made to prevent a publick Nusance; and this was the Reason of the Judgment in * Hayward and Pain's Case, which was a By-Law to restrain the Carmen from going into the City without a Licence from the Wardens of a particular Hospital, because it was a Law which had no Respect to a publick Good, but to the Profit of the Hospital. Sid. 284.

But for an Authority which comes near the Case in Question, this was cited; viz. a By-Law was made in London, That there should be but 420 Carts let to hire under penalty of 40 s. for every one above that Number, to be paid by the OWNER: Now this was a Law made in Restraint of a lawful Employment, yet it was held to be good: For if the

the Number should not be restrained it might prove a Nuisance by stopping up the Streets, and by hindring the Passages.

It hath been objected, That these are different Cases, because such By-Laws which have been held good have been founded upon Custom; but no Custom can extend to Coaches which have been newly set up.

But what Reason can be given why a By-Law should not be good, which is founded upon a general Custom to supply all Defects of former Laws? 1 Roll. Abr. 365. Godb. pl. 106, 126.

Many Instances may be given where such By-Laws have been held good, viz. A By-Law made in London, That none shall make or use a Hot-press there was held good, as founded upon the general Custom; so are all the By-Laws made against Butchers, prohibiting them from standing in certain Streets under a Penalty. 1 Bulst. 11, 12. 2 Brownl. 177.

It cannot be objected, That this is a Law to licence a Nuisance, because the City hath adjudged 400 Coaches to be a convenient Number; neither can it be said to be a Monopoly, because 'tis only a Restraint of Persons beyond such a Number to exercise an Employment in a particular Place, which was always allowed to be good. 8 Rep. 125. b. Cro. Eliz. 203.

Neither can it with any Reason be objected against the Authority of the Mayor and Aldermen to make this By-Law, viz. That Hackney-Coaches have been regulated by a * Statute-Law, which had made it needless if it could be done by a By-Law; because Acts of Parliament have been made in Confirmation of the Common Law, so that Things tho' good in themselves may have Occasion to be supported by the Legislative Power. * 14. Car. 2. cap. 2.

And lastly, for a late Authority the Case of Gavel and Tasker was cited, which was a By-Law to restrain Carts to such a Number as should be licenied by the Company of Woodmongers; and this was adjudged in the Common Pleas, Anno 2 Jac. 2. to be a good Law, which Judgment was affirmed in the Exchequer Chamber. Adjornatur.

Pitman

Pitman *verſus* Bidlecombe.

DEbt upon Bond, the Condition thereof was, That if the Defendant ſhall pay all ſuch Charges as ſhall appear to be due to John Willis (who was Attorney for the Plaintiff) in proſecuting the Defendant at his Suit, That then, &c.

The Defendant pleaded, That it did not appear what was due to the Attorney, &c.

The Plaintiff replied, That 9 l. was due to the ſaid Attorney, of which the Defendant had Notice but had not paid it.

The Defendant rejoined, That it did not appear what was due, &c. and traverſed that he had Notice thereof. Upon Demurrer Judgment was given for the Plaintiff, becauſe the Attorney was a Stranger to the Action, and the Defendant ought to take Notice at his Peril what was due to the Attorney; and ſo it was adjudged in the Caſe of Dewel and Wilmot.

March 108, 156.

1 Roll. Abr. 467.

'Tis true, where the Matter falls under the Cognizance of the Plaintiff himſelf, there he ought to give the Defendant Notice; as an Aſſumpſit to pay for Part of the Goods after the Rate the Plaintiff ſhould ſell the reſt; there Notice muſt be given both of the Sale and Price; but that is not like this Caſe.

Hob. 51.

Salter *verſus* Brunſden.

Wilt' *ſſ. An Action upon the Statute of Diſtreſſes for Rent for diſtraining where no Rent was due.*

Nicholaus Salter queritur de Johanne Brunſden & Johanne Kite in Cuſtod. Mar. &c. de eo quod ipſi decimo ſexto die Septembris Anno Domini 1691. apud &c. in Com. præd. vi & armis &c. bona & catalla videlicet quadraginta quarteria hordei ipſius Nicholai ad valentiam quadraginta librarum adtunc & ibidem invent' nomine diſtrictionis pro redditu per ipſum Nicholaum præfat. Johanni Brunſden ſuper dimiſſionem Meſſuagii & quarundem terrarum eidem Nicholao per ipſum Johannem Brunſden antetunc fact. debit. & in aretro fore ſuppoſit. & pretenſ. colore cujuſdam Actus parliamenti in hujuſmodi caſu nuper edit. & proviſ. ceper. & diſtrixer. & bona & catalla illa ſic diſtrict. adtunc & ibidem detinuer. quoſq; poſtea ſcilicet viceſimo tertio die Septembris Anno Domini 1691. ſupradicto præd. bona & catalla colore actus ill. vendider. & diſpoſuer. ubi revera & in facto tempore captionis bonorum & catallorum præd. aut tempore venditionis eorundem nullus redditus per ipſum Nicholaum eidem Johan. Brunſden debit. aut in aretro fuit & alia enormia eidem Nicholao adtunc & ibidem intuler. contra pacem dict. Domini Regis & Dominæ Reginæ nunc & contra formam ſtatuti in hujuſmodi caſu edit. & proviſ. unde dicit quod deteriorat. eſt & dampnum habet ad valentiam Centum librar. Et inde produc. ſectam &c.

Et modo ad hunc diem ſci. diem Veneris prox. poſt Craſt. ſanct. Trinitatis iſto eodem Termino uſque quem diem præd. Johannes Brunſdem & Johannes Kite habuer. licenc. ad billam præd. interloquend. & tunc ad reſpondend. &c. coram Domino Rege & Domina Regina apud Weſtm. ven. tam præd. Nicholaus Salter per Attorn. ſuum præd. quam præd. Johannes Kite per Antonium Ettrick Attorn. ſuum Et idem Johannes Kite defend. vim & injuriam quando &c. Et dicit quod ipſe non eſt inde culpabilis Et de hoc ponit ſe ſuper patriam Et præd. Nicholaus ſimiliter &c. Et præd. Johannes Brunſden ad eundem diem licet ſolempniter exact. non ven. nec aliquid dicit in barram ſive præcluſion. action. prædict. ipſius Nicholai per quod idem Nicholaus reman. inde verſus eundem Johannem Brunſden indefenſ. &c. ob qd. conſiderat. eſt qd. præd. Nicholaus damna

One Defendant pleads not guilty, and there is Judgment by default againſt the other.

na ſua verſus præfat. Johan. Brunſden occaſione tranſgr. præd. recuperare debeat ſed quia Cur. dict. Dni. Regis & Dnæ. Reginæ nunc hic incogn. exiſt. quæ damna idem Nicholaus occaſione tranſgr. præd. per præd. Johan. Brunſden ut præfertur fact. ſuſtinuit Ideo tam ad triand. exit. præd. inter præd. Nicholaum & præfat. Johannem Kite ſuperius junct. quam ad inquirend. quæ damna præd. Nich. occaſione tranſgr. præd. per præfat. Johannem Brunſden ut præfertur fact. ſuſtinuit ven. inde Jur. coram Dno. Rege & Dna. Regina apud Weſtm. die Mercurii prox. poſt tres ſeptimanas ſanctæ Trinitatis Et qui nec &c. ad recogn. &c. Quia tam, &c. Idem dies dat. eſt tam præfat. Nicholao quam præfat. Johanni Kite ibidem &c.

This was an Action brought upon an Act of Parliament lately made, empowering the Landlord to make Sale of Goods diſtrained for Rent after a certain Time therein limited, in which Act there is a Proviſo (viz. That in caſe a Diſtreſs or Sale ſhall be made for Rent (by Colour of that Act) pretended to be due, where in Truth no Rent is in arrear, *&c.* to the Perſon diſtraining, that the Owner of the Goods ſhall have an Action of Treſpaſs to recover double the Value.

The Plaintiff had a Judgment by Default, and it was now moved in Arreſt of that Judgment, and the Reaſon offered was, That there muſt be a Leſſor and Leſſee to bring this Caſe to be within the Act, and that if there is no Demiſe, the Act gives no Remedy, becauſe 'tis expreſly declared therein, viz. That where Goods ſhall be diſtrained for Rent reſerved, and due upon any Demiſe, Leaſe, or Contract, &c. the Perſon diſtraining may ſell the ſame, &c.

Now there is no Demiſe ſufficiently ſet forth in this Declaration, neither is it ſaid, That the Goods were diſtrained for Rent arrear; but that they were taken nomine diſtrictionis, which is not a good Averment that they were diſtrained.

But the Court held the Declaration to be good.

I

Rex

Rex & Regina *verſus* St. *John*'s College.

By the Statute of 1 W. & M. made for the Abrogating of the Oaths of Allegiance and Supremacy, and appointing of other Oaths, 'tis enacted, That if any Governour, Head or Fellow of any College or Hall in either of the Univerſities ſhall neglect or refuſe to take the Oaths thereby appointed, for ſix Months after primo Auguſti, and before ſuch Perſon or Perſons as by any Act or Acts are authorized and impowered to tender the abrogated Oaths, &c. that then the Government or Fellowſhip of every Perſon ſo neglecting or refuſing, ſhall be void.

The abrogated Oaths were enjoyned by the Statute of 25 Car. 2. to be taken by all Perſons in Office, either in the Court of Chancery, or King's Bench, or Quarter-Seſſions for the County where he or they ſhall inhabit. Cap. 2.

Several Fellows of St. John's College in Cambridge had not taken the Oaths purſuant to the Statute of anno 1 W. & M. and thereupon a Mandamus iſſued out of this Court, directed to Humfrey Gower, who was Head of the ſaid College, and to the Fellows and Maſters there, ſetting forth the ſaid Act, and that ſuch Fellows had not taken the Oaths, and that ſicut informamur they ſtill continue in the quiet Enjoyment of their Fellowſhips; therefore by this Writ they were commanded to amove them; but 'tis not ſaid vel cauſam nobis ſignificetis.

The Return to which Mandamus was (viz.) the Statute of 25 Ed. 3. whereby 'tis enacted, that none ſhall be put out of his Freehold, unleſs he be duly brought in to anſwer and be forejudged by the Courſe of the Law; and likewiſe the Statute of 28 Ed. 3. That no Man ſhall be put out of his Lands or Tenements, without being brought to anſwer by due Proceſs of Law, that the twenty Perſons mentioned in the Writ were, Anno primo W. & M. ſworn Fellows of the ſaid College, and were ſeized of a Freehold in their Fellowſhips, and that ſince the making of that Statute they were not brought to any Trial, &c. Cap. 4. Cap. 3.

Then it was returned, quod in nullo modo conſtat, that they had not taken the ſaid Oaths.

It was further ſet forth, That the College was founded by Margaret Counteſs of Richmond, That the Biſhop of Ely for the Time being, was by the Laws of the Foundreſs appointed Viſitor: That by ſome particular Statutes of the

College which were recited in the Return) 'tis provided, that for great Crimes the Master, by the Consent of the Senior Fellows, upon Examination and Enquiry, may proceed to an Expulsion, and that they cannot expel for any other Cause, &c.

This Return was not subscribed by any Person, neither was the Common Seal of the College affixed to it, which (as it was insisted on) ought to be done, because without it non constat de persona against whom to bring an Action if the Return should be false; but it was held that the Seal was not material, because the Writ was directed to the Head of the College by Name, therefore he is the Person who is to make the Return, and by Consequence against whom the Action will lie, if it is false.

Those who argued against the Writ held,

(1.) That it was illegal, and not warranted by any Law.

(2.) Admitting the Writ to be good, then the Matter returned is a sufficient Excuse.

As to the first Point; a Mandamus hath always been a Remedial and beneficial Writ to those who have been oppressed, especially where the Party grieved could not maintain an Assize; such Writs are called by Sir Edward Coke, in Calvin's Case, Brevia mandatoria remedialia; and they have often been allowed to restore Men to Places of which they have been dispossessed, * rather than to turn them to Actions on the Case to be recompensed by a Jury in Damages.

7 Rep. 20. Vaugh. 401.

* Sid. 94, 152.

Therefore the proper Office of this mandatory Writ is to restore and keep Men in their several Places and Employments, and not to displace them; but this now brought, is so far from being a Remedial Writ, that 'tis very mischievous to the Parties, for 'tis to remove them, which is directly contrary to the Nature of the Writ, and to the Opinion of the Court in Shuttleworth's Case, 11 Jac. where it was held, That a Mandamus was only to be allowed in Cases of Restitution, where there have been bad and undue Removals.

2 Bulst. 122.

This Court hath been always very careful in granting these Writs, especially where no Precedent (as in this Case) can be produced to warrant it; and therefore it was denied to be granted to make a Man free of a Corporation, who had served an Apprenticeship there, tho' the Court held it very reasonable that the Person should have his Freedom; and it was likewise denied to the Spiritual Court, who refused to deliver a Will to the Heir after it was proved in common Form, without a definitive Sentence; and the

Sid. 107.

Sid. 433.

Reason

Reason in both Cases was, because no Precedent could be shewed, that ever a Remedial Writ was granted in such Matters; and if no Precedent, then there can be no such Law. Plowd. 262. a.

'Tis admitted by this Writ it self, as well as by the Return, that the Parties had a Freehold in their Fellowship; and if the Law is more favourable in any one Thing than in another 'tis in the Case of a Freehold; and therefore was Magna Charta made to preserve the due Course of the Common Law to which every English Man hath a native Right; but this Writ doth not only infringe that Right, but doth subvert the very Course of the Law which favours every Man's Possession; 'tis to turn People out of their Freehold, who are no Parties to the Writ; 'tis to punish a Man without being heard, and 'tis to execute a Judgment when it doth not appear that any Judgment was given; but sicut informamur, which is a Suggestion of Persons unknown against the Properties of Men, and was never yet allowed.

The Law is so very careful that Persons shall not be dispossessed before they are heard, that Parties, or Privies to a Record (as an Heir or Executor) shall not have an Action of Debt upon a Judgment in a personal Action, or a Scire Facias in a real Action to have Execution, till after the Year and Day, that the Defendants may be called in and have an Opportunity to be heard what they can say to defend their Possessions; and this, probably was the Reason of making the Statute against forcible Entries; for tho' a Man is in Possession by an illegal Title, yet he shall not be turned out before he is heard. 2 Inst 471.

But here a Possession is endeavoured to be removed by a Suggestion or Information without an Inquisition by a Jury, which is against the known Rules of Law, and expresly against these Statutes set forth in the Return.

It had been much better if the Writ had commanded them generally to put the Law of 1 W. & M. in Execution; but as this Case is, 'tis like a Mandamus to an inferior Court, commanding them to give Judgment parte inaudita altera, which would be very unjust, tho' the Party for whom the Judgment was given had a Right.

But this Method of Proceeding was never intended by the Act of 1 W. & M. for by that Law these Persons are only disabled to hold their Fellowships which are made void, but the Consequences thereof are left to the ordinary Methods of the Law.

Those who have any Ecclesiastical Benefice are likewise deprived by this Act, if they refuse or neglect to take the Oaths beyond the Time therein limited, but it doth not di-

rect the Patrons to present after such Deprivation; and no Man will say that a Mandamus doth lie to a Patron for that Purpose; this would be festinum Remedium; and yet if a Person presented to a Benefice, refuseth to read the 39 Articles, or cometh in by Simony, his Living is as absolutely void as these Fellowships.

If this should be admitted to be Law, how easy would it be to displace the Officers of any Corporation by such Writs? for 'tis but suggesting an Offence, and the Business is done, the Consequences whereof would be so fatal, that it would out-do the late Quo warranto's, for there the Parties had Liberty to come in and plead.

In this Case the Defendants cannot claim to be heard by the Head of the College and the other Fellows, because no such Thing is commanded by the Writ, but absolutely to turn them out; and if the Master had Power to examine this Matter, it cannot be upon Oath; for he hath no Authority to administer it, neither doth the Writ mention that he and the Fellows have Power to remove these Persons, which ought to have been alledged.

Now if the Suggestion in the Writ should be false, and the Fellows thereupon turned out, they have no legal Remedy to be restored again; for they cannot have a Mandamus; and an Appeal will not lie, because there is a local and proper Visitor; neither will an Assize lie, because 'tis not a sole Corporation; neither can an Action on the Case be brought against Dr. Gower, because what he hath done, is by the King's Command in the Writ, which is a sufficient Authority to justifie him.

The Reason of granting these remedial Writs, is for Want of other Means of doing Right to injured Persons, but here can be no Pretence of a Failure of Justice, because the College is subject to a Visitor who hath Power to execute the Laws of the Founder; and therefore a Mandamus will not lie: It hath been denied to restore a Fellow of a College upon undue Expulsion; and if so, no Reason can be given why it should be allowed to expel one who is not well admitted to a Fellowship, or unduly continued after a good Admission.

This is the proper Work of the Visitor, and not of this Court; for the College is subject ad aliud examen, therefore the Writ ought to have been directed to him who hath Power of examining and correcting the Fellows, and likewise of executing the Powers in this Act.

If therefore this is a Remedial Writ, and no Precedent can be produced where it hath been granted to expel Persons,

but always to reſtore them; if it will not lie where there is a local and proper Viſitor; if the Law ſo far favours a Freehold that no Man ſhall be diſpoſſeſſed thereof by a bare Suggeſtion without a Trial, then this Writ now brought muſt be illegal.

'Tis no Objection to ſay, that this Court hath granted a Mandamus to abate a Nuſance without a Trial; 'tis true, it hath been done, but then the Fact hath been made certain either by Matter of Record, or by a View or Preſentmen of a Grand Jury; ſo it was in Jacob Hall's Caſe, who was preſented by the Jury for a Nuſance in the High-way, tho' it was at Charing-Croſs in the View of the Juſtices coming to Weſtminſter-Hall.

'Tis true alſo, that this Court hath Power to form Writs to compel the Execution of Acts of Parliament, but ſo as always to take care to preſerve the Rules of the Common Law.

(2. Point.) Admitting this Writ to be good, then the Matter returned is a ſufficient Excuſe.

The Return begins with the Statute of 25 Ed. 3. That no Man ſhall be turned out of his Freehold but *per legem terræ*, viz. by due Proceſs of Law, which is the ſame Thing; and this muſt be (according to my Lord Coke) by Indictment or Preſentment of good and lawful Men, which was not done in this Caſe, and therefore againſt Law; for this Statute is declaratory of the antient Common Law.

'Tis true, the Statute of 11 H. 7. was made directly againſt this antient Law, which gives Power to Juſtices of Aſſiſe or of the Peace upon a bare Information to judge Offences without the Preſentment of a Jury; by which Law this Nation ſuffered many Oppreſſions for the Space of eight Years, and therefore Anno 1 H. 8. that Statute was repealed. Cap. 3.

Next 'tis returned, That it doth not appear to them that the Fellows had not taken the Oaths, and this may be very true; for by the Act of 1 W. & M. they are enjoined to be taken before ſuch Perſon or Perſons, who by any former Law were impowered to tender the abrogated Oaths; now the Fellows of Colleges were not obliged to take the Oath of Supremacy in any Place by any other Act than that of 7 Jac. which appoints it to be taken in the Halls of their reſpective Colleges; yet this Statute was made for their Eaſe; there are no negative Words in it to puniſh them if taken elſewhere; and being a penal Law, 'tis well fulfilled if they take the Oaths in any other Place before a proper Cap. 6.

Perſon

Perſon who hath Authority to adminiſter the ſame; and therefore ſince they may be taken in many Places it may not appear to thoſe who made this Return that they were not taken in ſome of theſe Places; and if it doth not lie in their Knowledge, then Ignorance will be a good Excuſe.

There is no Act of Parliament which enjoins the Head of a College to tender, or the Fellows to take the Oaths before him; for by the Statute of 5 Eliz. Graduates in the Univerſities are appointed to take the Oaths in an open Place, before a convenient Aſſembly to witneſs it, or before ſuch Perſons who have Authority by common Uſe to admit them to any Degree: Now 'tis not the Head of a Houſe, but the Convocation which admits to Degrees in the Univerſities, and there they ought to take the Oaths either in the King's Bench, or at the Quarter Seſſions, &c.

But admitting they are found to take the Oaths in the College-Hall, yet the Maſter and Scholars are not bound by the Act to be preſent, neither is the Maſter at his Peril to make any Entry or Memorandum of it.

Then they return that they have a local Viſitor who hath Power to correct the Offences of the College: Now all ſuch Eleemoſynary Corporations are viſible in their very Nature and Creation; and if the Founder doth not give the Viſitor an Authority to determine ſuch Offences, yet 'tis incident to his Office; ſo that there can be no Neceſſity of having any Recourſe to an extraordinary Remedy, becauſe the Viſitor hath as much Power to remove an Offender by a publick Act of his own, as by the private Laws of the College.

He hath a peculiar and legal Power excluſive of all others to ſee that thoſe Perſons where he is Viſitor do conform to the Laws of the Land, and that none be continued there but thoſe who are truly Fellows of the College: So that if the Fact ſuggeſted in this Writ is true, then they are no Fellows; if ſo, the Viſitor, and not this Court, muſt remove them.

But if a Mandamus will lie, Mr. Attorney is too early in bringing this, becauſe it doth not appear that the Viſitor was obſtructed to make his Viſitation, or that Application had been made to him for that Purpoſe, and that he refuſed to come; or that his Power was too weak; and this makes the Caſe more extraordinary, becauſe the Law requires a Method in all its Proceedings, and deprives no Man of that Authority which he lawfully hath; and therefore where it gives an Appeal to the Seſſions, the Matter is never begun originally there, for that would be to deprive the Juſtices

of the Peace of their legal Jurisdiction; so likewise a Writ of Error out of Ireland to the Parliament here, is never allowed till the Matter hath first received the Judgment of B. R. in Ireland.

And lastly they return they have not Power to expel but for great Crimes mentioned in the Statutes of the College; so that if they have any Power it must be either by Prescription or Charter; they cannot have it by Prescription, because the College was founded within Time of Memory; and they have it not by Charter, because not warranted by their Statutes.

So that if these Persons are expelled from their Freeholds it must be done by those who have no Power, and before they are called to answer the Fact of which they are accused, and likewise before they are tried per judicium parium vel per legem terræ, &c. for which Reasons it was prayed, That no peremptory Mandamus might go.

Econtra. The Writ is good, and the Proceedings thereon are legal for these Reasons.

(1.) From the Law it self and the Subject-matter upon which it was made.

The Act of 1 W. & M. is a Law made for acknowledging the Right and Sovereignty of their Majesties; 'tis thereby enacted, That all Persons shall be obliged to take the Oaths, &c. 'Tis a Law made for the Security of the Government, and for suspending of the Persons and making of their Places void who refuse to give Obedience to it.

The open Hall of the College is the Place appointed by the Statute of 1 Jac. therefore they who made the Return, cannot be ignorant of the Neglect; 'tis an Offence in those who have the Government of the College to suffer Men to enjoy their Fellowships who have not taken the Oaths, and 'tis a weak Excuse to say, That they had no Notice of this Matter: for the Act doth not put it under any formal Examination, neither are those Persons to have any Notice given of their Duty; the Statute is sufficient Notice, and the Neglect of that Duty incurs a Forfeiture.

'Tis a Breach of the Law, and of the Peace of the Government, 'tis an Encouragement to ill Men to contemn Authority; and 'tis for these Reasons that a Mandamus is good, for the Offenders do as much as in them is to undermine the Government, and do despise the Wisdom and Authority of a Parliament.

(2.) The

4 Inſt. 71. 1 H. 4. 19. 8 H 6. 29.

(2) The Court of King's Bench hath a ſufficient Authority to ſee this Law put in Execution, for the King having an executive Power in him for that Purpoſe hath tranſmitted the ſame in a more ſpecial Manner to B. R. for the Preſervation of Right and Juſtice; and therefore this Court hath a Sovereign Juriſdiction to correct all Matters tending to the Breach of the Peace, which is applicable to this Offence, and the Remedy now deſired is proper.

It was never yet doubted but that this Court might remove all common Nuſances, or any Thing done to the Prejudice of the Publick, and certainly a greater Nuſance to the Government cannot be than for theſe Perſons to continue in the Enjoyment of their Fellowſhips in Oppoſition to the Laws, and contrary to a poſitive Statute which hath made this Place void.

Ryley pl. parliam. 601.

Anno 19 R. 2. a Writ was directed to the Chancellor of Oxon to expel Lollards, and particularly a Man mentioned in that Writ; ſo that it was then allowed to remove an ill Man, and it was obeyed by the Univerſities; and this may be an Anſwer to that Objection made by the Counſel on the other Side, that a Mandatory Writ hath been often granted to reſtore, but never to turn a Man out of his Freehold.

As to that part of the Return which ſets forth the Statutes of Ed. 3. 'tis in the Nature of a Demurrer, by which they would diſpute the Juriſdiction of this Court to grant the Writ, 'tis to deny the Statute of 1 W. & M. to be an Act of Parliament, or that 'tis Lex terræ; but 'tis by this Law that the Avoidance is made, and if a Mandamus will lie to reſtore a Man to a Place of which he is diſpoſſeſſed, it will lie as well to turn out ſuch who are actually deprived by the Law of the Land, and in ſuch Caſe it would be to no Purpoſe to call them in to anſwer, or to have a Trial per judicium parium: for the Act it ſelf is a ſufficient Conviction, of which they are bound to take Notice.

Then as to the Return of the viſitatorial Power, viz. that for that Reaſon a Mandamus would not lie, it was ſaid, That it hath been often ſettled to the contrary.

'Tis true, where local Statutes are made to puniſh Offences, ſuch are properly cognizable by the Viſitor, and this Court doth not uſually interpoſe; but this is an Offence made by Act of Parliament, which neither the Viſitor, or Maſter, or Fellows of this College are proper Judges to determine.

'Tis objected, That this is a peremptory Writ, commanding the Thing to be done without saying, vel causam nobis significetis, &c. but 'tis said that these Persons had not taken the Oaths, sicut informamur, and there are several Precedents to warrant this Form, but none were mentioned.

Curia. This Statute of 1 W. & M. hath a Reference to that of 7 Jacobi, the one appoints the Oaths to be taken before such Persons who by any Act were authorized to tender the Oaths of Alleigance now abrogated, and by the other the Fellows of Colleges quatenus Fellows are obliged to take them in the open Hall, before the President; and therefore the Members must and ought to take Notice of such publik Acts done in their College.

This cannot be taken to be a peremptory Writ, because it sets forth the Fact sicut informamur, which Words must go to the whole, and such a Construction must be made when the Writ is grounded upon a Suggestion as this is, but when upon a Judgment, then 'tis otherwise.

The Visitor is made by the Founder, and is the proper Judge of the private Laws of the College; he is to determine Offences against those Laws. But where the Law of the Land is disobeyed this Court will take Notice thereof notwithstanding the Visitor, and in this Case the proper Way to put it in Execution is by this Writ of Mandamus. Sed Adjournatur.

Waples *versus* Basset.

A Special Action upon the Case was brought against the Defendant for not keeping of a Bull and Boar, and upon a Demurrer to the Declaration these Exceptions were taken to it, viz. he did not set forth that the Defendant was obliged to keep them either by Custom, Prescription, or otherwise; neither hath he alledged any particular Loss or Damage by his Cattle not encreasing, or that the Defendant being Rector of a Church ought to find a Boar in Consideration of paying of him Tithes; for which Reasons the Declaration was held ill. 1 Roll. Abr. 109, 559. Cro. Eliz. 569. Moor 355.

Pearſon *verſus* Garrett.

Trin. 5 Willielmi & Mariæ, *Rot.* 177.

An Action upon a Note of 60 Guineas when the Defendant ſhould marry ſuch a Perſon, upon which the Plaintiff declared as upon a Bill of Exchange.

JOhannes Pearſon queritur de Johanne Garrett in Cuſtod. Marr. &c. pro eo videlicet quod cum Civitas London eſt antiqua Civit cumq; etiam in eadem Civitate videlicet apud Paroch. beatæ Mariæ de Arcubus in warda de Cheape habetur necnon a toto tempore cujus contrar. memoria hominum non exiſtit habebatur quædam antiqua & laudabilis conſuetudo approbat. & uſitat. in eadem inter mercatores Et alias perſonas in eadem Civitate reſiden' videlicet quod ſi aliqua perſona in eadem Civitate reſiden. fecerit aliquam Billam ſive notam in ſcriptis ſub manu ſua ſubſcript. & per eandem billam ſive notam promitteret ſolvere alicui perſonæ aliquam denariorum ſummam ad aliquod tempus vel aliqua tempora in hujuſmodi billa ſive nota mentionat. talis perſona quæ hujuſmodi Billam ſive notam fecerit per hujuſmodi promiſſionem & conſideration. præd. inter mercatores & alias perſonas præd. ſic ut præfertur uſitat. & approbat. onerabilis eſſe conſuevit ad ſolvend. hujuſmodi denariorum ſummam in hujuſmodi billa ſive nota mentionat. hujuſmodi perſonæ cui promiſſio ſolutionis inde per hujuſmodi billam ſive notam facta fuit fore ſolvend. ad tempus ſive tempora in & per hujuſmodi billam ſive notam pro ſolutione inde denotat. ſecundum promiſſionem ſuam præd. cumq; viceſimo primo die Octobris Anno Regni Domini Willielmi & Dominæ Mariæ nunc Regis & Reginæ Angliæ &c. quarto apud London præd. videlicet in Parochia beatæ Mariæ de Arcubus in warda de Cheap præd. idem Johannes Garret fuit perſona reſiden. in Civitate London præd. & ſic ibidem reſiden. eodem viceſimo primo die Octobris Anno quarto ſupradicto apud London præd. in Parochia & warda præd. per quandam notam in ſcriptis ſub manu ſua ſubſcript. promiſit ſolvere eidem Johanni Pearſon vel aſſign. ſuis ſexaginta pecias auri cuneti Anglice Thirtieth pieces of Guinea twenty Shillings pieces of Gold, infra duos menſes prox. poſt ipie præd. Johan. Garret cuidam Elizabethe Pretty legitime maritat. Foret, videlicet quinquaginta pecias inde pro ſeipſo prædicto Johanne Pearſon

The Cuſtom ſet forth.

The note made

To be paid upon Marriage.

ſon & decem pecias inde pro uxore ſua & idem Johannes Pearſon in facto dicit quod præd. Johannes Garret poſtea ſcilicet viceſimo octavo die Februarii Anno Regni dicti Domini Regis & Dominæ Reginæ nunc quinto apud London præd. in parochia & warda prædictis præfat. Elizabethæ Pretty legittime maritat. fuit per quod & vigore conſuetud. præd. prædictus Johannes Garret devenit onerabilis ad ſolvend. eidem Johanni Pearſon præd. ſexaginta pecias auri ſecundum promiſſionem ſuam præd. ac ſuperinde in conſideratione præmiſſ. præd. Johann. Garret adtunc & ibidem ſcilicet præd. viceſimo octavo die Februarii Anno quinto ſupradicto apud London præd. in parochia & warda præd. ſuper ſe aſſumpſit præfatoq; Johanni Pearſon adtunc & ibidem fideliter promiſit quod ipſe idem Johannes Garret præd. ſexaginta pecias auri eidem Johanni Pearſon infra duos menſes prox. poſt maritagium præd. habit. bene & fideliter ſolvere & contentare vellet pd. tamen Johannes Garret promiſſion. & aſſumption. ſuas præd. minime curans ſed machinans & fraudulenter intendens eundem Johannem Pearſon in hoc parte callide & ſubdole decipere & defraudare præd. ſexaginta pecias Auri ſeu aliquem inde denarium præfat. Johanni Pearſon nondum ſolvit nec ei pro eiſdem hucuſq; aliqualiter contentavit licet ad hoc faciend. præd. Johannes Garret poſtea ſcilicet ſecundo die Maii Anno quinto ſupradicto apud London præd. in parochia & warda prædictis per eundem Johannem Pearſon requiſit. fuit ſed ill. ei hucuſq; ſolvere ſeu proinde aliqualiter contentare omnino recuſavit & adhuc recuſat unde idem Johannes Pearſon dicit quod deteriorat. eſt & dampnum habet ad valentiam Centum librarum & inde producit ſectam &c.

The Defendant named.

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

The Action was brought upon a Note for the Payment of 60 Guineas when the Defendant ſhould marry ſuch a Perſon, &c. in which the Plaintiff declared as upon a Bill of Exchange ſetting forth the Cuſtom of Merchants, &c.

The Exceptions taken were, viz. That the Plaintiff doth not aver that he was a Merchant, or that the Note was made ſecundum conſuetudinem Mercatorum; neither hath he laid any conſideration.

This is not ſuch a Cuſtom amongſt Merchants of which this Court is obliged to take Notice as Part of the Law of the Land; for in Truth there is no ſuch Cuſtom, 'tis only an Agreement founded upon a Brokage, and therefore cannot be within the Cuſtom of Merchants; neither was there ever yet any Precedents to pay Money upon ſuch a collateral Contingency.

'Tis no more than a voluntary Note given with a preſent Conſideration, and if ſuch ſhould be allowed to be within the Cuſtom of Merchants, then every thing which is given without a Conſideration may be as well within the Cuſtom, which would quite change the Law.

Econtra. The Queſtion is, Whether this Cuſtom is good or not? 'Tis ſufficiently alledged in the Declaration, 'tis not laid to be inter Mercatores only, but inter alias perſonas reſidentes, &c. and if ſuch a Cuſtom can be good, then 'tis admitted to be ſo by the Demurrer.

Dr. Witherly's Son brought the like Action upon a Note, and he was a Gentleman, and no trading Merchant, but travelling into France, and had Judgment, which was affirmed in the Exchequer-Chamber.

No Reaſon can be offered why ſuch a Note ſhould not bind as well as a Bond, ſince the Conſideration for which it was given, was very juſt; for 'tis lawful for one Man to help another to a Wife.

If the Note had been given by way of Commerce, it had been good, but to pay Money upon ſuch a Contingency, cannot be called Trading, and therefore noe within the Cuſtom of Merchants. Judgment was given for the Defendant.

Gale *verſus* Till.

3 Levinz. 375, 396.

An Adminiſtrator brought a Writ of Error to reverſe a Judgment againſt himſelf, but the Judgment was affirmed; and now a Motion was made that he may pay Coſts; becauſe it was his own Fault to bring a Writ of Error to delay the Plaintiff, and to put him to Charge; and where an Adminiſtrator is guilty of any Wrong or Injury done, which lies within his own Knowledge, and which he might prevent; there if Judgment be againſt him, Coſts muſt be paid.

As if an Administrator should bring Trover and Conversion for the Goods of the Intestate, and the Conversion happens to be after the Administration granted, and Judgment against him, in such Case he shall pay Costs. Cro. Car. 219. Latch. 220.

'Tis true, there is a Case reported by Justice Croke, wherein the Law was held to be otherwise; the Case was thus: viz. An Executrix brought a Writ of Ravishment of Ward, and Issue being joined upon the Tenure, it was found against her; three Judges held that she should not pay Costs; of whom the Reporter saith that Justice Hutton was one; but that Judge in his own Reports declares himself to be of another Opinion in the same Case, with whom Justice Yelverton agreed, that Costs should be paid; and their Reason was, because the Action was brought by the Executrix upon her own Possession, and for an Injury done to her self by taking away the Ward, whose Marriage did belong to her; so that this can be no Authority against the Payment of Costs in this Case. Cro. Car. 29. Hutt. 78.

All the Cases which mention Costs not to be paid by an Executor or Administrator are where the Action is brought in the Right of another (viz.) upon Contracts, Obligations, or other Specialties or Things made to the Testator himself, and for which the Executor brings the Action; but where the Suit is founded upon their own Contracts, and a Verdict against them, or they suffer a Nonsuit, they must pay Costs. 2 Cro. 229, 361. Cro. Eliz. 503.

Econtra. The Judgment against this Executor is in auter droit, and therefore as it hath been said no Costs shall be paid; 'tis a Recovery de bonis Testatoris, and the Writ of Error now brought cannot be called an Action in his own Right; for 'tis to reverse that Judgment, and to have a Restitution to the Testator's Estate, not for his own Use, but for the Performance of the Will.

The Authorities cited on the other Side, are not applicable to this Matter; they only prove that Costs shall be paid by an Executor where he declares upon an immediate Tort done to himself, and found against him; but this Writ of Error is brought to have Relief in the Testator's own Cause.

Curia. By the Statute of 3 Jacobi 'tis enacted, that no Execution shall be staid by a Writ of Error, unless the Plaintiff in the said Writ give Bail to the Plaintiff in the Action in double the Sum recovered, to pay the Debt, and Damages and Costs, 3 Jac. Cap. 8.

Sid. 183. Coſts if the Judgment ſhould be affirmed; 'tis always held, that an Adminiſtrator who brings a Writ of Error, ſhall not give Bail, tho' he is not exempted by the Statute, neither ſhall he pay Coſts in this Caſe.

Ellery *verſus* Hicks & Uxor'.

ASſault and Battery was brought by Original againſt Husband and Wife; in the Writ there was but one Battery mentioned, and the Plaintiff declared upon two (viz.) one made on the firſt, and the other on the ſecond of January, and that the Defendant ſet on his Dog to bite the Plaintiff.

The Husband pleaded, as to the ſetting on of the Dog, Not guilty; and as to the Batteries, ſon Aſſault demeſne; and the Wife pleaded, that the Plaintiff and her Husband were quarrelling, and that in Order to part them, ſhe manus impoſuit, &c. ut bene licuit.

The Plaintiff replied præcludi non, &c. quia die & Anno, &c. in narratione mentionat', &c. de injuria ſua propria inſultum fecerunt, &c.

There was a Verdict for the Plaintiff at the Aſſizes in Cornwal, and now it was moved in Arreſt of Judgment, and the Exceptions taken were,

(1.) The Action is brought by Original, in which there is but one Battery laid, and two in the Declaration, and ſo there is a plain Variance; but this Exception was diſallowed becauſe the Defendant ſhall not take Advantage of an ill Original without demanding Oyer of it, which he had not done; beſides, 'tis only by Way of Recital in the Declaration, 'tis like attachiatus fuit, which is naught in an Action of Debt, but being only a Recital, it has been held good.

(2.) There are two Batteries laid in the Declaration on ſeveral Days, to which the Defendant pleaded ſon Aſſault, &c. and the Plaintiff hath replied but to one (viz.) die & anno, &c. de injuria ſua propria. This Exception was alſo diſallowed, becauſe 'tis only a Diſcontinuance, and helped by the Verdict. It had been otherwiſe upon a Demurrer; ſo the Plaintiff had his Judgment.

Dighton *verſus* Granvil.

A Judgment was obtained in the Reign of King James in an Action commenced in the Reign of King Charles the Second, and Debt was brought upon the Judgment in B. R. after a Writ of Error allowed, which Writ was (viz.) quia in Recordo & Proceſſu ac etiam in redditione Judicii loquelæ quæ fuit in Curia noſtra, &c. Now the Judgment and Continuances being in King James's Reign, and the Writ of Error ſuppoſing all to be done in tempore Regis nunc, an Objection was made, that the Record was not well removed, for it ought to be in redditione Judicii loquelæ quæ fuit in Curia nuper Domini Regis, becauſe the loquela was begun in his Reign. 1 Show. 36. 2 Vent. 321.

But Serjeant Pemberton inſiſted, that this was amendable by the Statute of 8 H. 6. eſpecially ſince the Word loquela might extend to the whole, and it was amended accordingly. 8 H. 6. Cap. 12.

Then the Defendant pleaded a Writ of Error depending, and the Record certified into the Exchequer-Chamber; to which Plea the Plaintiff demurred.

It was now argued for him, that this was no Plea, becauſe Debt will lie in B. R. after a Writ of Error brought, and ſo it hath been adjudged; the Reaſon is, becauſe by the Writ of Error the Tranſcript only, and not the Record it ſelf is removed; for if the Judgment ſhould be affirmed in the Exchequer, the Execution muſt be awarded in B. R. where the Record of the original Judgment remains. Sid. 236.

It has been an Opinion, that if Error is brought in B. R. upon a Judgment obtained in the Common Pleas, that pending the Writ Debt will not lie upon that Judgment in that Court, becauſe the Record itſelf is removed, and ſo there can be no Foundation for an Action of Debt there, but the Reaſon is not the ſame in B. R. where the Record is not removed, but the Tranſcript only.

But even this Opinion is againſt the old Books (viz.) in 4 H. 6. a Writ of Annuity was brought, and the Plaintiff obtained a Judgment. The Defendant brought a Writ of Error in B. R. and pending that Writ the Plaintiff brought an Action of Debt upon the Judgment in the Common Pleas for a nomine pœnæ in not paying the Annuity upon a Day certain. The Defendant pleaded the Writ of Error depending, but a Reſpondeas ouſter was awarded. 8 H. 6. 31. a.

So

18 E. 4. So in Easter Term, 18 Ed. 4. an Action of Treſpaſs was brought in the Common Pleas, and the Parties were at Iſſue whether the Plaintiff was the Defendant's Villain or not, and it was found for the Plaintiff; thereupon the Defendant brought a Writ of Error in B. R. and pending that Writ the Plaintiff in the original Action brought Debt in the Common Pleas upon the Judgment; and it was then objected, That ſuch an Action would not lie, becauſe there was no Record of any ſuch Judgment before the Court, that being removed by the Writ of Error; but the Judges were of the contrary Opinion; for they held, That the Judgment tho' removed was in Force till reverſed.

Curia. At the Common Law before the Statute of W. 2. if Execution had not been ſued upon a Judgment in any perſonal Action within a Year and a Day, the Party muſt then have brought an Action of Debt upon that Judgment; for he could have no Scire fac. upon that Judgment, but now that Statute applies a proper Remedy by giving the Sci. fac. upon the Judgment after a Year and a Day; and it has been held, that a Writ of Error pending, was a good Plea in Abatement to ſuch a Sci. fa. But of late days that has been over-ruled, tho' it has been ſaid, that if there is a Judgment precedent to a Statute from the ſame Perſon who dies, and afterwards a Writ of Error is brought upon the Judgment, and pending that Writ, the Money due upon that Statute is paid, and there is enough remaining to ſatisfie the Judgment Creditor, that the firſt Payment to the Cognizee is good, becauſe by the Writ of Error the Execution of the Judgment was ſuſpended.

But in this Caſe the Demurrer was held good, and afterwards the Defendant was ruled to anſwer over.

Rex & Regina *verſus* Waite.

A Motion was made to quaſh an Inquiſition for a forcible Entry, the Exceptions were, viz.

(1.) 'Tis ſaid, per ſacramentum duodecim, &c. jurat. & impanellat', &c. and doth not ſay adtunc & ibidem jurat', &c. for if the Time and Place are not ſufficiently aſcertained, the Inquiſition cannot be good, becauſe the Fact may be committed above a Year paſt. And

Dyer 68. b. a Caſe in Dyer was cited for this purpoſe (viz.) in quinto Ed. 6. one

one Buckler was indicted and outlawed for Murder in B. R. de eo quod such a Day and Year at such a Place he made an Assault upon B. Et ipsum cum quodam cultello, &c. felonice percussit occidit & murdravit, without saying adtunc & ibidem, and for this Reason the Indictment was adjudged to be ill.

But notwithstanding this Authority the Exception was not allowed in this Case, because 'tis not material here to shew the Place, &c. for the Party could not be amoved, so as to make the Defendant guilty of a forcible Entry from any other Place but from the Land,

(2.) Exception, viz. By the Statute of 8 H. 6. Restitution is to be granted where the Tenant of the Freehold only is put out of Possession, and the Statute of 21 Jac. makes no Alteration of any former Law, but only grants Restitution where a Termor for Years, &c. is put out of Possession: Now in this Case 'tis not said, that the Tenant of the Freehold was ousted, but that the Lessee for Years was ousted; and it was compared to a Case in B. R. Mich. 28 Eliz. viz. There was a Lessee for Years, and a Reversioner, and an Indictment was brought upon this Statute setting forth that the Defendant expulit & disseisivit him in Reversion, & quendam J. S. tenentem expulit, which last Word was applied to both, and two cannot be expelled where but one is in Possession; and therefore it should have been that the Tenant of the Freehold was disseized, and the Lessee for Years expelled, and for this Reason the Indictment was held to be naught, per Dolben & Eyre Justiciarios, cæteris absentibus. Cap. 9. Cap. 15.

Griffith *versus* Harrison.

THere was a Covenant in an Assignment of a Lease that the Assignee should quietly enjoy, &c. free and clear of and from all Arrears of Rent. 1 Salk. 196.

An Action was brought upon this Covenant, and the Breach assigned was, That the Rent was arrear, and not paid.

The Defendant pleaded that he left so much Money in the Hands of the Plaintiff ea intentione to pay it over to the Lessor in discharge of what Rent was then arrear, &c. And upon a Demurrer to this Plea it was held good notwithstanding the Objection, That the Intention was put in Issue; for if it had been ad solvendum, it would have been good, and in this Case the Plaintiff might have replied, non reliquit, &c. in manibus suis ad solvend', &c.

Perry *verſus* Odingſell.

INdebitatus Aſſumpſit for Payment of Money upon a Note, and on a certain Day.

The Defendant pleaded in Bar that after the Day of Payment was incurred, he paid ſo much Money in Satisfaction of what was due upon the Note; and upon Demurrer this was held to be no good Plea, becauſe after the Action is veſted you cannot plead exoneravit; for Payment after the Day is good by way of Diſcharge, but not by way of Satisfaction.

DE

Term. Sanct. Hill.

Anno 5 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1693.

Benſon *verſus* Scott.

IN an Ejectione firmæ for Copyhold Lands in Eſſex, upon not guilty pleaded, the Jury found a ſpecial Verdict, the Subſtance whereof was, viz. As to 4 Acres mentioned in the Declaration they find the Defendant not guilty, and as to the Reſidue they find that it was parcel of the Manor of Witherfield in the County of Eſſex, and held of the ſaid Manor by Copy of Court-Roll, &c. 3 Lev. 385. 1 Salk. 185.

That before the Ejectment brought, viz. Octob. 3. 1690. Samuel Scott was ſeized to him and his Heirs by Copy of Court-Roll of the Lands in Queſtion, and being ſo ſeized did the ſame Day ſurrender it into the Hands of the Lord of the Manor by the Hands of Edward Barker and John Pryor two Cuſtomary Tenants of the ſaid Manor, to the Uſe of Barbara Callard and her Heirs, with a Condition to be void upon Payment of 175 l. upon the 20th Day of Auguſt following.

They find that the Surrender was duly preſented at the next Court in the Life-time of the ſaid Samuel Scott, and that he did not pay the Money at the Day, or at any Time before or ſince, and that he died, and that Martha Scott the Defendant was his Widow.

They find that after the Death of the ſaid Samuel Scott, the aforeſaid Barbara Callard was admitted to theſe Lands,

and ſurrendered the ſame to the Uſe of Richard Scott, the Leſſor of the Plaintiff, who was Heir at Law to Samuel Scott, and that the ſaid Richard Scott was admitted, &c.

They find the Cuſtom of the Manor, That if any Copyholder die ſeized of Copyhold-Lands having a Wife at the Time of his Death, that ſuch Wife ſhall hold the ſaid Lands during her Widowhood for her Free-Bench; then they find that the ſaid Martha Scott was admitted to all the Copyhold-Lands, of which her Husband died ſeized, to hold the ſame during her Widowhood, and that ſhe is ſtill a Widow; they find that the Leſſor of the Plaintiff made a Leaſe to him, &c. and that the Defendant ejected him, and ſo made a general Concluſion, &c.

The Queſtion upon this ſpecial Verdict Was, whether the Surrenderee, tho' admitted after the Death of Samuel Scott, the Surrenderor, ſhall hold this Eſtate againſt the Widow who was thus entitled by the Cuſtom of the Manor?

It was argued that he ſhall,

(1.) Upon the Conſtruction of the Cuſtom it ſelf, which is that the Widow ſhall enjoy the Land in the ſame Manner as her Husband held it in his Life-time; but he might alien or extinguiſh his Right; if ſo, that which will determine his Eſtate, will likewiſe put an end to her Title.

(2.) From the Nature of Copyhold Eſtates; for Admittances to ſuch Eſtates ſhall have Relation to all mean Acts; and therefore the Admiſſion of the Surrenderee in this Caſe ſhall have Relation to the Surrender: but if no Admittance had been made, the very Acceptance of the Rent by the Lord after a Surrender is an Admittance in Law of him to whoſe Uſe the Surrender was made.

1 Roll. Abr. 505.
3 Bulſt. 214.

And to prove theſe two Points a Caſe was mentioned, which was adjudged in B. R. Hill. 15 Car. 1. viz. the Cuſtom of a Manor was that the Wife of a Copyholder dying ſeized ſhould have her Widow's Eſtate; it happened that in the 10th Year Car. 1. a Statute of Bankrupt was taken out againſt the Copyholder, and the Commiſſioners ſold the Eſtate by a Deed of Bargain and Sale enrolled, Anno 12 Car. the Copyholder died, and his Widow was admitted before the Bargainee, who thereupon brought an Ejectment, and it was adjudged that by the Conveyance the Eſtate was veſted in the Bargainee before Admittance; which proves that a Copyholder may extinguiſh his Right ſo as to bind the Eſtate of the Widow; in which Caſe it was alſo held,

Cro. Car. 568.

That after the Bargainee was admitted it had Relation to the Sale and should divest the Widow of that Right which she might have by the Custom.

If there are two Join-tenants of a Copyhold, and one surrenders out of Court to the Use of his Will, and deviseth his Moiety to a Stranger, and dieth, afterwards this Surrender is presented at the next Court, &c. the Devisee ought to be admitted, for by the Surrender and Presentment the Jointure was severed, for the Land was bound by the Surrender by way of Relation. 1 Inst 59. b.

The Heir and the Widow are both by Custom, and the Widow's Estate is no more than a Continuance of her Husband's.

Econtra. The Widow's Title commences from her Marriage, and shall not be defeated by any subsequent Act done by the Husband after the Coverture.

The Case of a Bankrupt Copyholder is not at all pertinent to this, for the Widow was divested of her Estate there, because her Husband did not die seized, the Estate being sold before his Death.

'Tis true, an Admittance doth refer to the Surrender, and likewise to all Acts between the Parties, but not to a third Person as the Widow is; it shall never relate to destroy a precedent Right, which is not consummate till the Death of her Husband.

If a Man marrieth, and afterwards makes a Bargain and Sale of his Land and dieth, then the Deed is enrolled, the Wife in such case shall be endowed.

Now nothing passes from the Surrenderor till the Admittance of the Surrenderee: for till then neither the Lord himself, or the Person to whose Use the Surrender was made; but only the Surrenderor continueth in Possession, so that the Plaintiff in this Case hath but an inceptive Title, and therefore shall not defeat the Widow. Cro. Eliz. 349 Yel. 16.

Curia. The Widow's Title doth not commence by the Marriage, if it did, then the Husband could do nothing in his Life-time to prejudice it; but 'tis plain he may alien or extinguish his Right, as in the Case of Bankrupcy before-mentioned.

The Free-Bench grows out of the Estate of the Husband; and 'tis his dying seized which gives the Widow a Title; and as the Husband had a defeasible Estate, so the Wife may have her Free-Bank defeated.

There

There is no Difference between this Case and that of Joint-tenants of a Copyhold; for as by a Surrender by one Joint-tenant, and a Presentment thereof, the Jointure is severed, and the Estate is bound by the Surrender by way of Relation; so in this Case the Admittance shall relate to the Surrender, and the Estate is thereby divested. Judgment for the Plaintiff absente Justice Gregory.

Coombs *versus* Talbott.

1 Salk. 21. 210, 209.

DEBT for Rent upon a Demise of a House and Lands at the yearly Rent of 9 l. per Annum, the Action was brought for two Years in arrear.

The Defendant pleaded as to the 9 l. part thereof nil debet, and as to the other 9 l. he confessed the Demise as laid in the Declaration, reddendo annuatim 9 l. for a Piece of Land called Chalwell, and 40 s. for other Lands, and 7 s. for another Parcel, &c. and quoad 40 s. Part thereof nil debet; and as to the rest, nil habuit in tenementis: And upon a Demurrer the Plea was held to be ill, because in Construction of Law, nil habuit in tenementis goes to the whole, tho' pleaded as to Part; and having likewise pleaded nil debet, that makes the Plea double; for upon nil debet the Defendant might give in Evidence nil habuit in tenementis; but by pleading he owed nothing, the Demise was admitted; and then by saying the Plaintiff had nothing in the Lands, &c. that made the Plea double and repugnant; but he should have traversed the whole Demise.

3 H. 6. 19. 21 H. 7. 21. b. 16 H. 7. 3 & 4. 12 H. 8. 11. Cro. Eliz. Collins *versus* Parding.

Johnson *versus* Oxenden.

PRohibition was prayed to the Arches, to stay a Suit commenced there for Fees, against which it was said, That they are the proper and best Judges of their own Fees, which generally arise by Constitutions Provincial; and for this Reason a Prohibition was denied in the Common Pleas to a Proctor who libelled in the Spiritual Court for his Fees; and for the like Cause it was denied in B. R. in Hillary Term, 16 Jac. and the Reason then given was, That 'tis just a Proctor should be recompensed for his Trouble and Charge, tho' a Suit was commenced in a Court-Christian for a

1 Mod. 167. 2 Roll. Rep. 59.

Cauſe of which that Court had not an original Juriſdiction.

'Tis true, in Hillary Term 35 & 36 Car. 2. the Court of Exchequer made a Queſtion in this Matter, but afterwards they refuſed to grant a Prohibition in the Caſe of Skelton and Lee; and ſince that Time the Court of Common Pleas in Hillary Term, 2 Willielmi & Mariæ would not prohibit them in the Caſe of Frogget the Official of Wells and Joſſelin.

But on the other Side it was argued, That Courts of Common Law take Notice of Proctors Fees; and to prove this they cited * Dr. Lake's Caſe, who being a Commiſſary, was indicted for Extortion for taking 11 s. and 6 d. for abſolving an excommunicated Perſon; and an Exception was taken to the Indictment becauſe it did not ſet forth what Fee was juſtly due, and for this Reaſon it was quaſhed. * 3 Leon. 268.

Chancellors, Regiſters and Proctors are Officers of temporal Profit, whoſe Fees do not relate to the Juriſdiction of the Spiritual Court; there is a proper Remedy at Law to recover them, and therefore a Prohibition was prayed.

Curia. 'Tis Cuſtom and not the Authority of Conſtitutions which entitles Proctors &c. to take Fees, for which an Action will lie at the Common Law, and therefore the Spiritual Court ought to be prohibited; the Rule was, That they ſhould declare upon the Prohibition.

Goodright *verſus* Corniſh.

IN a ſpecial Verdict in Ejectment the Caſe was thus, viz. John Knowling was ſeiſed in Fee of the Lands in Queſtion, who had Iſſue two Sons, John and Richard. 1 Salk. 226.

The Father deviſed the Lands to John his eldeſt Son for fifty Years, if he ſhould ſo long live (which Term was to commence after the Death of the Teſtator) and after the Determination thereof, then to the Heirs Males of the Body of the ſaid John; and for want of ſuch Iſſue, then to his ſecond Son in Tail, &c. Remainder to the right Heirs of the Deviſor.

The Father died, John the eldeſt Son ſuffered a Common Recovery of theſe Lands, and declared the Uſes to himſelf for Life, and to the Heirs Males of his Body; and for want of ſuch Iſſue to the Defendant and his Heirs.

John

John died without Iſſue, and Richard died leaving Iſſue a Son of that Name.

The Queſtion was, Whether John the eldeſt Son had an Eſtate-Tail by this Deviſe? If he had, then the Recovery was well ſuffered to dock that Eſtate, and it ſhall be a good Bar to the Remainders.

It was argued againſt the Eſtate-Tail, that the Nature of this Deviſe was by expreſs Limitation for 50 Years, ſo that what the eldeſt Son had more, muſt be by Implication; for the Term was only deſigned for him; but where the Intent of the Deviſor is apparent in the Will, no Conſtruction ſhall be put upon his Words, ſo as to make any Eſtate to ariſe by Implication.

The legal Conſtruction of theſe Words is to expound the Deviſe of the Inheritance to be an Executory Deviſe: It cannot be a Remainder, becauſe a Freehold muſt depend, and be ſupported by a Freehold; but here the particular Eſtate being but a Term for Years, 'tis too weak to ſupport a Remainder.

4 Leon. 21. This was the Opinion of Dyer and Manwood in Mich. 29 Eliz. in the Common Pleas, that a Remainder in ſuch Caſes was void, becauſe there is no Perſon who can take preſently; but if the Leaſe had been made for Life with a Remainder to his right Heirs, then he would have a Fee executed; ſo that in this Caſe John cannot have an Eſtate-Tail executed, becauſe the Limitation to him by Way of Remainder was void in its Creation.

To prove that John took up an Executory Deviſe, they cited Mathew Manning's Caſe, which was thus, viz.

8 Rep. 94. Edward Manning was poſſeſſed of a Term which he deviſed to his Wife for Life, paying every Year 7 l. to Matthew Manning, and after the Death of his Wife he deviſed it to Matthew, and made his Wife Executrix; ſhe proved the Will, but had not Aſſets ultra the Term to pay the Debts of the Teſtator.

The Executrix aſſented to the Legacy, and paid it conſtantly to Matthew during her Life, ſhe died Inteſtate, and Adminiſtration de bonis non of Edward was granted to Mathew, againſt whom a Creditor of Edward brought an Action, and upon plene Adminiſtravit pleaded, the Queſtion was, Whether the Reſidue of the Term was Aſſets in the Hands of Matthew to pay the Debts of the Teſtator?

This Matter was found ſpecially before the Lord Chief Juſtice Coke at Guildhall; and upon arguing of it in the Common Pleas, Juſtice Walmſley was at firſt of Opinion, that the Deviſe to Matthew was void, becauſe the whole

Term was deviſed to the Executrix for Life, who might have ſurvived the ſame; and there was only a Poſſibility that ſhe might die within the Term and Matthew ſurvive, which Poſſibility could not be limited by way of Remainder.

But it was adjudged, that it did veſt in Matthew not as a Remainder, but by way of Executory Deviſe, which, in Judgment of Law, ſhall precede the Diſpoſition of the Term, till the Contingency ſhall happen; as if he had ſaid (viz.) If my Wife die within the Term, then Matthew ſhall have the Reſidue, and farther had deviſed it to her for Life.

The ſame Point was adjudged three Years afterwards in the ſame Court in Lampett's Caſe, which was thus, viz. 10 Rep. 48.

John Morrice was poſſeſſed of a Term for 5000 Years in a Houſe, &c. he deviſed the Houſe &c. to his Father for Life, Remainder to Elizabeth his Siſter, and to the Heirs of her Body, and made his Father Executor, and died.

The Siſter married William Taylor, and then the Husband and Wife releaſed to the firſt Deviſee,

It was objected, That Elizabeth having only a Poſſibility to have this Term after the Death of the Executor, ſuch Poſſibility could not by the Rules of Law be releaſed to him in Poſſeſſion.

But it was adjudged, that ſhe had more than a Poſſibility becauſe ſhe took by Executory Deviſe, which veſted an Intereſt immediately in Point of Law, tho not to take Effect till the Contingency ſhould happen; and therefore by this Releaſe their Right was extinguiſhed, and they had abſolutely perfected the whole Term in the Executor, which before was determinable by his Death.

Now in the Caſe at Bar, if there had been a Limitation over to the right Heirs of John, the Remainder could never have veſted in him, but his right Heirs would have taken by way of Purchaſe, becauſe John their Anceſtor had no Freehold, but only a Leaſe for Years; but if he had a Freehold for Life with a Remainder to his right Heirs, then the Fee had veſted in him, becauſe then thoſe Words, (viz. right Heirs) would be Words of Limitation of the Eſtate, and not of Purchaſe. Co. Lit. 319. b.

This is like a Covenant to ſtand ſeiſed for 20 Years, Remainder to the Heirs of the Body of the Covenantor, which is an executory Remainder, and to be barred by a Common Recovery.

Econtra. Such a Conſtruction muſt be made of this Deviſe that the Will may have its Effect; and 'tis a known Rule in Law, that it ſhall not be conſtrued by way of Executory Deviſe, if it will admit of any other Conſtruction.

This is therefore a Remainder veſted, or otherwiſe it muſt be void; 'tis an Eſtate-Tail in John of Neceſſity by Implication, becauſe of theſe Words, viz. for Want of ſuch Iſſue; and it makes no Difference whether thoſe Words follow an Eſtate for Life or for Years, ſo as the Limitation is to the Heir.

9 Rep. 127. *Sunday's* Caſe. A Deviſe to his Wife for Life, Remainder to William, and if he have Iſſue Male of his Body, then to ſuch Iſſue, and if no Iſſue Male, then to Samuel, &c. ſo to Thomas, totidem verbis: It was adjudged, that every one of the Sons had an Eſtate-Tail, becauſe of the Words viz. if no Iſſue Male, which are ſufficient to create ſuch an Eſtate, and yet there was no Freehold for Life deviſed to the Iſſue, but only a Deviſe generally,

The like Reſolution was in Trinity Term, 7 Jac. in B. R. in

1 Roll. Abr. 837. a Caſe between Robinſon and Miller, which was a Deviſe to the Wife for Life, Remainder to the Son of the Teſtator, and if the Son die without having a Son, Remainder over, the Son had an Eſtate-Tail by this Deviſe.

There is as much Reaſon that an Eſtate ſhould ariſe by Implication here as in that known Caſe of Pybus and Mitford, and 'tis not material whether the Leaſe for Years is drowned by the Reverſion in Fee deſcending upon John the eldeſt Son and Heir of the Deviſor; for the Limitation being to the Heirs of the Body of John, and he being likewiſe Heir at Law to the Teſtator, ſo much of the old inheritable Eſtate ſhall ariſe to him by Implication, which may make him a Tenant for Life, and then he hath an Eſtate-Tail executed in him.

1 Mod. 121, 156. A Man having two Sons by ſeveral Venters, did covenant to ſtand ſeiſed to the Uſe of his Heirs Males begotten on the Body of his ſecond Wife (without any precedent Limitation of an Eſtate for Life) Remainder to his own right Heirs: It was adjudged that an Uſe did ariſe to the Son of the ſecond Wife, becauſe an Eſtate for Life did ariſe to the Covenantor by Implication, and this was by Operation of Law; for a Limitation to the Heirs of his Body, is

2 Mod. Davis *verſus* Speed. in effect to himſelf, and then the Caſe is no more than a Limitation to himſelf for Life, and to the Heirs Males of his Body begotten on the Body of his ſecond Wife; and this was the Caſe of Pybus and Mitford.

So a Deviſe to S. from Michaelmas next for 5 Years, Remainder to A. and his Heirs; S dies before Michaelmas, this was adjudged a good Remainder in Contingency, becauſe it being in the Caſe of a Will, the Freehold ſhall be in the Heir or the Deviſor till the Contingency happens. Noy. 43. Cro Eliz. 878.

So here this ſhall be a good Deviſe to the Heirs of the Body of John by way of contingent Remainder, and in the mean Time the Freehold ſhall not be in Abeiance, but ſhall deſcend to him being likewiſe Heir of the Deviſor.

Agreeable to this is a very late Reſolution of both the Courts of Law in Weſtminſter-Hall, which was thus, viz. Paſch. 4. Willielmi. Reeve *verſus* Long.

John Long being ſeiſed in Fee, deviſed to Henry Long for Life, then to the firſt Son of Henry, and to the Heirs Males of the Body of ſuch firſt Son, &c. and for Default of ſuch Iſſue, to Richard Long for Life, with like Remainder in Tail-Male, Remainder over, &c.

The Deviſor died, and Henry entred and died without Iſſue Male, but left his Wife with Child of a Son, then Richard entred, and afterwards the Son was born, who brought an Ejectment.

Thoſe who argued for him, would have it to be an Executory Deviſe, and that the Freehold ſhould veſt in Richard until the Son was born; but it was held to be a contingent Remainder, and there being no particular Eſtate in Henry to ſupport it, therefore it was adjudged void; for otherwiſe, if it had been an Executory or a Springing Remainder (as it was called) in one, it would be ſo in all the Deviſees, and that would be to introduce Perpetuities; ſo here to conſtrue this to be an Executory Deviſe, would be to introduce the ſame Miſchief, and to elude the Force of a Common Recovery, which is one of the chief Aſſurances of the Kingdom.

Curia. This cannot be an Executory Deviſe; if it ſhould, then the Limitations over are void; it muſt therefore be a Contingent Remainder, and then 'tis void, becauſe there is nothing but a Term for Years to ſupport it: And afterwards in Eaſter Term Judgment was given for the Plaintiff.

Rex & Regina *verſus* St. *John's* College in *Oxon.*

A Mandamus was prayed to the Preſident of the College, &c. for that White who was the Founder thereof, had appointed that there ſhould be a Preſident and fifty Scholars there, whereof three and forty ſhould be named by particular Schools in London, and ſeven more by three Cities, of which Briſtol was to name two; That one Baskervile being a Scholar of that College, had ſurrendred his Place, by Reaſon whereof that City had a Right to name another, that they named one King to ſucceed him, who was refuſed by the College, and that they had choſen a Perſon in his Stead, and therefore prayed a Mandamus.

Object. Such Writs have been granted in doubtful Caſes, but not where a Viſitor is appointed, which in this College is the Biſhop of Winton, and he is to determine all Things concerning that Foundation.

But it was anſwered, That the Perſon who deſired this Mandamus, was only a Nominee, and not yet of the Foundation, and therefore the Viſitor had no Power over him till he came to be a Member of the College. The Court ordered the Statutes of the College to be returned; & adjornatur.

DE

Termino Paſch.

Anno 6 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1694.

Jones *verſus* Morley Mil' Balnei & Bar'.

IN Treſpaſs and Ejectment for the Manor of Frenſham in the County of Surrey, a Verdict was found, the Subſtance whereof was: Cases in Parliament 140. 2 Salk. 677.

That Ann Bowyer was ſeiſed thereof in Fee, and by Indentures of Leaſe and Releaſe bearing date the 22d. and 23 d. Day of January 1664. and made between Edward Morley, who was Brother to the Defendant, of the firſt Part, the ſaid Ann Bowyer of the ſecond part, and the Defendant Sir William Morley and John Wells, of the third part, in Conſideration of a Marriage then intended between the ſaid Edward and Ann, and of a Settlement of Lands to be made by the ſaid Edward in Jointure of the yearly Value of 300 l. ſhe the ſaid Ann did convey the ſaid Manor to the Defendant Sir William Morley and John Wells and their Heirs, &c. in Truſt for the ſaid Ann and her Heirs until the ſaid Marriage ſhould take Effect, and until ſuch Settlement in Jointure ſhould be made; and from and after ſuch Marriage and Settlement, then to the Uſe of the ſaid Edward Morley and his Heirs.

That

That afterwards the ſaid Marriage was had, and then by Indenture bearing Date about a Year after, viz. 29 Januarii, 17 Car. 2. Anno 1665. and made between Husband and Wife of the one Part, and Richard Young and John Truſſer of the other Part, 'tis recited, That whereas a Fine is already acknowledged and agreed to be levyed the next Hillary Term, by the ſaid Edward and Ann, of the aforeſaid Manor, it was declared that the Uſes thereof ſhould be and enure to the ſaid Edward and his Heirs.

But before the ſaid Fine was levyed, viz. 31 Januarii, being two Days after the Date of the former Deed, there was another Deed made between the Husband of the one Part, and the Wife of the other Part, by which they did covenant and agree to make void all former Agreements, Contracts, Writings and Deeds whatſoever, until the Husband ſhould fulfil the Covenants in the Marriage-Settlement, of the 23d of January, and for Default thereof, that the ſaid Ann and her Heirs ſhould enter and hold the Premiſes.

The Fine was levyed in the ſame Hillary Term, in which the Deed to lead the Uſes thereof was dated, viz. 9 Februarii.

They find that 300 l. per Annum was not ſettled upon the ſaid Ann in Jointure by Edward Morley; but only 250 per Annum, and that charged with an Annuity of 15 l. per Annum to another Perſon.

In July following, viz. Anno 1666. Edward Morley mortgaged the Premiſes to one Doble for 600 l. and the Year following he died without Iſſue, and Ann ſurvived about 21 Years, and is ſince dead without Iſſue.

Sir William Morley the Defendant, as Brother and Heir at Law to Edward, entred after the Death of Ann, and diſcharged the Mortgage made to Doble, and now the Plaintiff Henry Billingham, as Couſin and Heir to Ann Bowyer brought the Ejectment.

The Queſtions upon this ſpecial Verdict were,

(1.) Whether by the Deed dated 29 January any Uſe was raiſed to Edward Morley, becauſe it was dated in Hillary Term, and it declared the Uſes of a Fine of next Hillary Term following, which muſt be a Year afterwards, and therefore that Fine levyed in the ſame Term, in which

that Deed was dated cannot be to the Uſes in that very Deed; and for this the Caſe of Whetſtone and Wentworth was cited, where 'twas held that if a Recovery be ſuffered Octab. Mich. and then an Indenture, dated 14 Novemb. next enſuing declares, That all Recoveries HEREAFTER to be ſuffered between the Parties ſhall be void, this Word hereafter excludes all Recoveries ſuffered before, without averring the Intent of the Parties that it ſhould be otherwiſe. 2 Roll. Abr. 749.

'Tis true, precedent Indentures ſhall direct the Uſes of Recoveries, and other Conveyances made afterwards; but no Reaſon can be given why the Uſes of the Fines and Recoveries ſhould not likewiſe be guided by ſubſequent Deeds, and that they are ſo guided it was ſaid, That Anno 6 H. 8. a Feme-ſole ſuffered a Common Recovery, and being about to marry, declared the Uſes thereof to be immediately after Marriage to her Husband and her ſelf and their Heirs; afterwards they and the next Heir of the Wife by Indenture (taking Notice that ſhe had no Iſſue) declare their Intent to be that notwithſtanding the former Deed, the Heirs of the Body of the Woman ſhould have the Land, and that therefore they would ſtand ſeiſed thereof to themſelves in ſpecial Tail, Remainder to the right Heirs of the Feme: And it was adjudged that by this ſecond Deed the Uſes of the Recovery were changed. 2 Rep. 71. b. Ld. *Cromwell's* Caſe. Dyer. 306.

(2.) The chief Queſtion was, whether the Deed of 31 Januarii did not revoke and controul that of the 29th preceding, becauſe it was made and executed before the Fine was levyed? For 'tis not a Fine till engroſſed, and then and not before the Uſes are raiſed; but before that Time the Parties were come to a new Agreement; and therefore no Uſe could ariſe to Edward by the Deed of 29 Januarii; was a Revocation of it. 1 And. 126.

And as to this Matter it was ſaid that there was ſome Difference to be made where a Fine is levied, and the Uſes thereof declared by a ſubſequent Deed varying in ſome Circumſtances from the Fine, for in ſuch Caſe the Party himſelf and his Heirs (tho not a Stranger) is bound and cannot aver it to be to any other Uſe than is declared in that Deed.

But where the Deed declaring the Uſes of a Fine is Precedent, and then a Fine is levyed varying from ſuch Deed, there all Parties are at Liberty to aver againſt it, becauſe the Fine ſtands ſingly by it ſelf; and this is now the Caſe at Bar.

'Tis

'Tis a very immaterial Objection to ſay, that this Deed of 31 Januarii is void, becauſe made only between Huſband and Wife; for 'tis a Writing which will amount to a * 2 And. 58. * Deed-Poll, 'tis an Agreement ſhewing the Intent of the Parties: and 'tis therefore ſufficient to declare the Uſe of a Fine, for an Uſe is a Creature of Equity, and therefore any Agreement between the Parties by which their Intentions do plainly appear has been held to be a good Ap- * Moor 789, 512. pointment of an Uſe tho' * void to operate as a Deed, as a Bargain and Sale not enrolled purſuant to the Statute, or a Feoffment without Livery, ſo as 'tis made between the Parties, and of the ſame Lands.

And as ſuch Agreements are ſufficient to declare the Uſes of a Fine, ſo a Parol-Agreement will be good to hinder the Raiſing of an Uſe where there is a manifeſt and plain Variance between the Deed and the Fine, as 'tis here; and therefore if this Deed of 31 Januarii, amounted to no more, 'tis not only a ſufficient Declaration of the Uſes of this Fine to the Wife and her Heirs, but it hinders any Uſe ariſing to the Huſband, and the rather, becauſe the Deed 1 And. 240. of 29 Januarii reciting the Fine did not declare any Uſes to 1 Leon. 210. him; for there never was any ſuch Fine levyed as is there- Cro. Eliz. 219. in recited (viz.) A Fine of the then next Hillary Term after the Savil. 124. Date of the Deed; for the Fine levyed was in the ſame Hil- 2 Roll. Abr. lary Term wherein the Deed was dated. 251.

Beſides, that Deed of 29 Januarii was only directory, and the Uſes therein declared were at all Times revocable till the Fine was levied; and therefore this intermediate Deed of 31 Januarii, being another Direction and Declaration of the Parties, and coming before the Fine was actually levyed, is not only ſufficient to revoke thoſe former, but to declare new Uſes to the Wife and her Heirs.

Econtra. It was argued for Sir William Morley, That this Fine and Deed of 29 Januarii made but one Conveyance, and that there was no Deed intervening declaring other or any Uſes which did not conſiſt with thoſe declared by that Indenture.

That there muſt be a favourable Conſtruction made of Deeds, according to the common and reaſonable Intentions of the Parties, tho there may be ſome Room for a private Intendment; but no Man can think that theſe Perſons did intend this Fine ſhould be levyed a Year after the Date of the Deed; 'tis neither agreeable to Reaſon or the uſual Practice amongſt Men, to have Fines levied ſo long after the Dates of Deeds.

Then as to the Matter it was ſaid,

1. That this Deed and Fine made but one Conveyance, and that there was no Variance between them.
2. That the Uſes were well directed by the Deed of 29 Januarii.
3. That they were not revoked or altered by the ſubſequent Deed of 31 January made between the Husband and Wife.

As to the firſt Point it was agreed, That the Fine was the ſuperior Act which drew the Deed to it, they are both between the ſame Parties, and concern the ſame Lands, and therefore are but one Conveyance.

It was ſo adjudged in Wigſon and Garret's Caſe, viz.

The Earl of Leiceſter by Deed dated 21 Eliz. covenanted to levy a Fine, &c. to Truſtees to the Uſe of himſelf for Life, and after his Death the Lands to be ſold for Payment of his Debts, with a Power of Revocation by any Writing under Hand and Seal; a Fine was levied accordingly.

1 Feb. 24 Eliz. he covenanted with other Truſtees to levy another Fine of the ſame Land to the Uſe of himſelf in Tail with divers Remainders over, which Fine was alſo levied.

The Queſtion in that Caſe was, whether this latter Deed by which he covenanted to levy a Fine to other Uſes was a Revocation of the former?

It was argued, That the Deed alone could not do it, becauſe in Operation of Law it was ſuſpended till the Fine was levied; and it was but an Executory Intention till that Time, becauſe he might have altered his Mind, and not levyed the Fine purſuant to his Covenant: Beſides, it was no expreſs Revocation, and the Rule is that ſuch Powers which go to divеſt an Eſtate muſt be ſtrictly purſued.

Neither could the Fine alone without the Deed be a good Execution of the Power, becauſe it was not purſuant to the Deed of 21 Eliz. for he having reſerved a Power to revoke by any Writing under his Hand and Seal, a Fine cannot be called ſuch a Writing, for 'tis a Record. But it was adjudged upon the whole Matter a good Revocation; for tho' theſe were ſeveral Inſtruments made at ſeveral Times, yet they were but as one Conveyance; and tho' 'tis not revoked by the Fine it ſelf, yet the Covenant

to levy that Fine works a Revocation, which Covenant is made perfect when the Fine is actually levied.

So here, when this Fine was levied, tho' at a different Time from that Fine mentioned in the Deed of 29 Januarii; yet they both make but one Conveyance, and the one adds Strength to the other.

But there was a Judgment which comes nearer to the Caſe at Bar both in Reaſon and Conſequence, and it was thus, viz.

One Parker by Deed dated 31 Octob. 8 Jacobi granted a Rent-charge in Fee to Warden, in which Deed there was a Covenant to levy a Fine to theſe Uſes (viz.) That if the Rent ſhould be in arrear at the Days limited in the Deed for the Payment thereof, and no Diſtreſs to be taken upon the Land; or if taken and replevied, that then the Grantee and his Heirs might enter, &c.

1 Roll. Abr. 849.

Warden by Bargain and Sale enrolled and dated 12 Junii 1 Jacobi conveys his Intereſt to Fiſher, and afterwards half a Year's Rent was in arrear, viz. in Octob. 11 Jacobi.

In Trinity Term 12 Jacobi, a Fine was levied to the Uſes of the firſt Deed dated 31 Octobris, and Fiſher diſtrained for Rent in September following.

Two Juſtices, viz. Coke and Montague held, That notwithſtanding this Rent was in arrear before the Fine levied, yet that being once done made but one Aſſurance, and the Uſes thereof were well guided by the firſt Indenture: Their Reaſon was, That tho' theſe were diſtinct Acts, and done at ſeveral Times, yet in Conſtruction of Law they ſhall be taken as one, becauſe the firſt Deed was executory only till the Fine was levied, and muſt then of Neceſſity have Relation to the original Cauſe.

'Tis true, Juſtice Houghton and Doderidge held, That no Uſes were raiſed till the Fine was actually levied, which was not done till after the Rent was due, and therefore ſuch Uſes which were raiſed afterwards could not extend to the Rent arrear before that Time; but the other Opinion ſeems to be better warranted by the Books and Authorities in Law.

To apply it therefore to the preſent Caſe, viz. the firſt Deed dated the 29th of January was only executory till the Fine was actually levied, it waited on and attended that Time, it was the firſt and only Cauſe why the Fine was afterwards levied, which being once done muſt look back and have Reſpect to the original Cauſe.

Neither is there any Variance between theſe two Acts, for the Deed recites that a Fine is already acknowledged, which by common Intendment muſt be taken to be the Caption thereof before the Term in which the Deed is dated, otherwiſe 'tis not Senſe to ſay afterwards, viz. and agreed to be levied the then next Hillary Term; for how can a Fine be ſaid to be already acknowledged, and agreed to be levied a Year afterwards?

But ſuppoſing the Fine was to be levied a Year after the Date of the Deed, yet if 'tis levied before, 'tis ſtill in Purſuance of the original Intention of the Parties, and being of the ſame Lands, it cannot with any Colour of Reaſon be intended to be different from what was at firſt deſigned by the Deed of 29 Januarii, and therefore no Parol-Averment ought to be admitted againſt it.

(2.) But Authorities are not wanting in the Books to prove that the Uſes may be well directed by the firſt Deed of 29 Januarii, viz. Baron and Feme by Deed covenanted to levy a Fine of Lands to W. upon Condition that if they or either of them paid 943 l. to W. at Lady-Day, 1611. that then his Eſtate ſhould ceaſe, in which Deed the Husband did covenant that he and his Heirs ſhould enjoy the Lands under that Condition of Payment, &c. and after Default the Rents to be received by W. and his Heirs, without Interruption, &c. Six Months afterwards there was a ſubſequent Deed made between the ſame Parties, and of the ſame Lands under the ſame Condition of Payment as in the firſt Deed, and the Husband did covenant that he and his Wife would make a further Aſſurance by Fine to W. and his Heirs, under the ſame Condition, until Default of Payment, &c. and after Default, to the Uſe of W. and his Heirs abſolutely; which is different from the Uſes declared by the firſt Deed, for thoſe were, That W. and his Heirs ſhould receive the Rent if Default ſhould be in Payment, &c. Bridgman 112.

In Eaſter Term following a Fine was levied by the Huſband and Wife to W. and his Heirs; and it was adjudged that the Uſes ſhould be directed by the firſt Indenture. *But it was becauſe the Jury found that the Wife diſagreed to the laſt Deed.*

3. The Uſes being well limited by the firſt Deed, were not revoked or altered by the ſubſequent Deed of 31 Januarii, becauſe it hath no Reference to any Fine levied; it limits no Uſes to any Perſon whatſoever; 'tis only a perſonal Agreement and a Covenant between Husband and Wife, 'tis not made between the ſame Parties, neither hath it any Relation to the former Deed.

Now if this intermediate Act between the firſt Deed and the Fine levied, ſhould be a Revocation of the former Uſes, no Man can be ſafe in lending Money, there would be an eaſie Way opened to baffle Creditors, and to defraud them of their juſt Debts, if the firſt Deeed and Fine will not give them a Title.

But the Husband cannot covenant with the Wife, nor ſhe with him, they are but as one Perſon in Law; and therefore as this latter Deed ſtands by it ſelf, 'tis nothing, 'tis void both in Law and Reaſon, becauſe there is but one Party to it.

'Tis true, if it had any Relation to a Fine, it might amount to a Declaration of its Uſes, but there is neither Mention of any Fine or former Deed; therefore if it ſhould be a Revocation, 'tis only quouſq; the Husband ſettle a Jointure, &c. but it will not amount to that, becauſe if it is a Covenant, 'tis void; for a Wife during Coverture cannot bind her Freehold but by Fine, where ſhe is examined, and barred by Eſtoppel.

And 'tis for this Reaſon that the Counteſs of Rutland's Caſe cannot be applied to this, where it was held, that the laſt Indenture ſhall direct the Uſes of a ſubſequent Fine, which was ſhortly thus (viz.) The Earl of Rutland by Deed dated the 10th of March did covenant with B. and G. to aſſure the Manor of E. to them before the End of the next Trinity Term by Fine, &c. to the Uſe of the ſaid Earl and his Lady, and the Heirs of the Earl.

On the 28th Day of the ſame March he made another Deed to the ſaid B. and G. by which he covenanted to convey the ſaid Manor to them before Lady-day then next following, to the Uſe of the ſaid Earl, and the Heirs Males of his Body, Remainder over, &c. By which laſt Deed the Earl did covenant with his ſaid Truſtees, That if he ſhould not ſufficiently convey, &c. before the ſaid Lady-day, that then he and his Heirs would ſtand ſeized thereof to the Uſes contained in the ſecond Deed.

On the 17th of September following, and not before, the Fine was levied; and it was adjudged, that the Uſes thereof were guided by the laſt Deed; but the Reaſon was, becauſe it was a good Conveyance at Law, it being a Covenant to ſtand ſeiſed to ſuch Uſes; which differs from the Caſe at Bar, becauſe the latter Deed was made between Husband and Wife only, and therefore void.

Here is no Alteration of the Minds of the Parties as to the Uſes before declared, nor any expreſs or implied Revocation; the latter Deed is no more than a Contract, and that was never yet allowed to make a Revocation; for ſup-

poſe the Husband and Wife had covenanted between themſelves to ſell the Land, it would not have been a Revocation of the Uſes.

This Contract is as much void as any Agreement can be which is made by a Feme covert, who cannot be bound by any Act, which ſhe doth to her Prejudice; and for this Reaſon 'tis that ſhe ſhould not take Advantage of any Act which ſhe can do for her own Benefit.

Since therefore this latter Deed of the 31 of January doth not refer to the Fine, ſince 'tis only a perſonal Contract, and cannot therefore amount to a Revocation; and ſince 'tis void in Law, it being no legal Conveyance either to affect the Eſtate, or bind the Perſon of the Woman; therefore the Uſes declared by the firſt Deed muſt ſtand unaltered and not revoked.

Curia. The ſecond Deed is not only Evidence, but it actually changeth the Uſes of the firſt Deed; for before the Statute of Frauds any Thing, even a Parol-Declaration of the Uſes of a Fine, was good.

Now ſuppoſing this to be a Deed-poll, yet it will have the ſame Operation as a Deed indented, for they both work by way of Eſtoppel; and therefore in Hillary Term, nono Willi' Judgment was given for the Plaintiff, which was afterwards removed by Writ of Error into the Houſe of Peers, and there the Judgment was affirmed.

Rex & Regina *verſus* Larwood.

INformation againſt the Defendant, ſetting forth, that the City of Norwich was an antient City incorporated, whoſe Liberties were confirmed Anno 5 H. 4. which King made it a County, and gave the Inhabitants thereof Power to chuſe two Sheriffs every Year. 1 Salk. 167.

That on the 26th of January 15 Car. 2. the Charter granted to that City by H. 4. was confirmed, by which it was appointed, that one Sheriff thereof ſhall be choſen by the Mayor, Sheriffs and Aldermen, and the other by the Mayor and Commonalty of the ſaid City, and that they ſhall be ſworn every Year upon the 29th Day of September in the Guildhall of the ſaid City before the Mayor and two or more Juſtices of the Peace.

That

That the Defendant on the 9th of July 4 Willi. was by the Mayor, Sheriffs and Aldermen, &c. duly choſen Sheriff of the ſaid City juxta formam chartæ Car. 2. and they aver him to be a Perſon capable of the Office, and that he had due Notice that he was choſen, &c. and was required to take the Oath of a Sheriff on the 29th of September following, but that he refuſed ſo to do, and to take upon him the ſaid Office of Sheriff, to the great Hinderance of the Buſineſs both of the King and his Subjects, &c.

The Defendant pleaded the Statute of 13 Car. 2. cap. 1. commonly called The Corporation Act, by which 'tis enacted (viz.) That no Perſon ſhall be elected or choſen into any Office of Truſt in Cities, Corporations or Boroughs, who ſhall not within one Year next before ſuch Election have taken the Sacrament of the Lord's Supper according to the Rites of the Church of England, and in Default thereof ſuch Election is declared void.

Then he averred, that for ſeveral Years laſt paſt he was a Proteſtant Diſſenter, and did not take the Sacrament within a Year before he was choſen Sheriff, &c. ſo that the Choice was void; and of this he gave the Mayor, &c. Notice.

He further ſets forth, that on the 19th of July, primo Willi' & Mariæ he did take the Oaths appointed by the Statute of 1 Will. & Mary Entituled, An Act for removing and preventing all Diſputes concerning the ſitting of that Parliament, and ſubſcribed the Declaration appointed by the Statute of 30 Car. 2. cap. 1. Entitled, An Act for diſabling Papiſts to ſit in either Houſe of Parliament, &c,

They reply, That he as a Member of the Church of England, ought to have taken the Sacrament within a Year before the Election, and that he ought not to be excuſed from taking upon him the Office by his own Default, &c.

The Defendant rejoined, that he ought not as a Member of the Church of England to have taken the Sacrament every Year, according to the Rites of the Church, &c. for that by an Act made primo Will. & Mariæ for exempting Proteſtant Diſſenters from the Church of England from the Penalties of certain Laws therein named, 'tis enacted, that no Law or Statute of this Realm made againſt Popiſh Recuſants, excepting the Statutes of 25 Car. 2. and 30 Car. 2. for diſabling Papiſts, &c. ſhall be conſtrued to extend to Diſſenters from the Church of England, who ſhall take the Oaths preſcribed by the Statute of 1 Willi. & Mariæ cap. 1. and ſubſcribe the Declaration enjoyned by 30 Car. 2. cap. 1. Which Oaths and Declaration the Juſtices of Peace in their

their Quarter-Seſſions are obliged to tender to the Perſon: By which Statute of 1 W. & M. 'tis farther enacted, that ſuch Perſons who ſhall take the ſaid Oaths, and ſubſcribe the ſaid Declaration, ſhall not be liable to any Penalties, &c. mentioned in the Statute of 35 Eliz. nor 22 Car. 2. entitled, An Act to prevent ſeditious Conventicles; nor ſhould be proſecuted in any Court for Nonconformity to the Church of England, &c.

Then he averred, that he was a Proteſtant Diſſenter on the 19th of July 1 Will. & Mary and that at the Quarter Seſſions of the Peace then held at Norwich he took the ſaid Oaths, and ſubſcribed the Declaration, &c.

The Plaintiff demurred generally.

Pro Quer. The Intent of the Statute of 13 Car. 2. was not to keep Men out of the Church, but to incapacitate ſuch who would not conform, that they might not hold any Office till they came in to the Church; for otherwiſe it would be to give a Man Opportunity by his wilful Default to avoid an Office of Burthen when 'tis coming upon him; and ſo it was adjudged in Sir John Read's Caſe, who was excommunicated for not paying Alimony, and becauſe he would not take off the Excommunication when he was appointed Sheriff of the County, he was fined 1500 l.

'Tis true, this Statute ſaith, that if the Perſon elected ſhall not within a Year before his Election receive the Sacrament, that it ſhall be void; but as to that, the Statute muſt have a reaſonable Expoſition (viz.) it ſhall be void to claim any Benefit to the Office to which he is elected, but not ſo void that he ſhall not be puniſhed for not qualifying of himſelf; 'tis like the Caſes of Biſhops, Deans and Chapters, whoſe Leaſes, if not purſuant to the Statute, will be adjudged void; but it hath often been ruled, that they are not void to all Intents, but only to the Leſſors themſelves, and againſt their Succeſſors; for * Statutes muſt have a reaſonable Conſtruction. * Plowd. 110. b. 8 Rep. 118 a.

Every Man is enjoined by the Eccleſiaſtical Law to take the Sacrament once in a Year, and that is part of the Law of the Land: But to excuſe himſelf, the Defendant ſaith, that there is another Law made primo W. & M. to exempt Perſons from being puniſhed for Nonconformity, which is a very unneceſſary Excuſe, becauſe a Puniſhment is not now intended for any Thing exempted by the Statute, but for an Offence at the Common Law in not qualifying himſelf to

to take the Office of a Sheriff for the Service of the Government, and which by Law he ought to take upon him.

Then as to the Pleading, this Rejoinder is a Departure from the Bar; for he hath pleaded the Statute of 13 Car. 2. which (as he alledgeth) made his Election void by not receiving the Sacrament within a Year; and in his Rejoinder he excuſeth himſelf from taking the Office by pleading another Statute (viz.) that he ought not to take the Sacrament according to the Rites of the Church, &c. as a Member thereof, &c. which is not purſuant to the ſame Thing.

Rotheram Serjeant contra. If the Election is made by the Statute of 13 Car. 2. then the Defendant was never lawfully choſen Sheriff, and ſo cannot be puniſhed; and it would be very inconvenient if he ſhould be compelled to act without a legal Election, becauſe he would be uncapable of executing any Proceſs.

The Statute intended only to diſable Men who were not of the Communion of the Church of England to hold publick Offices, and not to puniſh them if they did not qualifie themſelves; it was made in Favour of the Church, and not to inflict Puniſhments upon Diſſenters for Nonconformity; for they being excluded (unleſs they would qualifie themſelves) the Profits of all the great and beneficial Places throughout the Kingdom, muſt of Conſequence be enjoyed by Churchmen.

14 Car. 2. cap. 4. 17 Car. 2. cap. 2.

That this was the Intent and Deſign of that Law, will more plainly appear by comparing the Bartholomew and Oxfords Acts together; the one enjoins that every Parſon, &c. ſhall within a Time limited declare his Aſſent to the Book of Common Prayer, or that his Living ſhall be ipſo facto void. The other enacts, That if they have not declared their Aſſent as aforeſaid, and ſhall take upon them to preach, that then they ſhall not come within five Miles of a Corporation, or the Pariſh where he was Parſon, upon Penalty of 40 l. which ſhews that the firſt Act makes the Living only void, but the other inflicts the Puniſhment; therefore the Defendant cannot be puniſhed in this Caſe, becauſe the Statute of 30 Car. makes the Election void, but adds no Puniſhment to the Perſon unqualified.

As to the Objection, that the Incapacity ariſes from the Default of the Defendant himſelf, that cannot be material; for if he removes from the Corporation, he ſhall not be puniſhed for not executing the Office, and yet he is thereby made incapable by his own Act.

The Neglect in not receiving the Sacrament is not an Offence at the Common Law, or againſt any Statute; 'tis made ſo by the Canons which enjoin the receiving of it three Times in a Year; ſo that it doth not fall within the Cognizance of the Temporal Courts to puniſh the Defendant, but by that Law againſt which the Offence was committed.

But if B. R. ſhould take Notice of it, he ought not to be made a Criminal upon a bare Preſumption, for he may be hindred from receiving of it by an Incapacity of Mind, by Sickneſs, or otherwiſe.

Neither can Sir John Read's Caſe be any Authority againſt the now Defendant, becauſe he was lawfully appointed to be Sheriff, and his Incapacity incurred ex poſt facto, which is different from this Caſe.

But if the Neglect to receive the Sacrament was an Offence before the Statute of 1 Will. & Mariæ, yet 'tis not puniſhable now; for by that Statute Proteſtant Diſſenters are exempted from the Puniſhment inflicted on them as ſuch by any former Laws; and tho' they diſſent from the lawful and eſtabliſhed Church, yet if they are Proteſtants, and have taken the Oaths and ſubſcribed the Declaration, they are not to be puniſhed for Nonconformity; and the Defendant hath averred himſelf in his Plea to be qualified in theſe Points, and ſo not to be proſecuted for Nonconformity.

Judicium. Afterwards in Hillary Term 6 & 7 W. & M. Judgment was given for the Plaintiff (viz.) That the Corporation-Act never deſigned to exempt Diſſenters from bearing Offices in the Govrnment, but to eſtabliſh a Succeſſion of Perſons who were well affected to it, for otherwiſe it would be an Encouragement for ſome Men to perſiſt in their Nonconformity on Purpoſe to avoid Offices of Burthen and Charge, inſtead of bringing them to conform, which was chiefly intended by that Statute.

'Tis a Fault in the Defendant not to have received the Sacrament at leaſt once in a Year, becauſe by the Canon Law which hath been received here Time out of Mind, he is obliged ſo to do; and therefore 'tis very abſurd to alledge as an Excuſe, what is really a Neglect of his Duty.

If he had been diſabled by a Judgment in Law, he might have been excuſed; for tho' his Fault or Neglect was the Occaſion of ſuch Judgment, yet 'tis a Mark ſet upon him by the Government.

But in Caſe of an Excommunication where he may remove the Diſability, there he ſhall not be excuſed.

Then as to the Pleading he doth not ſay, that he could not receive the Sacrament, &c. for the Sake of his Conſcience. Supposing then a Man before the Act of Indulgence of 1 W. &. M. had neglected or omitted to receive the ſame within a Year before his Election to an Office, no Man will ſay, that it ſhould have excuſed him.

The Defendant therefore ſhould at firſt have pleaded in Bar, That he was a Diſſenter from the Church, &c. and then brought himſelf within the Compaſs of the Act of Indulgence, of which the Court cannot take any Notice, becauſe 'tis a private Act; for before it was made, the Law did not take any Notice of Proteſtant Diſſenters, but only of Diſſenters from the Church in general; beſides, 'tis an Act which doth not extend to all Sorts of Proteſtant Diſſenters, but only to ſuch who ſhall qualifie themſelves as therein is preſcribed.

If therefore the Act of Indulgence is a private Law, then the Corporation-Act will not be a ſufficient Excuſe for the Defendant to be exempted from this Office, becauſe the Act never intended to excuſe him who was liable before; it was not made in Favour of Diſſenters, it intended to make Perſons qualifie themſelves the better to ſerve the Government in eſtabliſhing faithful Officers therein, and ever ſince the Making of that Law, when a Freeman who was a Diſſenter, was choſen an Alderman of a Corporation, he never inſiſted upon the Act as an Excuſe, but ſubmitted to a Fine, and ſo muſt the Defendant.

But one Judge, (and the Lord Keeper, as it was ſaid at Bar) being of a contrary Opinion (viz.) That the Defendant was ſufficiently puniſhed by the Corporation-Act, in being diſabled to hold any Office or Employment of Profit; and now to puniſh him by an Information, would be a double Puniſhment for one Offence, which the Law will not allow: therefore there being a Capias againſt the Defendant pro fine, and he now appearing in Court, he was fined five Marks, and no more.

Rex & Regina *verſus* Kemp.

Mich. 5 Willielmi, &c. *Rot.* 333.

SCire fac. out of the Petty-Bag to repeal Letters Patents, &c. ſetting forth, That King Charles the Second did on the 25th of July, Anno 12 of his Reign, grant to Martin the Office of Searcher in the Port of Plimouth, quam diu Domino Regi placuerit. 2 Salk. 465.

That on the 14th of January, Anno 25 of his Reign, the King by Letters Patents reciting the Grant to Martin, &c. did grant this Office to William Fryer for Life, habendum cum poſt mortem, ſurſumredditionem vel forisfacturam of the ſaid Martin, it ſhould be void, with a non obſtante to the Statute of 14 R. 2. c. 10.

William Fryer on the 24th of December, Anno 27 Car. ſurrendered his Intereſt to the King, who in Conſideration thereof the ſame Day did grant this Office to Henry Kemp for Life, to commence upon the Death, Surrender, Forfeiture, or other ſooner Determination whatſoever of the Eſtate of Martin, and in the ſame Letters Patents grants it to William Kemp for Life, upon the Death, Surrender, or Forfeiture of Henry Kemp and Martin.

Henry Kemp died, Martin ſtill ſurviving, then the King died. ſo that Martin's Patent was void; for he having only an Eſtate at Will inſiſted that it was not only determined by the Grant made to Fryer, but by the Demiſe of the King, and William Kemp being poſſeſſed of the Office by Virtue of the laſt Grant, a Scire fac. was brought to repeal it, to which he demurred.

The Queſtions were,

(1.) Whether the Grant made to William Fryer was good or not; for if that fails, then the Grant to Kemp is void?

(2.) Whether the King can grant an Office to commence in futuro?

(1.) The Grant to William Fryer is void, becauſe the Eſtate of Martin being only during Pleaſure, it was too weak to ſupport a Grant of this Office in Reverſion, which was likewiſe to com-

mence upon ſuch an Incertainty as the Determination of the King's Will.

Beſides, the King was miſtaken in his Grant both in Point of Law and in Fact.

Firſt in Point of Fact, becauſe he intended to grant an Eſtate in Reverſion to Fryer: now Martin having an Eſtate at Will, and if that Will be determined by the Grant it ſelf to Fryer, then the King had the Office in Poſſeſſion, and Fryer muſt have it ſo, which was never intended.

'Tis plain that the King thought that Martin had a more durable Eſtate when he made the Grant to Fryer, for Mar-
2 Brownl. 241. tin's Patent is recited in Fryer's Grant, which Patent was then actually determined; now where an Office or an Intereſt in an Office is recited to be in being when in truth it is not ſo at the Time of the Grant, 'tis enough to make that Grant void,

Dyer 197. b. King H. 7. Anno 9. of his Reign, by Letters Patents made Robert Blague Remembrancer of the Exchequer for Life, who Anno 3 H. 8. was made one of the Barons of the Exchequer quam diu ſe bene geſſerit, he ſtill executed his firſt Office by Deputy, and afterwards, viz. 7 H. 8. he got Leave of the King to grant it to his Son for Life, when it ſhould be void by his Death or Surrender, or by any other means whatſoever, but becauſe he had no Right to the Office after he was Baron, therefore it was held that the Grant to the Son was void, and a Scire fac. being brought by the King it was repealed.

'Tis obſervable that the King doth not ſay ex certa ſcientia & mero motu damus, &c. Now ſuppoſe he had died before Martin, as in Fact he did, that would certainly have determined his Intereſt, but yet the Patent ſaith that Fryer's Intereſt ſhall not commence, but upon the Death, Surrender, or Forfeiture of Martin.

3 Leon. 5. 1 And. 6. Sir Thomas Moor being poſſeſſed of a Term for 44 Years was attainted of Treaſon, the King ſeized it, and made a Grant thereof to Phillips, Habendum for 21 Years after the End of the Term made to Sir Thomas; now this Leaſe to Philips was adjudged void, becauſe the firſt Leaſe for 44 Years being forfeited by Attainder was extinguiſhed in the King long before that Leaſe was made; ſo that the Eſtate and Intereſt to Philips was not well limited in the Commencement, which ſeems to come near the Caſe at Bar, for by the Grant to Fryer his Intereſt was to commence upon the Death, &c. of Martin, when it actually commenced in Poſſeſſion, becauſe Martin had only an Eſtate at Will which was determined by that very Grant made to Fryer.

2. The King was miſtaken in the Law, for by the Premiſes in his Grant his Will (as to Martin's Intereſt) being determined, then the Habemdum to Fryer after the Death of Martin can have no Operation, becauſe its Office is to limit, and not to revive or extinguiſh.

And the non-obſtante to the Statute of R. 2. will not help, becauſe the Grant to Fryer is void; 'tis true the firſt Grant is recited in the ſecond, for otherwiſe it had been clearly void by the expreſs Words of the Statute of 6 H. 8. cap. 15. which Law was made on Purpoſe that the King might not be deceived in his Grants; but this Recital of the firſt Grant muſt be intended at the Suggeſtion of the Party, and he having falſly informed the King, viz. that the Grant to Martin was in being when the King had determined his Will, that falſe Information being the Conſideration upon which the ſecond Letters Patents were grounded ſhall avoid the Grant. Dyer 237. 339. 6 Rep. 55. b. Cro. Car. 197.

If therefore the Grant to Fryer was void in its Creation, then his Surrender to the King muſt be likewiſe void, and if any Thing paſſed by the ſecond Grant to Kemp, it muſt be an Eſtate in Poſſeſſion, and muſt veſt preſently which was never intended; it cannot be an Eſtate for Life in him to veſt in futuro, for the Law will not allow any Fractions of an Eſtate for Life.

And to prove that at the Time of the ſecond Grant the King had the Office in Poſſeſſion, the Caſe of one Philpot was cited, which was mentioned by the Chief Juſtice Flemming, Anno 2 Eliz. in his Argument in my Ld. Rutland's Caſe, viz. The King made a Leaſe for Years, and afterwards reciting that Leaſe, he granted the Reverſion to another; but before the Letters Patents were ſealed, the Leſſee ſurrendered the Term, it was held, That by this means the Grant of the Reverſion was void, becauſe the King intended to paſs a Reverſion who had the Poſſeſſion himſelf at the Time of the Grant; ſo that when his Grants cannot have the Operation which is intended by him, they muſt be void. 2 Brown. 241.

Econtra. Nothing has been ſaid why the Grant to Fryer ſhould be void, but that by the Making of the Patent to him the King had determined his Will as to Martin, ſo that at that Time he had an Eſtate in Poſſeſſion, which he granted as a Reverſion, and therefore his Grant was void; but it appears to be otherwiſe upon reading of the Letters Patents, for the King has therein recited the Eſtate at Will to Martin, which ſhews that he did not intend to determine it.

It

It has been objected, That Fryer's Patent is void, becauſe the Limitation of his Intereſt is different from what was intended by the King, for it was to commence upon the Death, Forfeiture, or Surrender of Martin; Now tho' in fact it did not commence by either of theſe means, but by the Death of the King, yet this cannot be an Objection of any Weight, becauſe theſe Words were only to ſhew when his Title ſhall begin, and if the King is miſtaken in that Matter 'tis not to his Prejudice; and therefore his Grant cannot be void for this wrong Commencement, or for the Uncertainty when it ſhould commence.

'Tis true, it might have been made much better, but ſtill 'tis a good Grant, and that within the Reaſon of the Biſhop
6 Rep. 35. of Bath's Caſe, which was thus, viz. he made a Leaſe to Eliz. and Robert Coſin for 60 Years, in which there was a Proviſo, That if they die within the Term, the Biſhop and his Succeſſors might re-enter: Robert ſurvived Elizabeth, then the Biſhop died, and in 18 H. 8. another was conſecrated, who made a Leaſe of the ſame Land to Clark for 60 Years, when it ſhould be void after the Death, Forfeiture, or Surrender of R. Coſin, who died within the Term firſt granted.

It was objected in that Caſe that the Commencement of the ſecond Leaſe was uncertain, for it muſt be upon one of thoſe three Accidents, and therefore it was void, becauſe uncertain upon which of thoſe Contingencies it ſhould commence; for if it did not begin upon Forfeiture or Surrender, it could never begin in Poſſeſſion upon the Death of R. Coſin, becauſe the firſt Leaſe was not void upon his Death; for it was voidable by Re-entry of the Biſhop: but it was adjudged that the ſecond Leaſe did veſt in Point of Intereſt immediately, and ſhould not wait to take Effect in Poſſeſſion at the End of the Term firſt demiſed, if that Leaſe ſhould not happen to determine by either of thoſe three Accidents; ſo that its Commencement in Intereſt was certain enough.

36 a. In which Caſe it was alſo agreed, That if it be doubtful whether the King hath a Title to grant or not, by Reaſon of a former Leaſe in being, which may be either good or not, and the ſecond Leſſee accepts a Leaſe of the ſame Lands, habendum after the End or Determination of the former Leaſe, and if that Leaſe ſhould not happen to be good, then from ſuch a Feaſt for ſo many Years, &c. Now tho' the Commencement of ſuch a Leaſe as this ſeems to be very uncertain, yet 'tis good in the Caſe of the King, becauſe the firſt Leaſe muſt be void or not; if void, then the ſecond

Leaſe commences from the Feaſt, &c. if good, then from the Determination of the firſt Leaſe.

A Grant of a Stewardſhip of ſeveral Manors by Name without mentioning in what County, is very incertain, becauſe the King may have divers Manors of the ſame Name in ſeveral Counties, and no Iſſue can be taken which Manors the King intended to grant; but yet ſuch a Patent has been held good. 9 Rep. 42.

So a Grant to the Earl of Rutland a tempore plenæ ætatis, when in Truth he was of Age long before, yet it was adjudged a good Patent, becauſe it was the Intent of the King that it ſhould commence from that Time; and if that could not be, then for the Time to come. But the moſt material Queſtion was not debated by thoſe who argued on the other Side, viz. 8 Rep. 45.

Whether an Eſtate for Life in an Office may be granted in futuro to commence after the Determination of an Eſtate at Will? for if this can be done, tho' 'tis a Grant in Reverſion, yet there needs no precedent Eſtate to ſupport it.

As to this Matter the King hath a general Power to grant Offices in Reverſion; it hath been a doubtful Point whether a miniſterial Office could be ſo granted in the Caſe of a common Perſon, but it was never queſtioned but the King might do it, who hath a ſpecial Prerogative for that very Purpoſe, and thereefore Anno 15 Eliz. it was the Opinion of my Lord Dyer who was a learned Judge, that a Biſhop could not grant the Office of a Regiſter in Reverſion without preſcribing ſo to do, becauſe in Propriety of Speech there is no Reverſion of this Office, 'tis only a Nomination of the Perſon who ſhall ſucceed the Officer in Poſſeſſion, but the King may grant it after the Life of the Perſon in being, tho' not by way of Reverſion, but only reciting that ſuch a one hath an Eſtate for Life, nos de gratia ſpeciali, &c. conceſſimus officium, &c. to the Grantee, habendum poſt mortem, &c. 9 Ed. 4. 6. 3 H. 7. the laſt Caſe. Bro. tit. Patent pl. 52. 3 Leon 31. Dyer 80. b. 259. a. Hob. 150, 151. Cro. Car. 279. 2 Roll. Abr. 154.

But as to this Matter the Law is now altered (viz.) That a Biſhop may grant the Office of Regiſter in Reverſion without reciting the Eſtate of the firſt Grantee; and if ſo, certainly the King may grant this Office in futuro; and the rather, becauſe in its very Nature he hath only a Right of Nomination, and the Grantee himſelf hath little more in it than a bare Authority without an Intereſt; he hath only a Power to ſearch for prohibited Goods either impoſted or exported at Plymouth; and it was never yet denied, but an Authority (as this is) might be granted in futuro.

'Tis

'Tis no Objection to ſay, that a Freehold in Lands, &c. cannot be thus granted: 'Tis true, the Law is ſo in the Caſe of a Freehold of Lands which are always in being, for otherwiſe it would be in Abeiance, which is not allowed but in particular Caſes, and it would be to make Fractions of Eſtates, neither could Livery of Seiſin be had in ſuch Caſes; but none of theſe Reaſons concern an Office which hath no Exiſtence but at the Pleaſure of the Grantor, and is no longer in being then whilſt it continueth in Grant.

But the Wisdom of the Law hath made a Difference, even in Offices themſelves (viz.) between ſuch as are in Fee exiſting, and ſuch as are only granted for Life or at Will; and then Offices in Fee will fall under the ſame Rules with other Inheritances, but Offices for Life may be granted in futuro by the ſame Reaſon as a Rent or a Common may be granted to a Man and his Heirs; and therefore in this Grant the King was neither miſtaken in Fact or Law; for this Office may be granted in futuro after the Determination of an Eſtate at Will, which is not to ſupport the ſubſequent Grant, but the Recital of it is only to ſhew when that ſhall take Place.

Curia. The King may grant an Eſtate in an Office to commence in futuro, or upon a Contingency, which Eſtate ſhall ariſe out of the Inheritance he hath in the Office it ſelf, for ſuch he may have in point of Intereſt, tho' not in Execution.

Now admitting that the Eſtate at Will which Martin had was determined, yet the Grant to Fryer ſhall be good, and by Conſequence after his Surrender the Grant to Kemp ſhall be alſo good; for there was ſuch an Office as this of Searcher, &c. tho no Eſtate in the Office was in being when the Grant was made to Fryer; and if ſo, then by that Grant a new Thing was created to commence in futuro after the Death, &c. of Martin; and ſince Corbet's Caſe it hath not been doubted but a Rent de novo may be granted to commence in futuro, for 'tis a Creature of the Grantor; and this being in the King's Caſe, he may conſtitute his Grant in what Manner he thinks fit.

There have been many ſuch Grants of late Years, and it will be very hard to aſſign a Reaſon why a Grant to commence in futuro ſhould not be as good where there is no ſuch Eſtate or Intereſt in an Office in being.

This is not a Remainder or Reverſion; 'tis not the one, becauſe not created when the particular Eſtate was granted,

nor the other, becauſe there is no Inheritance in this Office, but ſtill 'tis a good Grant by way of Reverſion (viz.) habendum after the Death of the firſt Grantee, &c. and ſuch Grants have been held good in Law; wherefore in Trinity Term following Judgment was given for the Defendant.

Knipe *verſus* Edwin,

A Mandamus to the Dean and Chapter of Weſtminſter to admit the Defendant to the Office of Bailiff there, upon the Nomination of the Duke of Ormond who is High Steward, and it was inſiſted, That he could not have an Aſſize, becauſe he had neither any Seiſin or Freehold before Admittance.

Econtra. 'Tis the Dean and Chapter, and not the High Steward, who uſually appoints a Perſon to this Office; for of common Right they who have a Franchiſe or Retorna Brevium, have alſo Power to put in a Bailiff, which the Dean and Chapter hath in this caſe, and accordingly they have always granted this Office; and when the Perſon is in, he is ſtyled Ballivus Decani & Capituli, &c. and 'tis they who are to anſwer for his Miſcarriages.

A Mandamus is a Prerogative Writ, and uſually granted where the publick Juſtice of the Nation is concerned; but here is a Diſpute between two Perſons about the Right of Nomination to this Office, and Knipe is admitted by the Dean and Chapter, and ſworn into it, ſo that he hath a Freehold for Life; and this Writ was never yet granted to try Titles; if Edwin hath any Prejudice, he may bring an Action on the Caſe, as a Clerk may againſt an Archdeacon who refuſes to admit him, but cannot have a Mandamus. March. 101

Curia. An Action on the Caſe will not put the Man in Poſſeſſion of the Office, for by that he ſhall only recover Damages: A Mandamus was granted, but without Prejudice.

Reeve *verſus* Long.

3 Lev. 408.
1 Salk. 227.

ERror of a Judgment in the Common Pleas in Ejectment for Lands in Milkſham in the County of Wilts, in which there was a ſpecial Verdict found to this Effect (viz.) That John Long Eſq; was ſeized of the Lands, &c. in Fee, who by his laſt Will dated the 20th of July 1676. did deviſe the ſame to his Nephew Henry Long (the eldeſt Son of his Brother Richard Long) for life, and after his Decaſe to the firſt Son of the ſaid Henry Long lawfully begotten, and the Heirs Males of the Body of ſuch firſt Son lawfully iſſuing, and for Default of ſuch Iſſue, to the ſecond, third, fourth, fifth, &c. and every other Son of the Body of the ſaid Henry Long lawfully to be begotten, ſucceſſively one after another, and to the Heirs Males of their reſpective Bodies; and for Default of ſuch Iſſue to Richard Long the Defendant, ſecond Son of Richard Long, for Life, and after his Deceaſe, to his firſt, ſecond, third, &c. and every other Son, ut ſupra, with divers Remainders over.

John Long died, and Henry entred, who had Iſſue one Daughter, and about Lady-day 1687. died leaving his Wife enſeint with a Son, who was born about ſix Months after the Death of his Father. But upon the Death of Henry without Iſſue-male, Richard Long being the next in Remainder, entred, &c. and afterwards the poſthumous Son by his Guardian entred upon him, and thereupon Richard brought this Ejectment, and had Judgment in the Common Pleas, which Judgment was ſaid to be erroneous.

'Tis plain that Henry the after-born Son is Heir at Law, and if this Will had not been made, he would have inherited; and therefore the Intention of the Teſtator muſt be very clear in the Will it ſelf to diſinherit this Heir, otherwiſe he muſt not be defeated of the Eſtate.

But his Intention (which is the only conſiderable Thing in the Will) appears to be of another Nature; for throughout every Paragraph 'tis plainly to be collected, that he intended his Land ſhould go, and be continued in the Heirs males of his Family ſucceſſively.

This muſt therefore be an Executory Deviſe, and not a contingent Remainder; and the rather becauſe 'tis in the Caſe of a Will by which Eſtates do paſs otherwiſe than by Conveyances

at the Common Law; and the Law will not ſuffer this to be conſtrued a contingent Remainder, becauſe that would be to diſinherit an Heir upon a Nicety againſt the plain Intention of the Teſtator.

That Intentions govern in Wills many Authorities may be cited (viz.) If the Father, having three Sons deviſes his Land to his Eldeſt Son in Tail, Remainder to his ſecond Son in like manner, Remainder to his third Son in Fee, and the Eldeſt Son happens to die in the Life-time of his Father leaving Iſſue, it has been held that ſuch Iſſue ſhall inherit without a * new Publication of the Will, becauſe it was not the Intention of the Father to diſinherit him. Cro. Eliz. 424.

* But if the Deviſe had been to a Stranger, the Will muſt be new publiſhed.

If therefore this is a ſpringing Remainder, then the Freehold ſhall veſt in Richard till the Son of Henry was born, and then it ſhall veſt in him; and to prove it to be a ſpringing Remainder or Executory Deviſe, that noted Caſe of Pell and Brown was cited, which is reported in ſeveral Books (viz.) the Father being ſeiſed in Fee, and having Iſſue three Sons, William, Thomas and Richard, deviſed it to Thomas and his Heirs, paying Richard 20 l. per Annum, &c. and if Thomas died without Iſſue, living William, then to him in Fee. 2 Cro. 590. 1 Roll. Abr. 611. 2 Roll. Rep. 394. Palm. 121. Bridgm. 1.

Thomas entred and ſuffered a Common Recovery to the Uſe of himſelf and his Heirs, and deviſed it to A. and died without Iſſue in the Life-time of his Brother William, to whom the Land was adjudged; for Thomas had no Eſtate-tail, but a limited Fee which was determined by his dying without Iſſue, living William, whoſe Intereſt muſt ariſe upon a Contingency (viz.) by way of Executory Deviſe; for Thomas might have ſurvived him, or might leave Iſſue living William; and therefore this Recovery could be no Bar, becauſe the Eſtate of William did not depend upon that of Thomas, but was collateral to it, and a meer Poſſibility which a Recovery could not affect, and which it would have done if it had been a Remainder veſted; ever ſince this Caſe Executory Deviſes have been allowed not abſolutely upon a dying without Iſſue, but dying ſo in a particular Time, for otherwiſe Eſtates might be continued to Perpetuity which the Policy of the Law will not endure.

To prove likewiſe that Freehold ſhall veſt in the Heir till the Contingency happens, a Judgment was cited in B. R. 43 Eliz. viz. A Man deviſed his Lands to M. for a Term of years, which was to commence at the next Michaelmas after the Death of the Teſtator, Remainder to N. and his Heirs, Cro. Eliz. 879. Noy 43.

the Queſtion was, Whether this was a good Remainder? 'Tis plain it could not take place eo inſtante that the particular Eſtate determined, becauſe of the Term for Years coming between thoſe Eſtates; but it being in the Caſe of a Deviſe, the Freehold in the mean Time ſhall deſcend to the Heir of the Deviſor.

Econtra. This is a contingent Remainder, for if it ſhould be an Executory Deviſe, then a Perpetuity would be introduced, becauſe if 'tis executory in one, it may be ſo in all the Deviſees; and therefore it would be againſt the known Principles of Law to make it an Executory Deviſe, eſpecially in this Caſe where the Teſtator was not ſure that Henry Long would have a Son; ſo that 'tis a plain Contingency, which not happening in time, nothing remains in him to make it executory.

There are two Things to make a Deviſe executory, (viz.) it muſt be limited upon an Eſtate in Fee-ſimple, and it ought to be limited upon a Condition, both which are wanting in this Caſe; neither can any Remainder be executory where there is a particular Eſtate to ſupport it.

2 Saund. 380. As for Inſtance, A Deviſe was to his Wife for Life, and to a Son after the Death of his Mother, if ſhe ſhould have a Son; and if he die before he come to Age, then to the right Heirs of the Deviſor, which Deviſor died without Iſſue, his Wife married again; then the Heir of the Deviſor by Bargain and Sale enrolled, &c. conveyed the Reverſion to the Husband and Wife, who had afterwards a Son born: Now it was adjudged, that the Eſtate limited to that Son ſhall not enure by way of Executory Deviſe, becauſe that is never allowed where a Contingency is limited to depend upon a Freehold capable to ſupport it; for the Mother had a Freehold for Life, and therefore it was adjudged a contingent Remainder to the Son; and the Heir at Law having a Reverſion in Fee in him by Deſcent, it was held, that the Remainder was deſtroyed by his conveying that Reverſion to the particular Eſtate for Life in the Mother before her Son was born.

1 Rep. 66. But Archer's Caſe was relied on as an Authority in Point (viz.) A Deviſe to the Father for Life, Remainder to his next Heir-male in Tail-male; the Deviſor died, the Father made a Feoffment with Warranty; adjudged that by this means the Remainder was deſtroyed, becauſe every contingent Remainder muſt take place eo inſtante that the particular Eſtate determines, or veſts during the particular Eſtate;

now it could not take place eo inſtante the particular Eſtate determined, for that being gone by the Feoffment, the Son could not be Heir to his Father who was then alive; for nemo eſt hæres viventis, and therefore could not enter for a Forfeiture, neither could it veſt during the particular Eſtate, becauſe that was actually forfeited.

So here in the Caſe at Bar, the Eſtate being limited to Henry Long for Life, Remainder to his firſt Son, and Henry dying before that Son was born, the Remainder could not veſt in him who was not then in being; and the particular Eſtate being determined by the Death of Henry, it muſt go over to the Defendant who was next in Remainder.

As to the Caſe of Pell and Brown, the great labour there was to make it an Eſtate-tail in the firſt Deviſee, which not being allowed, then it muſt be a void Limitation to the next, unleſs conſtrued to be an Executory Deviſe to him; and that was the Reaſon of that Judgment on purpoſe that the Intent of the Teſtator might be fulfilled; but that differs from this Caſe, becauſe the Perſon to whom the Eſtate was deviſed, was in being, but 'tis otherwiſe here; and ſo the Judgment in the Common Pleas was affirmed without any farther Argument, but in Michaelmas Term following it was reverſed in the Houſe of Peers.

Nichols *verſus* Pawlet.

IN an Action on the Caſe the Defendant pleaded, that the Plaintiff was alienigena born in France under the Allegiance of the French King, adverſar. Domini Regis & Dominæ Reginæ de patre & matre inimicis ipſorum Domini Regis, &c. nunc & eidem adverſario ſuo adheren. oriundus & ingreſſus in Regno Angliæ abſq; ſalvo conductu, &c. Et hoc paratus eſt verificare ubi quando, &c. Et prout Curia dicti Domini Regis & Dominæ Reginæ conſideraverit unde petit Judicium, &c.

The Plaintiff replied, quod ipſe eſt indigena in Regno Angliæ ſub ligeantia dicti Domini Regis & Dnæ. Reginæ nunc de patre & matre amicis eorundem Domini Regis & Dominæ Reginæ nunc oriundus & natus apud London. præd. in parochia & warda præd. & non alienigena prout præd. (the Defendant) ſuperius allegavit & hoc petit quod inquiratur per patriam, &c.

The

The Defendant demurred generally, and it was adjudged that the Iſſue was not well taken, becauſe the Plaintiff ought not to have concluded to the Countrey, for there being new matter ſet forth in the Replication, he ſhould have given the Defendant Opportunity to rejoin.

DE

Term. Sanct. Trin.

Anno 6 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1694.

Wilſon *verſus* Law.

Appeal of Murder. 1 Salk. 59. 2 Salk. 589.

Midd. ſſ. JOhannes Law nuper de parochia Sancti Egidii in Campis in Com. præd. generoſus attachiat. fuit per corpus ſuum ad reſpondend. Roberto Wilſon generoſo fratri & hæredi Edwardi Wilſon generoſi de morte præd. Edwardi quondam fratris ſui unde eum appellat & ſunt pleg. de proſequendo ſcilt. Carolus Williams de parochia ſancti Jacobi infra libertatem Weſtm. in Com. præd. tapetiarius & Johannes Wheeler de parochia Sanctæ Mariæ le Savoy in Com. præd. generoſus & unde idem Robertus Wilſon frater & hæres præd. Edwardi

The Count.

Wilſon in propria perſona ſua inſtanter appellat præd. Johannem Law de eo quod ubi prædict. Edwardus Wilſon fuit in pace Dei & Domini Regis & Dominæ Reginæ nunc apud prædict. parochiam Sancti Egidii in Campis in prædict Com. Midd. nono Die Aprilis Anno Regni Domini Gulielmi & Dominæ Mariæ Dei gratia Angl. Scotiæ Franciæ & Hiberniæ Regis & Reginæ fidei defenſor. &c. ſexto circa horam primam poſt meridiem ejuſdem diei ibi tunc venit præd. Johannes Law felonice ac ut felo dictorum Domini Regis & Dominæ Reginæ nunc inſidiando & ex malitia ſua præcogitat. & inſult. præmeditat. contra pacem dictorum Domini Regis & Dominæ Reginæ nunc coronam & dignitatem ſuas ac eiſdem die Anno hora & loco vi

&

& armis &c. felonice voluntarie & ex malitia ſua præcogitata in ipſum Edwardum Wilſon inſultum fecit & præd. Johan. Law adtunc & ibm. cum quodam gladio de ferro & chalibe confecto valoris quinque ſolidorum quem ipſe idem Johan. Law in manu ſua dextra adtunc & ibm. extract. habuit & tenuit eundem Edwardum Wilſon in & ſuper ſuperiorem partem ventris ipſius Edwardi Wilſon juxta pectus & medium corporis ejuſdem Edwardi adtunc & ibidem violenter felonice voluntarie & ex malitia ſua præcogitata percuſſit pupugit & inforavit Anglice did ſtrike ſtab and thruſt in dans eidem Edwardo Wilſon adtunc & ibidem cum gladio præd. in & ſuper præd. ſuperiorem partem ventris ipſius præd. Edwardi Wilſon juxta pectus in medium corporis ejus unum vulnus mortale latitudinis duorum pollicium & profunditatis quinq; pollicium de quo quidem vulnere mortali idem Edwardus Wilſon adtunc & ibidem inſtanter obiit & ſic præd. Johannes Law adtunc & ibidem ſcilicet dicto nono die Aprilis Anno ſexto ſupradicto circa horam primam poſt meridiem ejuſdem diei apud præd. parochiam Sancti Egidii in Campis in Com. Middleſex præd. modo & forma præd. felonice voluntarie & ex malitia ſua præcogitata præfat. Edwardum Wilſon interfecit occidit & murdravit contra pacem dictorum Domini Regis & Dominæ Reginæ nunc Coronam & dignitatem ſuas Et quam cito idem felo dictus Johannes Law feloniam & murdrum præd. feciſſet ipſe idem Johannes Law fugit prædictuſq; Robertus Wilſon ipſum Johannem Law recenter inſequutus fuit de villa in villam uſq. quatuor villat. propinquiores & ulterius quoſq; &c. & ſi dictus felo feloniam & murdrum pd. ei in forma præd. impoſitum velit dedicere idem Robertus Wilſon hoc paratus eſt verſus eum probare prout Curia, &c.

The place where the Wound was.

Fugam fecit.

Et præd. Johannes Law in propria perſona ſua venit & petit auditum brevis de appello præd. & retorn. ejuſdem brevis & ei leguntur in hæc verba ſcilicet Gulielmus & Maria Dei Gratia Angliæ Scotiæ, Franciæ, & Hiberniæ Rex & Regina fidei defenſores &c. vicecom. Middleſex ſalutem quia Robertus Wilſon generoſus frater & hæres Edwardi Wilſon generoſi fecit te ſecur. de clamore ſuo proſequendo per Carolum Williams de parochia ſancti Jacobi infra libertatem Weſtm. in Comitatu tuo tapetiarium & Johannem Wheeler de Parochia Sanctæ Mariæ le Savoy in Comitat. tuo generoſum ideo tibi præcipimus quod attachias Johannem

The Defendant craves Oyer *of the Writ and Return.*

Law nuper de parochia ſancti Egidii in Campis in Comitatu tuo generoſum per corpus ſuum ſecundum legem & conſuetudinem regni noſtri Angliæ ita quod eum habeas coram nobis a die Paſchæ in unum menſem ubicunq; tunc fuerimus in Anglia ad reſpondend. præfat. Roberto Wilſon de morte præd. Edwardi quondam fratris ſui unde eum appellat & habeas ibi tunc hoc breve Teſte nobisipſis apud Weſtm. xix die Aprilis Anno regni noſtri ſexto, Martin. Virtute iſtius brevis mihi direct. Attach. feci infranominat. Johannem Law per corpus ſuum cujus quidem corpus ad diem infracontent. coram Dno. Reg. & Dna. Regina ubicunq; &c. parat. habeo prout interius mihi precipit. Reſponſ. Thomæ Abney Militis & Willielmi Hedges Militis Vic. Quibus lectis & auditis præd. Johannes Law defendit vim & injuriam quando &c. & omnem feloniam & quicquid &c. & petit judicium de brevi originali & narratione præd. quia dicit quod breve illud & retorn. inde necnon narratio præd. ſuperinde minus ſufficien. in lege exiſtunt ad compellend. eundem Johan. Law adinde reſpondend. quodq; ipſe ad breve præd. ſic ut præfertur retornat. ſeu ad narrationem præd. ut præfertur declarat. neceſſe non habet neq; per legem terræ tenetur reſpondere & hoc paratus eſt verificare unde petit judicium de brevi retorn. & de narratione præd. & quod breve illud caſſetur &c. & quoad feloniam & murdrum præd. idem Johannes Law dicit qd. ipſe non eſt inde culpabilis & de bono & malo ponit ſe ſuper patriam & præd. Robertus Wilſon ſimiliter &c.

The Return.

Pleads in abatement to the Writ and Count.

And not guilty to the Murder, and Iſſue thereupon.

Et præd. Robertus Wilſon quoad præd. placitum prædicti Johannis Law ſuperius ad breve ipſius Roberti Wilſon præd. in forma præd. placitat. dicit quod breve illud & retorn. inde ac materia in eiſd. content. bona & ſufficien. in lege exiſtunt ad prædictum Johannem Law adinde reſpondere compellend. & hoc paratus eſt verificare unde ex quo dictus Johannes Law nihil allegavit aut aſſignavit in quo breve illud ſive retorn. ejuſdem malum vitioſum ſeu defectivum exiſtit idem Robertus Wilſon petit judicium & quod idem breve ſuum & dict. retorn. ejuſdem bona & ſufficien. in lege adjudicentur, &c. Et quoad præd. morationem in lege ſive placitum prædicti Johannis Law ad narrationem ipſius Roberti Wilſon præd. ſuperius in forma præd. placitat. idem Robertus Wilſon dicit quod narratio illa materiaq; in eadem content. ſic ut præfertur declarat. bon. & ſufficien. in lege exiſtunt tam ad appellum ſuum præd. verſus præfat. Johannem Law habend.

Joynder in Demurrer.

bend. manutenend. quam ad eundem Johannem Law adinde reſpondere compellend. quam quidem narrationem materiamq; in eadem content. idem Robertus Wilſon paratus eſt verificare & probare prout Curia &c. Et quia præd. Johannes Law ad placitum illud non Reſpondet nec illud hucuſque aliqualiter dedicit idem Robertus Wilſon petit Judicium Et quod præd. Johannes Law de felonia & murdro prædictis convincatur, &c.

Wilſon *verſus* Law.

1 Salk. 59. 2 Salk. 589.

IN an Appeal of Murder the Appellee after he had craved Oyer both of the Writ and Count demurred, and as to the Felony and Murder pleaded not guilty.

Theſe Exceptions following were taken to the Count, and to the Return,

1. 'Tis ſaid that the Perſon killed was on the 9th Day of April, &c. in the Peace of the King, &c. and that the Defendant circa horam primam of the ſame Day ex malitia ſua præcogitata eiſdem die & hora, &c. aſſaulted him; now circa horam primam is a very uncertain Allegation of the Time; and therefore of conſequence eiſdem die & hora, &c. inſultum fecit muſt be as uncertain.

5 Rep. 120. Raſt. Ent. 48 b. Co. Entr. 53.

2. Here is no direct Charge againſt the Defendant; for the Words in the Declaration do not poſitively alledge that he gave the Wound, &c. 'tis percuſſit pupugit & perforavit Dans, &c. when it ſhould have been dedit mortale vulnus, and ſo are the Precedents in the printed Entries.

2 Inſt. 319.

3. There is no legal Venue; for the Fact is alledged to be committed in Parochia, &c. when 'tis expreſly required by the Statute of Glouceſter, that it ought to be in ſome Vill or Town.

Dyer 199 a. Co. Ent. 56, 57, 59.

4. The Return is Attachiari feci, when it ſhould have been attachiavi, like the Writ which commands quod capias, the Return whereof is quod cepi, and never quod capi feci.

Where a Reſcous is made from the Servant, the Sheriff in his Return muſt ſay that it was from himſelf, becauſe he is the immediate Officer of the Court: Now in this Caſe it doth not appear whether the Sheriff himſelf or his Bailiff attached the Defendant; and if by a Bailiff then the Return

by

by the Sheriff is not good, unleſs it was by a Bailiff of a Franchiſe; and for this purpoſe the Year-book of 2 H. 4. 4 b. was cited, viz. King Edward the Fourth granted to a certain Perſon the Office of Bailiff itinerant in Hampſhire, and Execution of Writs, &c. and the Sheriff of that County returned a Writ thus, viz. Mandavi Ballivo itineranti qui habet retorn. &c. per Chartam Regis qui mihi nullum dedit reſponſum; and he was amerced for this Return, becauſe the Bailiff itinerant was not a Bailiff of a Franchiſe.

Now it cannot be objected that this is helped by the Appearance of the Defendant; 'tis true, he came in and appeared upon the Return, but demurred for this Fault, which is all the Appearance he made, ſo that he is now in Court to ſhew this inſufficient Return. 1 Bulſt. 76.

Neither is it an Objection to ſay that the Sheriff's Return is not traverſable, as in an Appeal of Murder, the Original was returnable Octab. Mich. which was the firſt Return of Michaelmas Term, but the Writ was not delivered to the Sheriff to execute till the ſixth of November following, and there he returned tarde, which tho' true, yet it was held that the Party might traverſe it. 348 b.

But the Caſe which was chiefly relied on was between Morgan and Egerton, Mich. 8 Jacobi, as an Authority in point, viz. an Appeal of Murder, the Writ was returnable Octab. Mich. the old Sheriff returned, Quod cepi Corpus & paratum habeo, &c. and the new Sheriff before the Priſoners were delivered over to him returned, Quod iſtud breve ſic mihi deliberat. fuit indorſatum; and upon a Demurrer this was held an ill Return, becauſe he had returned nothing done by himſelf, he ſaid nothing of the Body of the Priſoner, and the Count being againſt him in Cuſtodia vicecomitis, it doth not appear that the new Sheriff ever had him in Cuſtody, and he ſhall not be intended to be in Cuſtody of the old Sheriff, becauſe he is no Officer of the Court after a new one is choſen, and tho' the Party then appeared gratis, yet it was held that ſuch an Appearance will not make that good which was defective before upon the Return it ſelf. 1 Bulſt 69. 9 Rep. 72.

Econtra. The Counſel for the Appellant anſwered only the laſt Exception which ſeemed to be the moſt material, viz. That there was no Difference between Attachiari feci, and Attachiavi, where the Return was not made by a Bailiff of a Liberty, and this could not be intended to be a Return by a Bailiff of a Franchiſe, becauſe that is always ſpecial. Keilw. 58. 2 Roll. Rep. 225. 1 Roll. Abr. 779. placit. 3.

viz. Mandavi Ballivo libertatis, which is not in this Caſe, ſo it muſt be a Return by the Sheriff himſelf, and it might have been done by an Itinerant Bailiff, and 'cis then the Act of the Sheriff himſelf; for what he had cauſed to be done by another ſhall be taken to be done by him.

In the Common Caſe of Attachments the Return is quod infranominatus (the Defendant) attachiatus eſt per plegios, which being in the preſent Tenſe is ſo uncertain, that it cannot be ſaid by whom he was attached, yet ſuch Returns are held good.

But the Words which follow in this Return make it very certain, for after attachiari feci, the Sheriff ſaith, cuius quidem corpus paratum habeo prout interius mihi præcipitur.

Curia. (1.) By the Statute of Glouceſter the Time and Place where the Fact was committed ought to be certainly expreſſed, or otherwiſe the Appeal ſhall be abated; now circa horam primam is a certain and ſufficient Averment of the Time, 'tis within the Compaſs of an Hour, and tho' in Egerton and Morgan's Caſe, three Judges were of a contrary Opinion, yet even there Coke and Williams held that it was certain enough, and the Reaſons of thoſe two Judges ſeem to be better warranted by Law, than the Opinions of the other three, and ſo have the Precedents been ever ſince that Time.

4 Rep. 40. 'Tis true, the Fact cannot be alledged to be done with ſuch a ſeeming Uncertainty, as dedit plagam mortalem circiter pectus, nor the Year or the Day, but the Hour may, becauſe there is more Difficulty in alledging the very Hour than the Day

2 Inſt. 318. or Year which are longer Meaſures of Time, and therefore are more certain; but my Ld. Coke was of Opinion that it was not needful for the Appellant to give in Evidence the preciſe Hour or the Day it ſelf mentioned in the Declaration.

(2.) The Charge is direct againſt the Defendant by the Word Dans, and it had been more uncertain by the Word dedit.

(3.) It ſhall be intended that the Pariſh is a Vill, unleſs

1 Inſt. 125. otherwiſe ſhewed by the Defendant, and pleaded in Abatement; for tho' the Word Parochia is uncertain, becauſe it may include divers Vills, yet it ſhall be intended a Vill, unleſs the Contrary is ſhewn.

By the Statute of 1 H. 5. cap. 5. 'tis ordained that in original Writs in perſonal Actions, and in Appeals and Indictments wherein Exigents may be awarded, that Additions ſhall be made of the Eſtate, Degree, and Myſtery, and

like wise of the Town, Hamlet, Places or Counties where the Party is conversant, and if any of these are omitted, the Writ shall be abated; and yet where no Vill is in a Parish, the Writ shall be good, viz. præcipe A. de parochia, &c. because that may be the Place where the Defendant inhabits. 22 H. 6. 41. Br. tit. Addition placito 38, 14. 35 H. 6. 30.

(4. Attachiari feci prout interius mihi præcipitur, is a full Answer to the Writ; the usual Return to a Levari facias is quod levari feci; so in a Scire facias against K. the Sheriff returned, quod scire feci K. prout istud breve in se exigit, without saying infra nominat K. yet it was held that those Words supply that Omission. 1 H. 6. 6. Br. tit. Return del Brief plito. 64.

In Rescous the Return was that the Party was rescued out of the hands of the Bailiff; it was objected that it should have been out of the Hands of the Sheriff unless the Arrest was by a Bailiff of a Franchise; yet the Return was held good, and so it was in this Case. 5 Cro. 242. Sid. 332.

Rex & Regina *versus* Owen.

By the Statute of 1 Will. & Mariæ the Custos Rotulorum is to appoint and nominate the Clerk of the Peace when the Place is void, who hath Power by the Act to execute it by himself or Deputy for so long Time only as he shall demean himself well, &c. 2 Mod. 314. anno 167-

A Mandamus was brought by Mr. Owen, directed to the Justices of the Peace of Kent to restore him to the Office of Clerk of the Peace of that County; and upon the Return thereof, the Case appeared to be thus (viz.) The Earl of Winchelsea who was Custos Rotulorum, Anno 1 Will. & Mariæ, did appoint Mr. Owen to be Clerk of the Peace durante beneplacito, &c. then the Act of 1 Will. & Mariæ was returned; and that the said Earl was dead, and afterwards the King did constitute the Lord Sydney to be Custos, who appointed Mr. Saunders to be Clerk of the Peace, pursuant to the aforesaid Act who thereupon took upon himself the said Office, and displaced Mr. Owen who by this Writ desired to be restored.

The Question was, Whether a Grant of this Office, durante beneplacito, which is only an Estate at Will, shall be so governed by the Act as to make it an Estate for life, when once the Person is admitted to the Office; so that let the Custos make what Appointment he will, tho' not pursuant to

to the Statute, 'tis the Act and not the Cuſtos which gives an Intereſt, and Eſtate to the Perſon.

'Tis true, before the Statute of 1 Will. & Mariæ the Clerk of the Peace was dependent upon the Cuſtos, not only for his Nomination, but for his Continuance in the Office; but now the Cuſtos has no Manner of Intereſt in the Office it ſelf; he is only to nominate the Perſon who ſhall have it, and when ſuch Nominee is admitted, he is not to be removed at the Pleaſure, or by the Death of the Cuſtos; for the Intent of the Act is to have a Perſon who ſhould behave himſelf well in his Place, and that he ſhould not be dependent of any Man, for that might be a means to make him otherwiſe; and becauſe the Juſtices of the Peace and the People have an Intereſt in this Office (viz.) in entring Records, and drawing up Indictments, and diſpatching the Buſineſs of the Seſſions, therefore the Act fixes him in his Office, and gives him a more laſting Eſtate therein than he had before, ſo as not to be removed by the Death, or at the Pleaſure of the Cuſtos.

And this appears more plain by the Penning of the Act it ſelf; for after the Cuſtos hath nominated the Perſon, he muſt be admitted by the Juſtices in their Quarter-Seſſions, and is to be removed by them if he misbehave himſelf; and upon ſuch Removal, if the Cuſtos ſhould not appoint another, the Juſtices have Power to do it.

Now the Words in this Grant to Mr. Owen (viz.) That he ſhould have the Office durante beneplacito of the Earl of Winchelſea, cannot make the Nomination void ab initio, but the Words themſelves are void and uſeleſs, becauſe they are contrary to the Statute, which gives no Power to create this Officer under that Limitation, but for ſo long Time only as he ſhall behave himſelf well; neither ſhall the Acceptance of the Grant alter the Caſe, becauſe when once the Perſon is admitted to the Office, 'tis the Statute, and not the Grantor which gives him an Intereſt for Life; for by nominating the Perſon the Grantor hath executed his Power, and hath no farther Authority to modifie what Intereſt the Grantee ſhall have in his Office.

'Tis like a Perſon preſented to a Living during the Pleaſure of the Patron, the Preſentation is good, but the Limitation is void; becauſe by the Uſage and Cuſtom of the Kingdom a more durable Eſtate is fixed in the Preſentee.

So an Inſtitution by the Biſhop during pleaſure, the firſt is good, and not to be defeated by the ſubſequent Limitation.

The

The Caſes ſeem to be parallel, for the Eſtate of this Officer is as well fixed by this Act of Parliament as the Eſtates of thoſe are at the Common Law; and therefore the Words habendum during pleaſure, ought to be rejected out of this Grant as uſeleſs and inſignificant.

'Tis true, in Conveyances where the Party may grant a greater or leſſer Eſtate, there the Habendum is of great Uſe either to enlarge or limit the Thing granted; but it cannot be uſefull where an Act of Parliament fixes an Intereſt, as in this Caſe.

Many more Inſtances may be given where the Premiſes in a Deed or Grant may be good, and the Conditions void: If a Feoffment be made in Fee upon Condition not to alien, the Feoffment is good, but the Condition is void; ſo if a Gift in Tail is made upon Condition that the Donee ſhall not ſuffer a Common Recovery, the Gift is good, but the latter Clauſe is void; and for theſe Reaſons it was prayed, that the Mandamus might be granted.

Econtra. The Act of 1. Will. & Mariæ doth not give the Clerk of the Peace an Eſtate for Life, it gives the Cuſtos Power to name him, but not to execute the Office for his Life, but only for ſo long Time as he behaves himſelf well.

Now the Nomination and the Limitation of the Eſtate of the Nominee ſhall not be taken diſtinctly and apart, for it all makes an entire Appointment, and therefore muſt be taken together; and this being during pleaſure, is void ab initio; and if ſo, the Act hath made no more of it than the Grantor himſelf hath done.

Judicium. Afterwards in Hillary Term Judgment was given, That no peremptory Mandamus ſhould go; for by the Act of 1 W. & M. the Cuſtos is to nominate a Clerk of the Peace to execute that Office for ſo long Time as he ſhall well demean himſelf, &c. and if he appoint him in any other manner, he is no Clerk of the Peace; therefore the Defendant being appointed by the Earl of Winchelſea during pleaſure, 'tis not purſuant to the Act, for he hath not executed the Authority given to him by the Act, and ſo the Defendant hath no Title.

Newton *verſus* Richards.

Paſch. 6. Rot. 97.

1 Salk. 296. SCire facias **againſt an Adminiſtrator to ſhew Cauſe why the Plaintiff ſhould not have Execution upon a Judgment which he obtained againſt the Inteſtate?**

The Defendant pleaded, quod nulla habet bona & catalla quæ fuerunt (Inteſtati) tempore mortis ſuæ in manibus ſuis adminiſtrand. nec habuit die impetrationis brevis præd. nec unquam poſtea; **and upon a general Demurrer to this Plea, it was objected, that it was not good, becauſe the Charge was by a Judgment, which muſt be anſwered in the Plea by a Diſcharge of Debts upon Judgment; for the Adminiſtrator might pay Debts upon Specialties and otherwiſe, and ſo have** nulla bona **remaining in his Hands; but ſuch an Adminiſtration ſhall not bar the Plaintiff of this Action, and ſo it was adjudged in the Caſe of** Ordwey **and** Godfrey.

Cro. Eliz. 575. which Caſe was denied to be Law *per totam Curiam.* Aleyn 48.

But notwithſtanding this Objection, the Plea was held good, eſpecially upon a general Demurrer, as this was; but if the Plaintiff had demurred ſpecially, and ſhewed it for Cauſe, it might have been otherwiſe.

ComBes *verſus* Hundred de Bradley.

An Action upon the Statute of Winton, *for a Robbery.*

Glouc. ff. HOmines inhabitantes in Hundred. de Bradley in Com. Glouc. attachiati fuerunt ad reſpondend. tam Domino Regi & Dominæ Reginæ nunc quam Thomæ Combes qui tam pro eiſdem Domino Rege & Domina Regina quam pro ſeipſo ſequitur de placito quare cum in Statuto in Parliamento Domini Edwardi nuper Regis Angliæ primi apud Winton. Anno Regni ſui tertio decimo tent. edit. inter cætera ordinat. ſit pro eo quod de die in diem roboriæ homicidia & incendia plus ſolito tunc fiebant quam antea ſolebant & felones non potuiſſent eſſe attinct. per ſacramentum Jur. qui magis voluntarie permittebant felonias fieri gentibus extraneis & felones evadere abſque pœna quam malefactores indictari unde magna pars fuer. gentes de eadem

13 E. primi.

dem patria vel ad minus ſi malefactores fuer. de alia patria eorum receptores fuer. de vicineto ubi hujuſmodi feloniæ fiebant & hoc faciebant pro eo quod ſacramenta eiſdem Jur. de eadem patria ubi feloniæ ill. fiebant non miniſtrabantur & quod reſtitutio dampnorum pœna antetunc non fuit provis. pro concelamento & negligentia ſuis idem nuper Rex ad debilitand. poſſe felon. ſtabilivit pœnam in illo caſu ita quod pro timore pœnæ pluſquam pavore Sacramenti nullis extunc parcerent nec aliquas felon. extunc impoſterum concelarent & mandavit quod proclamatio ſolempniter fieret in omnibus Comitatibus Hundred. Mercat. Feriis & omnibus aliis locis ubi ſolempnis aſſemblatio gentium foret ſic quod nulli per ignorantiam ſe poſſint excuſare quod quælibet patria extunc ſic poſſit cuſtodiri quod immediate poſt roborias & felonias factas recens inſecutio fieret de villa in villam & patria in patriam ac etiam inquiſitiones fierent ſi neceſſe foret in villis per ipſum qui ſuperior eſſet de villa & poſtea in Hundred. & Franchef. & in Com. & aliqnando in duobus tribus vel quatuor Comitatibus in caſu quando feloniæ factæ fuer. in Marchiis Comitat. ita quod malefactores potuiſſent eſſe attinct. & ſi patria de hujuſmodi malefactoribus non reſponderet pœna talis eſſet quod quælibet patria ſcilicet homines in patria commorantes reſponderent de roboriis factis & dampnis ſic quod totum Hundredum ubi roboria illa facta foret cum Franchef. quæ eſſent infra præcinct. ejuſdem Hundredi reſponderent de roboriis factis & ſi roboria illa facta foret in diviſis duorum Hundredor. reſponderent inde ambo Hundred. ſimulcum Franchef. infra eadem & longiorem terminum non haberet patria poſt roboriam & feloniam fact. quam quadraginta dies infra quos faceret emendas de roboriis & malefactis vel reſponderent de coporibus malefactorum prout in eodem ſtatuto plenius continetur Ac cum quidam malefactore præfat. Thomæ ignoti 23 die Februarii Anno Regni dictorum Domini Regis & Dominæ Reginæ nunc quinto apud Hampnot infra Hundred. de Bradley in Com. Glouceſt. in alta regia via ibidem vi & armis in ipſum Thomam inſultum fecerunt & 30 l. 12 s. 6 d. in pecuniis numeratis de denariis ipſius Thome proprijs tunc ibidem invent. felonice de eodem Thoma ceperunt ſpoliaverunt & aſportaverunt contra pacem Domini Regis & Dominæ Regiuæ nunc idemqne Thomas immediate poſt feloniam roboriam & ſpoliationem prædict. fact apud Northleach in-

The Robbery ſet forth.

The Money taken.

ſra Hundred. præd. Huteſiam & Clamorem de roboria & felonia præd fecit & adtunc & ibidem notitiam inhabitantibus ejuſdem villæ de Northleach præd. de roboria & felonia prædict. dedit & poſt roboriam & feloniam illam & infra viginti dies prox. ante diem impetrationis Brevis originalis ipſius Thomæ idem Thomas coram Thoma Maſters Armigero tunc & adhuc uno Juſticiar. dictorum Domini Regis & Dominæ Reginæ nunc ad pacem infra Com. Glouceſter. conſervand. aſſignato tunc inhabitan. apud Cirenceſter. prope præd. Hundred. de Bradley præd. in Com. præd. examinatus fuit ſuper ſacramentum ſuum corporale juxta formam Statuti apud Weſtm. Anno Regni Dominæ Elizabethæ nuper Reginæ Angliæ &c viceſimo ſeptimo inde edit. & provis. Idemq; Tho. Combes ſuper ſacramentum ſuum præd. tunc dixit quod ipſe non cognovit partes quæ roboriam ill. feciſſent nec earum aliquam & poſt roboriam illam fact. quadraginta dies jam præterierunt iidem tamen homines inhabitantes in Hundred. prædict. emendas de roboria prædict. Thomæ Combes hucuſque non fecerunt nec corpora felonum & malefactorum prædict. nec corpus eorum alicujus ceperunt nec de corporibus eorum aut de corpore eorum alicujus hucuſque reſponder. ſed malefactores & felones ill. evadere permiſerunt in dictorum Domini Regis & Dominæ Reginæ nunc contemptum & ipſius Thomæ Combes grave dampnum & contra formam Statut. prædict. & unde idem Thomas Combes qui tam, &c. per Samuelem Brewſter Attornatum ſuum queritur quod cum quidam malefactores præfat. Thomæ Combes ignoti in alta regia via viceſimo tertio die Februarii Anno Regni Domini Gulielmi & Dominæ Mariæ nunc Regis & Reginæ Angliæ, &c. quinto apud Hampnot in Com. Glouceſter. infra Hundred de Bradley in Comitatu prædict. vi & armis (viz.) baculis gladiis & cultellis in ipſum Thomam Combes inſultum fecerunt & 30 l. 12 s. 6 d. in pecuniis numeratis de denariis ipſius Thome Combes propriis tunc ibidem invent. felonice de eodem Thoma Combes adtunc & ibidem ceperunt ſpoliaverunt & aſportaverunt contra pacem dictorum Domini Regis & Dominæ Reginæ nunc idemq; Thomas Combes immediate poſt feloniam roboriam & ſpoliationem prædict. fact. apud Northleach infra Hundred' de Bradley præd. prope præd. locum ubi roboria præd. ſic ut præfertur fact. fuit Huteſiam & Clamorem de roboria & felonia prædict. fecit & adtunc & ibidem notitiam inhabitantibus

Oath made before a Juſtice of Peace.

27 Eliz.

The Count upon the Writ.

tibus ejuſdem villæ de Northleach præd. de roboria & felonia præd. fact. dedit & poſt roboriam & feloniam ill. fact. & infra viginti dies proximos ante diem impetrationis brevis originalis predict. Thomæ Combes idem Thomas Combes coram præfat. Thoma Maſters Armigero tunc & adhuc uno Juſticiar. Domini Regis & Dominæ Reginæ ad pacem in Com. præd. conſervand. aſſign. inhabitante apud Cirenceſtr. prope præd. Hundred. de Bradley præd in Com. præd' examinatus fuit ſuper ſacramentum ſuum corporale juxta Statutum apud Weſtm. in Comitatu Middleſex. Anno Regni Dominæ Elizabethæ nuper Reginæ Angliæ viceſimo ſeptimo inde editum & proviſum idemque Thomas Combes ſuper ſacramentmm ſuum præd. tunc dixit quod ipſe non cognovit partes quæ roboriam illam feciſſent nec earum aliquam & quod poſt roboriam illam factam quadraginta dies jam præterier. iidem tamen homines inhabitantes in Hundred. de Bradly predict. emendas de roboria præd præfat. Thomæ Combes hucuſque non fecerunt nec corpora felonum & malefactorum præd. nec corpus eorum alicujus ceperunt nec de corporibus eorum ſeu de corpore eorum alicujus hucuſq; reſponder. ſed malefactores & felones illos evadere permiſerunt in dictorum Domini Regis & Dominæ Reginæ nunc contemptum & ipſius Thomæ Combes grave dampnum & contra formam Statut. prædict. de Anno Regni præd. nuper Regis Angl. Edwardi primi decimo tertio ſupradicto editi unde dicit quod deterioratus eſt & dampnum habet ad valentiam 50 l. Et inde producit Sectam, &c.

Et præd. homines inhabitantes infra præd. Hundred. de Bradley præd. per Richardum Longford Attornatum ſuum ven. & defend. vim & injuriam quando &c. Et quicquid &c. & dicunt quod ipſi in nullo ſunt culpabiles de præmiſſis eis impoſitis prout præd. Tho. Combes qui tam &c. ſuperius verſus eos queritur Et de hoc ponunt ſe ſuper patriam & præd. Thomas Combes qui tam &c. inde ſimiliter &c. Et ſuper hoc idem Thomas Combes dicit qd. præd homines inhabitantes infra hundred. de Bradly præd. ubi roboria præd. facta fuit ſunt partes defendentes verſus quas idem Thomas Combes qui tam &c. ſuperius in forma præd. ſuperius queritur & ea de cauſa petit breve dictorum Domini Regis & Dominæ Reginæ vicecomiti Comitatus præd dirigend. de venire faciend. coram dict. Domino Rege & Domina Regina ubicunque &c. duodecim, &c. de vicineto hundredi de Slaughter in

Not guilty pleaded.

Suggeſtion for a Jury of another Hundred.

Comitatu præd. quod quidem hundred. de Slaughter eſt proximum hundred. in eodem Comitatu præd. hundred. de Bradley proxime adjacen. ad triandum exitum præd ſuperius in forma præd junct' Et quia præd. homines inhabitantes infra hundred. de Bradley præd. hoc non dedicunt ei conceditur &c. Ideo præceptum eſt vicecomiti præd. qd. venire faceret coram dictis Dno. Rege & Dna' Regina in Octabis purific' beatæ Mariæ ubicunq; &c. duodecim &c. de vicineto præd. hundredi de Slaughter præd. per quos &c. & qui nec &c. ad Recogn. &c. quia tam, &c. idem dies dat. eſt tam præfat. Tho. Combes qui tam &c. quam præd. hominibus inhabitantibus in præd' Hundred. de Bradley præd. &c. poſtea continuatur inde proceſſus inter partes præd. de placito præd. per Jur' poſit. inde inter eas in reſpectu coram Domino Rege & Domina Regina uſq; a die Paſchæ in 15 dies ubicunq; &c. extunc proxime ſequen. niſi Juſticiarii Domini Regis & Dominæ Reginæ ad Aſſizas in Comitatu præd' capiendas aſſign' prius die ſabbati 3 die Martii apud Glouceſter in Com' præd. per formam ſtatuti &c. ven. pro defectu jur. &c. ad quem diem coram Domino Rege & Domina Regina apud Weſtm. venerunt partes prædict. per attornatos ſuos prædict. & præfat. Juſticiarii dictorum Dni. Regis & Dnæ' Reginæ coram quibus &c. miſ. hic recordum ſuum coram eis habit. in hæc verba Poſtea die & loco infracont. coram Egidio Eyre Milit. uno Juſtitiar. Domini Regis & Dnæ. Reginæ ad placiata coram ipſis Rege & Regina tenend' aſſign' & Thoma Breton Armiger. eidem Egidio Eyre & Nicholao Letchmere Militi uno Baronum Scaccarii Dictorum Domini Regis & Domnæ Reginæ Juſtitiariis ipſorum Domini Regis & Dominæ Reginæ ad Aſſizas in Comitatu Glouceſter capiend. aſſign' per formam ſtatuti &c. hac vice aſſociat. præſentia præd' Nicholai Letchmere non expectata virtute brevis dictorum Domini Regis & Dominæ Reginæ de ſi non omnes &c. venerunt tam infranominat. Thomas Combes qui tam pro Domino Rege & Domina Regina quam pro ſeipſo in hac parte ſequitur quam infraſcript' homines inhabitantes in Hundred. de Bradley per attornatos ſuos infracontent. & Jur. Juratæ unde infra fit mentio exact. ven' qui ad veritatem de infracontent. dicend. elect. triat. & jurat. dicunt ſuper ſacrament. ſuum quod quidam Malefactores præfat. Thome ignoti 23 die Februarii Anno Regni dictorum Domini Regis & Dominæ Reginæ nunc Regis & Reginæ Angliæ, &c. quinto apud

The Poſtea.

Special Verdict.

pud Hampnot infra Hundred. de Bradley in Comitatu Glouceſter in alta regia via ibidem vi & armis in ipſum Thomam inſultum fecerunt & 30 l. 12 s. 6 d. in pecuniis numeratis ibidem invent. felonice de eodem Thoma ceperunt ſpoliaverunt & aſportaverunt contra pacem Dni. Regis & Dnæ Reginæ nunc idemque Thomas immediate poſt feloniam roboriam & ſpoliation. infraſcript. fact. apud Northleach infra Hundred. præd. hurteſium & clamorem de roboria & felonia infraſcript. fecit & adtunc & ibidem notitiam inhabitantibus ejuſdem villæ de Northleach præd. debito modo de roboria & felonia infraſcript. fact' dedit & poſt roboriam & feloniam illam fact. & infra viginti dies prox. ante diem impetrationis brevis originalis ipſius Thomæ idem Thomas coram Thoma Maſters Armig. adtunc & adhuc un. Juſticiar. dictorum Domini Regis & Dominæ Reginæ nunc ad pacem in præd. Comitatu Glouceſter conſervand. aſſign. inhabitante apud Cirenceſter prope præd. Hundred. de Bradley in Comitatu prædict. infraſcript. examinatus ſuper ſacramentum ſuum corporale juxta ſtatutum apud Weſtm. Anno Regni Dominæ Elizabethæ nuper Reginæ Angliæ, &c. 27 inde edit. & proviſ. & ſuper ſacramentum ſuum prædict. coram præd. Thoma Maſters tunc depoſuit modo & forma prout poſtea mentinnat. eſt & non aliter Glouceſter. Memorand. That upon the 7th Day of June in the 5th Year of the Reign of our Sovereign Lord and Lady King William and Queen Mary, over England, &c. Annoq; Domini 1693. Thomas Combes of Fairford in the County of Glouceſter, Servant to Andrew Barker of Fairford aforeſaid, Eſq; came before me Thomas Maſters, Eſq; one of their Majeſty's Juſtices of the Peace for the ſaid County of Glouceſter, and took his corporal Oath, That upon Thurſday the 23d Day of February laſt paſt, between the Hours of two and three of the Clock in the Afternoon of the ſame Day, as the ſaid Thomas was travelling from Fairford aforeſaid, towards Tewxbury in the ſaid County of Glouceſter, he was ſet upon in a Field near Hampnot in the Hundred of Bradley in the ſaid County of Glouceſter by three Horſemen armed with Swords and Piſtols, who there made an Aſſault upon him the ſaid Thomas Combes, and did then and there feloniouſly take from him the ſaid Thomas Combes 30 l. 12 s. 6 d. and one ſorrel Mare, which Mare is ſince returned to Fairford aforeſaid, *Thirty Pounds and eleven Shillings, of which ſaid Money was the*

The Oath of the Party robbed.

The Money was the Money of another, and not of the Plaintiff.

the proper Money of the ſaid Andrew Barker *his Maſter*, and the other one Shilling and Sixpence was the proper Money of him the ſaid Thomas Combes, and the ſaid Thomas Combes further deposed, That the ſaid three Horſemen which ſo took away the ſaid Money and Ware from him were Strangers and altogether unknown to him the ſaid Thomas Combes and that the ſaid Thomas Combes immediately after he was ſo robbed went to Northleach a Market Town in the ſaid Hundred, and there made Hue and Cry after the ſaid Perſons that robbed him, Et iidem Jur. ulterius ſuper ſacramentum ſuum præd. dicunt quod 39 l. 12. s. 6. d. in narratione infraſcript. mentionat' fuerunt propriæ monetæ Andreæ Barker Armigeri adtunc Magiſtri præd. Thomæ Combes recept. per prædict. Thomam Combes pro uſu præd. Andreæ Barker Magiſtri ſui & iidem Juratores ulterius ſuper ſacramenta ſua præd. dicunt quod prædict. Andreas Barker non fuit præſens quando roboria prædict' fact' fuit ſed utrum ſuper totam materiam per juratores prædict. in forma prædict' compertam prædict. inhabitantes in hundredo de Bradley ſunt culpabiles de præmiſſis in narratione infraſcript. interius eis impoſit. contra formam ſtatuti in narratione mentionat. necne juratores præd. penitus ignorant & inde petunt adviſamentum & conſiderationem Curiæ, &c. Et ſi ſuper totam materiam prædict. per juratores prædict. in forma præd. compertam videbitur Curiæ dictorum Domini Regis & Dominæ Reginæ hic quod præd. inhabitantes in Hundredo de Bradley præd. ſunt culpabiles de præmiſſis in narratione infraſcript. interius eis impoſitis contra formam ſtatuti præd. tunc juratores prædict. ſuper ſacramentum ſuum præd. dicunt quod præd. inhabitantes in Hundredo de Bradley prædict. ſunt inde culpabiles prout præd Tho. Combes qui tam &c. interius verſus eos queritur & aſſidunt dampna ipſius Tho. Combes occaſione infraſcript. ultra miſ. & cuſtagia ſua per ipſum circa ſectam ſuam in hac parte appoſit. ad 30 l. 12 s. 6. d. & pro miſ. & cuſtagiis ill. ad quadraginta ſolidos Sed ſi ſuper totam materiam prædict. per Jur. præd. in forma præd. compertam videbitur Curiæ dictorum Domini Regis & Dominæ Reginæ hic quod inhabitantes de Hundredo de Bradley prædict. non ſunt culpabiles de præmiſſis prædict. tunc juratores prædict. ſuper ſacramentum ſuum prædict dicunt quod prædict. inhabitantes Hundred. de Bradley præd. non ſunt culpabiles prout prædict. inhabitantes Hundred. de Bradley prædict. interius pro ſe placitando allegaverunt ſed quia Cur. dict.

Dom. Regis & Dnæ. Reginæ nunc hic de Judicio ſuo de & ſuper præmiſſis redend. nondum adviſatur dies inde dat. eſt partibus præd. coram Dom. Rege & Dna. Regina uſq; ubicunq; &c. de judicio ſuo inde audiend. eo qd. Cur. dict. Dom. Regis & Dnæ. Reginæ nunc hic inde nondum &c.

Combes *verſus* Hundred de Bradley.

The Caſe upon the Pleadings was (viz.) An Action was brought upon the Statute of Winton, for that upon the three and twentieth day of February 5 Will. & Mariæ certain Maleſactors to the Plaintiff unknown, did aſſault him at Hampnot in the Hundred of Bradley in the County of Glouceſter, and robbed him of 30l. 12s. 6d. of his own Money, whereof he immediately gave Notice at Northleach within the ſaid Hundred, and near the Place where he was robbed, and that none of the Thieves were taken. 2 Salk. 613.

Upon Not guilty pleaded, a ſpecial Verdict was found at the Aſſizes (viz.) the Jury find the Aſſault, Robbery and Taking from the Plaintiff 30l. 12s. 6d. and a Mare which returned, and that 30l. 11s. of the ſaid Money, was the proper Money of Andrew Baker his Maſter, who was not preſent when the Robbery was committed, but that the Plaintiff had the ſame in his Poſſeſſion for the Uſe of his ſaid Maſter and that the Robbers were Strangers to him, and ſo made a general Concluſion.

The ſingle Queſtion was, Whether the Servant being robbed of his Maſter's Money (he being not preſent) may bring the Action againſt the Hundred, and declare de denariis ſuis propriis being taken away?

Sir Francis Winnington held, that the Action was well brought, tho' it appears both by the Affidavit and Verdict that it was the Money of the Maſter; for it was the uſual Courſe in former times for the Servant alone to bring the Action, and the Maſter ſeldom or never appeared in it. The Statute of Ed. 1. was made for the general Preſervation and Quiet of Travellers, whether Maſters or Servants, and therefore either of them might bring the Action. This was the Opinion of Dodderidge and Jones, who were learned Judges in the Caſe of Drope and Thaire, reported by Mr. Latch; nay, in ſome Caſes it hath been ruled, that the Maſter ought not to bring the Action, becauſe the Servant (being the Perſon robbed Latch. 127.

Cro. Eliz. 142. 1 Leon. 325. idem. 2 Leon. 82. robbed) is enjoined by the Statute of 27 Eliz. to make Oath that he did not know any of the Robbers.

A Bailiff or Receiver of Rents was robbed, and he declared de denariis ipsius querentis, and it was held good, because he is accountable to his Master, which is this very Case: Where-ever the Party has a Property, he may bring the Action against the Wrong-doer; And this is the Reason why a common Carrier may sue for Goods taken from him, tho' not his own.

1 Brownlow 155. But there is a Case which comes yet more near to this; it was an Action brought by a Servant who was robbed of Goods, part of which were belonging to his Master, and the rest to himself; and he declared in his own Name against the Hundred, and had a Verdict as to his own, and the matter was found specially as to the Goods of his Master; yet he had Judgment, which must be upon the special Finding; and for these Reasons and upon these Authorities he prayed Judgment for the Plaintiff.

Econtra. It was argued, That the Master ought to bring the Action because it was his Money which was lost; but for the Servant to declare de denariis suis is not true; for he had no Property in the Money, neither is he answerable for its being taken from him.

This is not like the Case of a Common Carrier, for he has a Reward and a Recompence for carrying the Goods of other Men, and therefore is responsible for them by Law, if lost or taken from him, which a Servant is not.

2 Saund. 47. If a Sheriff levies Goods by Virtue of a Fieri facias, which Goods are afterwards taken from him, tho' they are not his own, yet he may maintain an Action of Trover; the Reason is, because by the Seisure he has a Property in them by Law; but a Servant has no manner of Property in the Money or Goods of his Master, and therefore if robbed, either his Master being present or absent (for that makes no Alteration in the Case) the Master who hath the Property, must bring the Action.

Thus it was adjudged in the Case of Raymund against the Hundred of Working; the Servant made the Oath, and the Master brought the Action, and resolved so it ought to be; and upon a Writ of Error brought in B. R. that Judgment was affirmed.

So it was likewise in that very Case of Drope and Thaire cited on the other Side, viz. The Servant lodged in an Inn, and his Master's Goods were lost, who brought the Action; and tho' it

was ſaid by Doderidge and Jones that the Servant might have an Appeal of Robbery, yet it ſeems to be only a ſudden Opinion of theſe Judges, for the Law is otherwiſe, viz. That the Servant cannot bring an Appeal, and in the ſame Caſe reported by Juſtice Popham, Juſtice Jones was of another Opinion viz. That if the Servant is robbed, the Maſter ſhall bring the Action. Pop. 178. 179.

In 31 Eliz. the Servant was robbed, and the Maſter brought the Action and had recovered a Verdict, but becauſe the Oath was made by him, and not by the Servant who was robbed, the Judgment was ſtayed; for he might know ſome of the Robbers, tho' his Maſter did not. Cro. Eliz. 142. 1 Leon. 323.

In 7 Jac. 1. a Man by counterfeit Letters got Money out of the Servants Hands, and the Maſter brought an Action on the Caſe for the Deceit. 2 Cro. 224.

And in the ſame Year the Servant being robbed in an Inn, the Maſter brought the Action, and had Judgment, which was affirmed afterwards in the Exchequer-Chamber. 2 Cro 223. Co. Entr. 347.

So where the Maſter was preſent when his Servant was robbed, yet the Maſter brought the Action againſt the Hundred. And likewiſe where a Poſt-boy was robbed in the Preſence of the Owner of the Goods, and he brought the Action. Yel. 162. Style 156, 319.

Theſe and many more Caſes may be brought to prove that it hath been the conſtant Opinion, that the Maſter ought to bring the Action where the Servant hath been robbed.

Then as to the Poſſeſſion, 'tis not at all material to ſupport the Action brought by the Servant, for 'tis the Property only which is to be conſidered; and for this Purpoſe a late Caſe was cited, which was between Pinkney and the Inhabitants of the Eaſt-Hundred in Rutland, viz. The Plaintiff brought an Action upon the Statute of Winton, and declared for the taking from him of 29 l. de pecuniis propriis and likewiſe * for other Goods taken out of his Poſſeſſion, and upon a Demurrer to the Declaration it was held, That the Action was not well brought for the Goods taken out of his Poſſeſſion; and therefore as to them be entred a Remiſit dampna, and had Judgment for his Money, which ſhews that the bare Poſſeſſion without a Property, was not regarded. Adjournatur. 2 Saund. 379.

* But did not name them in particular, and that was the Reaſon of the Judgment as to the Goods.

Afterwards the Plaintiff had Judgment by the Opinion of the whole Court, and that in this Caſe either the Maſter or the Servant might maintain the Action.

DE

Term. Sanct. Mich.

Anno 6 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1694.

Lampton *verſus* Collingwood.

1 Salk. 262.

Plita.

PLacita coram Domino Rege apud Weſtm de Termino Sancti Hillarii Anno Regni Domini Willielmi tertii Regis Angliæ ſexto Rot. 309.

Writ of Audita Querela.

Angl. ff. Dom. Rex mandavit Juſtic. ſuis ad Placita coram ipſo Rege tenend. aſſign. Breve ſuum clauſum in hæc verba ff. Gulielmus tertius Dei Gratia Angl' Scoc' Franc' & Hibern' Rex fidei defenſ. &c. Juſtic' noſtris ad Placita coram nobis tenend. aſſign ſalutem Ex gravi querela Annæ Lampton vid. Adminiſtratricis bonorum & catallorum quæ fuer. Roberti Lampton Armigeri defunct' accepimus quod cum quidam Lucas Collingwood nuper ſcilicet Termino Paſche Anno Regni Dom. Caroli ſecundi nuper Regis Angliæ &c. triceſimo quarto in Curia ejuſdem nuper Regis coram ipſo nuper Rege apud Weſtm. in Com. Midd. per Judicium ejuſdem Curiæ recuperaſſet verſus præfat. Robertum Lampton & quendam Edmundum Craiſter Armigerū per nomina Edmundi Craiſter de Craiſter in Com. Northumbriæ Armigeri alias dict. Edmund Craiſter de Craiſter in Com. præd' Armiger & Roberti Lampton de Newham in Com' Northumbriæ Armigeri alias dict' Robertum Lampton de Newham in Com. præd. Gen' quadringentas libras de debito necnon quadraginta ſolid. qui eidem Lucæ in eadem Curia adjudicat. fuer. pro dampnis ſuis quæ ſuſtinuit tam occaſione

Judgment recorded againſt two Defendants.

one detentionis debiti illius quam pro miſ. & cuſtagiis ſuis per ipſum circa ſectam ſuam in ea parte appoſit. unde convict. fuer. prout per Recordum & Proceſſum inde in Curia noſtra coram nobis apud Weſtm' prædict. reſiden. plenius apparet Poſteaq prædʼ Robertus in vita præd. Edmundi ſcilicet primo die Novembris Anno Regni Domini Jacobi ſecundi nuper Regis Angliæ primo obiit & idem Edmundus ipſum Robertum ſupervixit videlt. apud Morpeth in Com. Northumbriæ per quod per legem Angliæ bona & catalla quæ fuer. præd. Roberti tempore mortis ſuæ in manibus cujuſcunq; adminiſtratoris aut adminiſtratricis bonorum & catallorum illorum adminiſtrand. exiſtenʼ de debito & dampnis præd penitus exonerat. devenerunt prout eadem Anna viis & modis quibus convenit parat. eſt edocere prædʼ tamen Lucas machinans & intendens ipſam Annam pretextu Judicii præd. minus rite prægravare ac magnopere dampnificare alias poſt mortem ipſius Roberti ſcilicet Termino Sanctʼ Trinitatis Anno Regni noſtri & Dominæ Mariæ nuper Reginæ Angliæ &c. quinto proſecut. fuit extra præd. Curiam coram nobis & Dnaʼ Maria nuper Regina noſtra apud Weſtm. quoddam Breve noſtrum & præd. Mariæ nuper Reginæ noſtr. de Scire fac. de & ſup Judicio p̃d. verſus p̃fat. Annam Adminiſtratricem bonorum & catallorum præd. Roberti præd. tunc Vic. London direct. per quod quidem Breve recitando qdʼ cum prædʼ Lucas nuper in Curia dicti nuper Regis Caroli ſecundi coram ipſo nuper Rege apud Weſtmʼ per billam ſine brevi dicti nuper Regis ac per Judicium ejuſdem Curiæ recuperaſſet verſus præd. Edmundum Craiſter alias dict. Edmund Craiſter de Craiſter in Com. prædʼ Armig. & præd. Robertum Lampton alias dict. Robertum Lampton de Newham in Com. præd. Gen. prædʼ quadringent. libras de debito necnon prædʼ quadraginta ſolidos pro dampnis ſuis quæ ſuſtinuit tam occaſione detentionis debiti illius quam pro miſ. & cuſtagiis ſuis per ipſum circa ſectam ſuam in ea parte appoſit. unde tunc convict. fuer. ſicut conſtabat de Recotdo recitando etiam & ſuggerendo quod prædʼ Edmundus ſecundo die Julii Anno Regni Domini Jacobi ſecundi nuper Regis Angliæ, &c. quarto apud London in Parochia beatæ Mariæ de Arcubus in Warda de Cheape obiit & quod præd. Robertus ipſum ſupervixit qdq; poſtea prædʼ Robert. primo die April. Ann. Regni noſtri & præd. nuper Reginæ noſtræ ſecundo apud Londonʼ p̃dʼin parochia & warda præd. obiit inteſtat. & quod poſt ejus mor-

One of the Defendants dies, and the other ſurvives.

Scire facias ſued out againſt the Adminiſtrator of the deceaſed.

mortem adminiſtratio omnium & ſingulorum bonorum & catallorum jur' & creditorum quæ fuer. præd. Roberti tempore mortis ſuæ præfat. Annæ Lampton commiſſa fuit (debito & dampnis præd præfat. Lucæ minime ſatisfact)quodq; præd. Lucas nobis & præd. nuper Reginæ noſtræ ſupplicaſſet ſibi de remedio congruo in ea parte provideri noſq;& pd'nuper Regina noſtra in ea parte fieri volentes qd.fuit juſtum per idem breve dict. Vicecomitibus London præcepimus quod per probos & legales homines de Balliva ſua ſcire facerent præfat' Annæ qd. eſſet coram nobis & præd'nuper Regina noſtra apud Weſtm. præd' die Martis prox. poſt Quinden. Sanct. Trinitatis tunc prox. ſequen' ad oſtendend' ſi quid pro ſe habuit vel dicere ſcivit quare præd. Lucas executionem ſuam de debito & dampnis præd' de bonis & catallis quæ fuer. præd' Roberti tempore mortis ſuæ in manibus ipſius Annæ adminiſtrand. habere non debuit ſi ſibi videtur expediri & ulterius factur. & receptur. qd'præd. Curia tunc coram nobis & præd' nuper Regina noſtra de eo adtunc & ibidem conſideraret in ea parte & quod haberent ibi tunc nomina eorum per quos ei ſcire facererent & breve illud &c. ad quem diem in ead. Cur. coram nobis & præd. nuper Regina noſtra apud Weſtm. ven' præd. Lucas in propria perſona ſua & Vic. London. præd videlt. Thomas Lane Mil. & Tho. Cook Mil. nobis & præd.nuper Reginæ noſtræ adtunc retorn. ſuper breve præd. quod præd. Anna nichil habuit in Balliva ſua ubi aut per quod ei ſcire facere potuer. nec fuit invent. in eadem & eadem Anna non ven' Ideo ſicut prius per eandem Curiam adtunc præcept. fuit eiſdem Vicecomitibus London quod per probos & legales homines de Balliva ſua ſcire facerent præfat. Annæ quod eſſet coram nobis & præd.nuper Regina noſtra apud Weſtm. die Martis px. poſt tres ſeptimanas Sanctæ Trinitatis tunc prox. ſequen. ad oſtendend. in forma præd. ſi &c. Et ulterius &c. idē dies dat. fuit per eandem Curiam tunc coram nobis & præd. nuper Regina noſtra præfat. Lucæ ibidem &c. Ad quem diem in præd. Curia coram nobis & præd.nuper Regina noſtra apud Weſtm' venit præd. Lucas in propria perſona ſua & Vicecomites London' præd. ſicut prius retorn. quod præd. Anna nichil habuit in Balliva ſua ubi ſeu per qd'ei ſcire facere potuer' nec fuit invent. in eadem & præd. Anna licet ad eundem diem ſolempniter exact. non venit ſed defaltam fecit Ideo adtunc & ibidem conſ fuit per eandem Curiam coram nobis & præfat. nuper Regina quod prædict Lucas haberet exe-

The Sheriffs return Nichil.

Alias ſcire facias.

The Sheriffs return a Nichil.

Execution adjudged upon the Scire facias by Default.

cutionem de debito & dampnis prædict. de bonis & catallis quæ fuer. præd Roberti tempore mortis ſuæ in manibus ipſius Annæ adminiſtrand. prout per Recordum & proceſſum inde in Curia noſtra coram nobis apud Weſtm' præd. reſiden' plenius apparet Idemq Lucas executionem verſus ipſam Annam de debito & dampnis prædict. de bonis & catallis præd. levand. licet eadem Anna nunquam ſummonita fuit in præd. placito de Scire fac. ad oſtendend. cauſam quare dictus Lucas executionem hujuſmodi verſus eam habere non deberet nec in placito illo comperuit licet etiam eadem Anna bona & catalla illa ex cauſa præd. inde de jure exonerari non debeat ꝑſequi ꝓponit & minatur in ipſius Annæ dampnum non modicum & gravamen ac contra legem & conſ. Regni noſtri Angliæ unde eadem Anna nobis ſupplicavit de remedio congruo ſibi per nos in hac parte provideri nos nolentes eidem Annæ aliqualiter injuriari volenteſque fieri in hac parte quod eſt juſtum vobis mandamus quod Audita Querela præd. Annæ vocatiſque coram vobis partibus præd. & aliis quæ in hac parte fore videritis evocand. auditiſq; hinc inde eorum rationibus partibus prædict' plenam & celerem Juſtitiam fieri fac. prout de jure & ſecundum legem & conſuetudinem Regni noſtri Angliæ fuerit faciend. Teſte meipſo apud Weſtm. 23 die Januarii Anno Regni noſtri ſexto.

Altho' the Adminiſtrator was never ſummoned to ſhew cauſe, nor did ever appear. The Plaintiff's gravamen.

Audita Querela.

Plumpton.

The Declaration upon the Writ.

Poſtea ſcilicet die Mercurii prox. poſt Quinden. Sancti Hillarii iſto eodem Termino coram Domino Rege apud Weſtmonaſt. venit præd. Anna Lampton per Nicholaum Harding Attorn. ſuum & ſtatim dicit quod præd. Lucas execution. verſus ipſam Annam de debito & dampnis præd' de bonis & catallis quæ fuer. præd. Roberti Lampton tempore mortis ſuæ in manibus ipſius Annæ levand. habere non debet quia dicit quod prædictus Lucas Collingwood nuper ſcilt. Termino Paſchæ Anno Regni dicti nuper Regis Caroli ſecundi 34. ſupradicto in Curia ejuſdem nuper Regis coram ipſo nunc Rege apud Weſtm. in Com. Middleſex prædict. per judicium ejuſdem Curiæ recuperaſſet verſus præfat' Robertum Lampton & præd. Edmundum Craiſter per nomina E. C. &c. præd' quadringent. libras de debito necnon præd. quadraginta ſolidos qui eidem Luce in eadem Curia adjudicat fuer. pro dampnis ſuis quæ ſuſtinuit tam occaſione detentionis debiti illius quam pro miſis & cuſtagiis ſuis per ipſum circa ſectam ſuam in ea parte appoſit. unde convict. fuit prout per Re-

The Recovery of the Judgment in the King's Bench.

Recordum & Proceſſum inde in Curia dicti Domini Regis nunc coram ipſo Rege apud Weſtm. præd. reſiden. plenius apparet & eadem Anna ulterius dicit quod poſtea præd. Robertus in vita præd. Edmundi ſcilt primo die Novembris Anno Regni dicti nuper Regis Jacobi ſecundi primo ſupradict' Obiit & idem Edmundus ipſum Robertum ſupervixit videlt' apud Morpeth præd' in Com. Northumbriæ præd. per quod per legem Angliæ bona & catalla quæ fuer. præd. Roberti tempore mortis ſuæ in manibus cujuſcunq; Adminiſtratoris vel Adminiſtratricis bonorum & catallorum ill. adminiſtrand'& exiſten'de debito & dampnis præd' penitus exonerat. devener. prout eadem Anna viis & modis quibus convenit parat. eſt edocere præd. tamen Lucas machinan' & intenden' ipſam Annam prætextu judicii præd. minus rite prægravare ac magnopere dampnificare alias poſt mortem prædict Roberti ſciit. Termino Sanctæ Trinitatis Anno Regni Domini Willielmi nunc Regis Angl' &c. & Dominæ Mariæ nuper Reginæ Angl. &c. quinto proſecut. fuit extra præd. Curiam tunc coram dicto Domino Rege nunc & dicta Maria nuper Regina apud Weſtm' præd' Breve dicti Domini Regis nunc & dictæ nuper Reginæ tunc de Scire fac. de & ſuper judicio præd' verſus ipſam præfat. Annam Adminiſtratricem bonorum & catallorum præd. Roberti præd. tunc Vicecomitibus London direct. per quod quidem Breve recitando qd' cum prædict' Lucas nuper in Curia dicti nuper Regis Caroli ſecundi coram ipſo nuper Rege apud Weſtm. per billam ſine breve dicti nuper Regis ac per judicium ejuſdem Curiæ recuperaſſet verſus præd. Edmundum Craiſter alias dict. Edmond. Craiſter de Craiſter in Com. præd' Armig. & præd. Robertum Lampton alias dict' Roberium Lampton de Newham in Com. præd' Gen' præd' quadringent. libras de debito necnon præd' quadraginta ſolidos pro dampnis ſuis quæ ſuſtinuit tam occaſione detentionis debiti illius quam pro miſis & cuſtagiis ſuis per ipſum circa ſectam ſuam in ea parte appoit. unde tunc convict. fuer' ſicut conſtabat de recordo recitando etiam & ſuggerendo qd' præd. Edmundus ſecundo die Julii Anno Regni Dom. Jacobi ſecundi nuper Regis Angl' &c. quarto ſupradict' apud London' præd. in præd. parochia beatæ Mariæ de Arcubus in Warda de Cheap obiit & quod præd. Robertus ipſum Edmundum ſupervixit quodq; poſtea præd. Robertus primo die Aprilis Anno Regni dict. Domini Willielmi nunc Regis & Dominæ Mariæ nuper Reginæ Angliæ ſe-

One of the Defendants dies.

Scire fac. *ſued out againſt the Adminiſtrator of the Deceaſed.*

ſecundo ſupradict. apud London præd. in parochia & warda præd. obiit inteſtat. & quod poſt ejus mortem adminiſtratio omnium & ſingulorum bonorum & catallorum jur. & creditorum quæ fuer. præd' Roberti tempore mortis ſuæ præfat. Annæ Lampton commiſſa fuit (debito & dampnis præd. Lucæ minime ſatisfact.) quodq; præd. Lucas præd. Domino Willielmo nunc Regi & Dominæ Mariæ nuper Reginæ Angliæ ſupplicaſſet ſibi de remedio congruo in ea parte provideri & quod dict. Dominus Rex nunc & dicta nuper Regina in ea parte tunc fieri volen. quod fuit juſtum per idem breve dictis Vicecomitibus London præceperunt quod per probos & legales homines de Balliva ſua ſcire fac. præfat. Annæ quod eſſet coram dicto Domino Rege nunc & dicta nuper Regina apud Weſtm. præd. die Martis prox. poſt Quinden. Sanctæ Trinitatis tunc prox. ſequen. ad oſtend'. ſi quid pro ſe habuit vel dicere ſcivit quare prædict. Lucas executionem ſuam de debito & dampnis præd. de bonis & catallis quæ fuer. prædict. Roberti tempore mortis ſuæ in manibus ipſius Annæ adminiſtrand. habere non debuit ſi ſibi viderit expediri & ulterius fact̃ur. & receptur. quod præd. Cur. coram dicto Dom. Rege nunc & dicta nuper Regina de eo adtunc & ibidem conſideraret in ea parte Et qd. haberent ibi tunc nomina eorum per quos ei ſcire facerent & breve ill' &c. ad quem diem in eadem Cur. coram dicto Domino Rege nunc & dicta nuper Regina apud Weſtm̃ ven. præd. Lucas in propria perſona ſua & Vic. London. prædict. videlt. Thomas Lane Mil' & Thomas Cook Mil' dicto Domino Regi nunc & dict' nuper Reginæ adtunc Retorn' ſuper brevi ill. quod præd. Anna nichil habuit in Balliva ſua ubi aut per quod ei ſcire facere potuer. nec fuit invent. in eadem Et quod eadem Anna non venit Io. ſicut prius per eandem Cur. adtunc præcept. fuit eiſdem Vic. London' quod per probos & legales homines de Balliva ſua ſcire facerent præfat. Annæ quod eſſet coram dicto Domino Rege nunc & dict. nuper Regina apud Weſtm' die Martis prox. poſt tres Septimanas Sanctæ Trinitacis tunc prox. ſequen' ad oſtend. in forma præd. ſi &c. Et ulterius &c. Idem dies dat. eſt per eandem Cur. tunc coram dicto Domino Rege nunc & dicta nuper Regina præfat. Lucæ ibidem &c. Ad quem diem in præd. Cur. coram dicto Dom. Rege nunc & dicta nuper Regina apud Weſtm. ven. præd. Lucas in propria perſona ſua Et Vic. London præd. ſicut prius retorm. quod præd. Anna nichil habuit in Balliva ſua ubi aut per

per quod ei ſcire facere potuer. nec fuit invent. in eadem & præd. Anna licet ad eundem diem ſolempnit. exact. non ven. ſed defalt. fec. lo' adtunc & ibidem conſ. fuit per eandem Cur. coram dicto Domino Rege nunc & dicta nuper Regina quod præd' Lucas haberet executionem de debito & dampnis præd. de bonis & catallis quæ fuer. præd. Roberti tempore mortis ſuæ in manibus ipſius Annæ adminiſtrand. prout per Recordum & Proceſſum inde in Curia præd. Domini Regis nunc coram ipſo Rege apud Weſtm. reſiden. plenius apparet idemq; Lucas executionem verſus ipſam Annam de debito & dampnis predict. de bonis & catallis predict. levand. licet eadem Anna nunquam ſummonita fuit in præd. placito de Scire fac' ad oſtendend' cauſam quare dictus Lucas executionem hujuſmodi verſus eam habere non deberet nec in placito illo comperuit, licet etiam eadem Anna & bona & catalla illa ex cauſa præd' inde de jure exonerari debent proſequi proponit & minatur in ipſius Annæ dampnum non modicum & gravamen ac contra legem & conſ. hujus Regni Angliæ Et hoc eadem Anna parat. eſt verificare unde petit judicium & qd' præd. Lucas ab omni executione quacunq; de & ſuper recuperatione præd. de bonis & catallis quæ fuer. præd. Roberti tempore mortis ſuæ levand' habend' precludatur &c. & quod eadem Anna ad omnia quæ ipſa occaſione adjudication. executionis præd. amiſit reſtituatur &c. Et quod præd. Lucas ven. hic in Curia de & ſuper præmiſſis reſponſur' &c. ſed quia Curia Domini Regis nunc hic coram ipſo Rege incognit. exiſtit utrum allegation. præfat. Annæ in hac parte ſint veræ necne Ideo præcept. eſt Vicecomiti Northumbriæ præd' quod venire fac. coram Dno' Rege a die Paſchæ in quindecim dies ubicunque &c. præd. Lucam de & ſuper præmiſſis reſponſur' ulteriuſq; factur. & receprur. quod Curia dicti Domini Regis nunc hic coram ipſo Rege de eo conſ. in hac parte idem dies dat' eſt præfat. Annæ &c. Ad quem diem coram Domino Rege apud Weſtm. ven. præd' Anna per Attorn. ſuum præd. & præd Lucas ad eundem diem ſolempniter exact. per Henricum Dodd Attorn. ſuum filit. ven. & dicit quod materia in brevi & narratione præd. content' minus ſufficien' in lege exiſtit ad præd' Lucam ad eandem reſpondere compellend. aut ad executionem ſuam de & ſuper judicio præd. de bonis & catallis quæ fuer. præd. Roberti Lampton tempore mortis ſuæ levand' habend' retardand ad quam idem Lucas neceſſe non habet nec per legem terræ tenetur

The Defendant ſummoned to ſhew Cauſe why there ſhould not be Execution againſt her.

The Plaintiff's gravamen.

Petit Judicium.

and Reſtitution.

A Venire facias awarded.

The Defendant appears thereupon.

And demurs.

netur aliquo modo reſpondere & hoc parat. eſt verificare unde pro defectu ſufficien. brevis & narrationis in hac parte idem Lucas petit Judicium de brevi & narratione illa & quod breve & narratio illa caſſentur &c. Cref. Levinz.

Joynder in Demurrer.

Et præd. Auna dicit quod breve & narratio præd. caſſari non debent quia dicit quod Breve & narratio ill. materiaq; in ill. content. bon. & ſufficien. in lege exiſtunt ad præd. Lucam ab executione ſua de & ſuper Judicio præd. verſus ipſam Annam de bonis & catallis quæ fuere præd. Roberti tempore mortis ſuæ levand. hend. præcludend. quæ quidem breve & narration. materiamq; in ill. content. eadem Anna parat. eſt verificare & probare prout Curia &c. Et quia præd. Lucas ad Breve & narrationem prædict. non reſpond. nec ill. hucuſque aliqualiter dedicit eadem Anna ut prius pet. Judicium & quod prædict. Lucas ab omni executione quacunque de & ſuper recuperation. prædict. de bonis & catallis quæ fuer. prædict. Roberti tempore mortis ſuæ levand. hend. præcludatur &c. & quod ipſa ad omnia qua ipſa occaſione adjudicationis executionis prædict. amiſit reſtituatur &c. ſed quia Curia Domini Regis hic de judicio ſuo de & ſuper præmiſſis reddendo nondum adviſatur dies inde dat. eſt partibus præd. coram Domino Rege a die Sanctæ Trinitatis uſque in tres Septimanas ubicunq; &c. de judicio ſuo de & ſuper præmiſſis audiend. eo quod Curia dicti Domini Regis hic inde nondum &c. ad quem diem coram Domino Rege apud Weſtm. ven. partes præd. per Attornatos ſuos prædict. ſuper quo vicis & per Cur. Domini Regis nunc hic plenius intellectis omnibus & ſingulis præmiſſis maturaq; deliberatione inde habitat pro eo quod videtur Cur. dicti Dom. Regis nunc hic quod breve & narratio præd. materaq; in ill. content. bon. & ſufficien. in lege exiſtunt ad præd. Lucam ab executione ſua de & ſuper judicio præd. verſus præfat. Annam de bonis & catallis quæ fuer. præd. Roberti tempore mortis ſuæ levand. habend. præcludend. Ideo conſ. eſt quod prædictus Lucas ab omni executione quacunque de & ſuper recuperatione præd. de bonis & catallis quæ fuer. præd. Roberti tempore mortis ſuæ levand. habend præcludatur &c. Et quod ipſa eadem Anna ad omnia quæ ipſa occaſione adjudication. executon. prædict. amiſit reſtituatur, &c.

Continuance.

Judgment for the Plaintiff.

Lampton *verſus* Collingwood.

The Caſe.

1 Salk. 262. Judgment was obtained againſt two Perſons who are both dead, the Creditor brought a Scire fac. upon that Judgment againſt the Adminiſtratrix of one of them, and after two Nichils returned Judgment was awarded againſt her by Default.

Afterwards ſhe brought a Writ of Error, coram vobis reſiden. and the Error in Fact aſſigned was, That ſhe was never ſummoned.

And the Queſtion was, Whether this Writ of Error would lye or not? becauſe the two Nichil's returned amount to a Scire feci; and ſo there being a Judgment by Default after two Nichils, 'tis too late now to bring a Writ of Error.

4 Leon. 24, 36. placit. 76. 99. Some Caſes were cited to prove that Error would lie after a Judgment in Scire fac. viz. where Judgment was had againſt the Bail upon Scire fac. and yet they brought a Writ of Error, there being no Capias againſt the Principal, which being Error in Proceſs, it was held that the Writ would lie: In Mich. Term, 41 Eliz. the ſame Error was aſſigned by the Bail after Judgment againſt them in a Scire fac. upon two Nichils returned, as in the Caſe at Bar; and it was then objected, That a Writ of Error would not lie, not for the Reaſon above-mentioned, but becauſe ſuch Writ is given by the Statute to the Parties only in the Action, and not to the Bail; but it was held that a Suit upon a Scire fac. is in Nature of an Action of Debt, and a Judgment in Debt is particularly mentioned in the Statute, and therefore a Writ of Error would lie.

Cro. Eliz. 730.

* 27 Eliz. cap. 8.

Cro. Car. 481. The like Error was aſſigned in Hillary Term, 12 Car. 1. but there was alſo Error aſſigned by the Bail in the principal Judgment, which being coupled with the Error in the Judgment on the Scire fac. two Judges held the Writ ſhould abate, becauſe the Bail cannot have Error for an Error in the principal Judgment; but it was agreed by all that it would lie upon the Judgment on a Scire fac.

But the latter Caſes ſeem to be otherwiſe, viz. That a Judgment upon two Nichils returned, is a Judgment by Default after Notice, and therefore a Writ of Error comes too late to reverſe ſuch Judgment; this is the Caſe of Bar-

Style 323. 1 Roll. Abr. 309.

cock and Tompſon reported by Style, and is mentioned alſo by my Ld. Rolle, and agreed by him that ſuch Judgment is not erroneous; and upon the Authority of this Caſe the Writ of Error was now quaſhed.

Afterwards the Adminiſtratrix of Lampton brought an Audita Querela, ſuggeſting alſo therein that ſhe was never ſummoned, and that her Husband died in the Life-time of the other Debtor, and ſo his Eſtate was thereby diſcharged of the Debt; and upon a Demurrer it was debated,

Firſt, Whether an Audita querela would lie, becauſe where the Party might have any other Remedy, that Writ will not lie?

Now 'tis plain, That if the Adminiſtratrix had not ſuffered Judgment againſt her by Default in the Scire fac. ſhe might have pleaded this Matter; but by her Neglect therein ſhe cannot now have an Audita Querela.

But the Court were of a contrary Opinion upon the Authority of Barcock and Thompſon's Caſe abovementioned, that the Adminiſtratrix ſhall have an Audita Querela, becauſe now ſhe hath no other Remedy.

Then the Queſtion was, Whether the Adminiſtratrix of the Perſon firſt dying, ſhall be charged with the Executors of the Survivor?

Serj. Levinz argued That both ſhall be charged, becauſe where Judgment has been obtained againſt two in an Aſſize of Novel Diſſeiſin, and upon a Scire fac. to have Execution of the Damages the Sheriff returned, That one was dead, and that he had ſummoned the Survivor; and it was held that he ſhould not be compelled to plead before the Heir and Tertenants of the dead Man were ſummoned. Fitz. Abr. tit. Execution. pl. 81.

So where Judgment was had againſt two in an Action on the Caſe, and a Writ of Error brought, and one died pending the Writ, it was abated, becauſe what was ſeveral before the Judgment was thereby made joint, and the Plaintiff in the Judgment muſt have a Scire fac. againſt the Executors of the dead Man who are now become charged with that Judgment, and it ſhall not ſurvive to the other alone. Yel. 208, 209.

But on the other Side it was argued, That where the Lands of ſeveral are charged with a Debt, it ſhall not lie wholly upon the Survivor; as, if a Recognizance is acknowledged by ſeveral, the Lands of all are thereby become chargeable, and Execution ſhall be equally made; and if one ſhould die, the Creditor muſt bring a Scire fac. againſt his Heir and Tertenants; for they being all in æquali jure, the Charge doth not ſurvive; but 'tis otherwiſe where Sir *William Herbert's* Caſe, 3 Rep. 12. 1 Lev. 30. Raym. 26

1 Sid. 238. the Lands are not bound by Judgment; as if two enter into a Bond, and one dies before Judgment, the Survivor ſhall be charged alone: And Judgment was given accordingly.

Moor *verſus* Parker.

Mich. 4 Will. *Rot.* 268.

ASſumpſit upon a Wager being a feigned Iſſue directed by the Houſe of Peers, the Caſe upon a ſpecial Verdict found was thus, viz.

George Chute the Father being ſeized of the Lands in Queſtion made a Settlement thereof to George his Son for Life, Remainder to his firſt, &c. Son in Tail-male, Reverſion in Fee to George the Father, who in June 1683. made his Will as followeth, viz.

As touching my Lands and Tenements, *&c.* my Will is, That if my Son's Wife die during the Life of her Husband without Iſſue Male, that then he ſhall have Power to make a Jointure to any other Wife, AND FOR WANT OF ISSUE MALE of his ſaid Son, then the Lands ſhall be and remain to his Son by any other Wife, and his Grandaughter ſhall have 4000 l. AND IN CASE OF FAILURE OF ISSUE MALE by his Son George, then all his Lands ſhall go to his Grandchildren and their Heirs, ſhare and ſhare alike.

George the Father died, his Son ſurvived and ſuffered a Common Recovery, and died without Iſſue Male.

The Queſtion was, Whether thoſe who claimed under the Recovery, or the Grandchildren of the Teſtator had the better Title, that is, whether George the Son had only an Eſtate for Life or in Tail?

Serj. Levinz argued, that the Son had an Eſtate-tail, and that by the Recovery the Eſtate to the Grandaughters was barred.

That it was an Eſtate-tail by Implication, and it could not be otherwiſe, becauſe the Son could not have a Fee-ſimple, for that was devi[illegible] to the Grandaughters upon his dying without Iſſue-Male, and therefore not having the Fee, he muſt of Neceſſity have the Eſtate-tail in the mean Time by the laſt Clauſe of the Will.

There is nothing deviſed to him by expreſs Words, but by Implication; and 'tis no new Thing that an Eſtate-tail ſhould ariſe by Implication eſpecially in a Will; as for example,

In

In Michaelmas Term 9 Jac. the Caſe upon a ſpecial Verdict was, viz. William Brown had Iſſue John and two Daughters, and he had likewiſe two Nephews, Matthew and Henry, and having Lands in ſeveral Places, he deviſed all to his Son and his Heirs; and if he died without Iſſue then he gave his Land in one Place to Matthew in Fee, Item, I deviſe my Land in *White-acre* to *Henry* and his Heirs; it was adjudged, That this was a Limitation by way of Remainder to Henry, and that the Words ſhall be conſtrued thus: viz. That *Henry* ſhall have the Fee if *John* die without Iſſue. 2 Cro 290. Brown *verſus* Jerves. Yel. 209.

Now tho' there was an expreſs Deviſe of the Fee in that Caſe, which is not in the Caſe at Bar, to the Son, yet that will make no Alteration, becauſe the Son would have been entitled to a Fee-ſimple by Deſcent had it not been for the Will,

So in Trinity Term 14 Jacobi, the Caſe was, a Man had a Wife, one Son and two Daughters, and deviſed his Houſe in London to his Son after the Deceaſe of his Mother, And if his three Siſters ſurvive their Brother and his Heirs, that then they ſhall have it for their Lives, Remainder over, &c. it was held, That the Son had an Eſtate-tail, becauſe the Word Heirs there ſhall be intended Heirs of his Body, otherwiſe the Limitation to the Siſters would be void, becauſe then a Fee would be limited upon a Fee, which is againſt the Rules of Law: Now in this Caſe there was no expreſs Deviſe of any Eſtate to the Son, and yet it was adjudged that he had an Eſtate-tail by Implication. 2 Cro. 415. Webb *verſus* Herring. 1 Roll. Abr. 836. pl. 5 & 6.

'Tis true, in the Caſe of Pell and Brown there is a contrary Reſolution, that was a Deviſe to T. his youngeſt Son and his Heirs, and if he died without Iſſue living W. his eldeſt Brother, that then he ſhould have it in Fee; this was adjudged an Eſtate in Fee in T. and no Tail, the Reaſon given was, becauſe W. had only a Poſſibility of having it, for it was not deviſed to him abſolutely, viz. if T. died without Iſſue: but upon a Contingency, viz. his dying with Iſſue living W. 2 Cro. 590. 1 Roll. Abr. 835.

The Serjeant did not anſwer this Caſe, only ſaid, That he had heard very learned Judges affirm that it was a very hard Caſe.

Then he argued, That if the Daughters had any Title, it muſt be by way of Contingent Remainder or of an Executory Deviſe.

It cannot be the one, becauſe the Son had no Eſtate of Freehold to ſupport ſuch Remainder.

Neither can it be the other, because an Executory Devise is never to arise upon Failure of Issue Male generally, or without Issue indefinitely, and in this Case there is an Estate-tail which may last many Generations.

Sir Bartholomew Shower, contra.

By the Settlement George the Son had but an Estate for Life, and he shall not have an Estate-tail by Implication by this Will, because the Design of it was only to enable him to make a Jointure to any other Wife, and to provide for her Children, but not to enlarge his Estate.

The Words which seem to create an Estate-tail are, viz. And for want of Issue, &c. but the Law is otherwise, because there is no express Estate given to him by the Will before those Words: 'Tis like the Case in Mich. 10 Jacobi, where a Man devised an Estate to his eldest Son for Life; Remainder to the Sons of his Body lawfully begotten, and if they alien, &c. that then his Daughters shall have the Land, Remainder to his right Heirs; it was held that the Words, viz. Sons of his Body, and first Son, &c. are Words of Purchase.

1 Roll. Abr. 837. pl. 13.

Neither can the Words, viz. In Case of failure of Issue Male, &c. create an Estate-tail, because those were added to explain what was generally and uncertainly expressed before.

In Mich. 1 Eliz. Clement Frensham devised Lands to his Wife for Life, Remainder to his Cousin, and the Heirs Male of his Body; and if his Cousin die without Issue of his Body (but doth not say Issue Male) Remainder over in Fee, the Cousin had Issue a Daughter only and died; and it was adjudged, that she should not have the Land by these general Words; it was not an Estate-tail to him, and the Heirs of his Body in general, but to him and the Heirs Male of his Body, for the Will took Effect by the first Words which are a Guide to those which follow.

1 And. 8. Dyer 171. Godb. 16.

And there is no more Reason why these general Words in the Case at Bar should give an Estate-tail by Implication to George Chute the Son, there being no particular Estate devised to him before, than there was in the Case abovementioned, why the general Words in that Case did not make any such Estate.

There is another Case to this Purpose, it was a Copyholder in Fee, who made a Surrender to the Use of his Will, and then devised to his Wife, and if she had Issue by him, then to the Issue, &c. and if such Issue die before Age, or before his Wife; Or if she have no Issue, then, &c. it

2 Cro. 199.

it was held, that she had but an Estate for Life, and could not dispose the Lands to her Children.

And according to these Resolutions have late Cases been adjudged; as, where a Woman had two Sons by two Husbands, she devised to T. her eldest Son for Life, and to his Issue in Tail, and if he died without Issue then living, to her second Son in Fee; But if he die having Issue of his Body then living, then to him in Fee: It was held that tho' the Reversion descended to him as Heir, yet by the Limitation of the Will he had but an Estate for Life, which is like the present Case, viz. a good contingent Remainder to commence upon his dying without Issue Male. Sid. 47.

Curia. It will be impossible to make this an Estate-tail by tacking the Estate by the Will to the Estate for Life in the Settlement on Purpose to support the contingent Remainder; because the Settlement and Will are two distinct Conveyances; and therefore Judgment was given that this was not an Estate-tail.

Warrington *versus* Mosely.

Hill. 6 Willielmi, *Rot.* 291.

ERror of a Judgment in the County-Palatine of Chester. The Plaintiff prescribed for Toll of Goods bought within a Manor, and the Question upon the Pleadings was, Whether such a Toll independent of all Markets and Fairs can be good? 1 Mod. 231. 2 Mod. 244. 2 Jones 118. 3 Lev. 38.

It was argued that the Prescription was unreasonable,

(1.) For the Manner, viz. The Lord only claims the Toll in his Manor, and it's not for Goods bought or sold in a Market, &c.

(2.) For the Matter, viz' he prescribes to Toll of 2d. for every Pack bought in Manchester, called Manchester Wares, except of the Burgesses there.

All Toll must arise by Prescription or Grant, the one supposeth the other; now the Lord of a Manor cannot have Toll by Prescription, because at the Common Law there was no Custom paid but for Wooll, Woolfels, and Leather, which 2 Inst. 59. Vaug. 162.

which was therefore called antiqua ſive magna cuſtuma, and all other Tolls are eſteemed Malæ Tolnetæ.

Neither can he be entitled to this by any Grant from the King, becauſe he cannot charge his People with any Thing but what is for the Publick Good, without their Aſſent in Parliament, and therefore the Writ of ad quod dampnum is directed to the Eſcheator to enquire what Damage it would be to the King, or any of his Subjects if he ſhould grant to B. that he may make an Aſſignment of certain Lands to a Chaplain for ever to pray for his Soul in a certain Church, for by Reaſon of ſuch Aſſignment the Land would be exempted from ſeveral Duties, as Fines, Amerciaments, &c. ita quod Patria per donationem & aſſignationem præd. magis ſolito non oneretur ſeu gravetur.

F.N.B.222.a.

Now if the King cannot impoſe a Duty upon his Subjects but ſuch which is for their Benefit; a fortiori, a Lord of a Manor cannot; and to this Purpoſe there is an expreſs Authority in Eaſter Term, 11 Car. viz. There was an Information againſt Morgan for levying 2d. for every Barrel landed at Cockernepill, tho' it was his own Land, and the Parties could not ſell there without his Aſſent; yet this being to levy a new Toll, it was held unlawful; he might make a particular Agreement with the People, but he could not exact a Toll.

2 Roll. Abr. 171.

This Toll is in Nature of Toll-through, for which there can be no Preſcription, becauſe 'tis lawful for any Man to paſs by or through the Highway; ſo 'tis as lawful for any Man to buy Goods brought to his Shop.

22 Aſſ. pl. 58. Br. Abr. tit. præſcript. 88. Title toll. 6. Cro. Eliz. 710. contra.

If the Plaintiff had any Right to this Duty, he ſhould have ſhewed that the People had ſome Benefit by ſelling their Goods in this Place; as. where a Man juſtifies in Treſpaſs, and preſcribes to have a Toll for Beaſts driven over ſuch a Manor; 'tis a void Preſcription, being for Toll-through, unleſs the Party who claims the Duty doth ſhew that the Subject hath ſome Advantage.

2 Roll. Abr. 522. 2 Inſt. 220. 1 Mod. 231. Lit. Rep. 103.

So where a Man alledges a Cuſtom to have ſo much per Tun for all Goods paſſing on a River by ſuch a Wharf: This is a Toll-through which the Law calls Malum Tolnetum, unleſs the Plaintiff ſheweth, that the River was uſually cleanſed by him, or that he repaired the Banks, or that he hath done ſome Good for this Duty.

1 Mod. 47. Sid. 454.

Nay, it has been held, That a Tax cannot be impoſed on the Subject but by Parliament, tho' 'tis for their Benefit.

Sid. 218.

But

But admitting that the Plaintiff may prescribe for Toll of Goods bought within this Place, yet such a general Prescription is not good to bind Strangers, no more than a Prescription to have a Heriot of every Stranger dying within such a Manor, which is void, because it cannot have a reasonable Commencement between the Lord and a Stranger, tho' it may between him and his Tenants.

So a Prescription to have a Heriot (viz.) the best Beast of his Tenant, and if it be esloigned before the Lord seizes it, that then he may take the Beast of any other Person Levant and Couchant upon the Land; this is a void and an unreasonable Prescription. Dyer 199 b.

(2.) This is not good by Reason of the Uncertainty of the Thing out of which the Duty doth arise; for 'tis de qualibet sarcina, not saying of what it consists: Now if the Court must judge whether 2d. is a reasonable Duty or not, they must know what is in the Pack; and what a Customary Pack of Manchester Wares is, will be difficult to be known in Westminster-Hall.

To instance in parallel Cases, viz. many Indictments and Informations have been quashed for such Uncertainties, viz.

An Information for engrossing diversos cumulos tritici, was held void, because of the Uncertainty of the Quantity in each Heap, tho' the Value of the whole was particularly set forth. 1 Roll. Abr. p. 134.

So an Indictment for engrossing magnam quantitatem stramins & fœni was quash'd for the like Reason. Cro. Car. 318.

Likewise in Trover and Conversion pro duobus garbis Anglice Sheaves of Corn, the Declaration was held ill, because the Plaintiff had not shewed what Corn it was, and the Anglice being void, then it was only Trover de duobus garbis which Word in its Latitude comprehends any Thing which may be tied up in Bundles. March, 60. Aleyn 80.

This Prescription is also void by Reason of the Persons of whom 'tis demanded, viz. of all People bringing Wares thither to be sold, &c. so that neither the King himself nor his Purveyors are excepted; 'tis contrary also to Magna Charta, which enacts, That all Merchants may buy and sell without any manner of evil Tolls. Cap. 30.

'Tis void likewise by Reason of the Time demanded, viz. immediately upon the Sale of each pack of Wares: Now no Toll is due before the Sale, unless by Custom time out of Mind, and here is no Consideration laid why the Lord should have such a Duty. 2 Inst. 220.

It was argued on the other Side, that Time and Uſage were the Foundations both of Preſcriptions and Cuſtoms; and if Cuſtoms were not unreaſonable it was not neceſſary to ſhew their Commencement.

As to the Generality alledged againſt this Preſcription, 'tis not void for that Reaſon, for ſuch general Preſcriptions to have Toll of all People, have been warranted by ſeveral Precedents.

1 Bulſt. 195. In Anno 10 Jacobi the Iſſue in a Quo Warranto was, whether the Defendant had Toll of all People within the Manor of Petworth in the County of Suſſex, as well of the Tenants of the Earl of Arundel as of Strangers? And the Iſſue was found for him.

1 Leon. placito 195. 1 Roll. Abr. 559. 8 Rep. 115. b. Cro. Eliz. 203. Nothing is more common in our Books than for a Lord of a Manor to preſcribe for a Duty within the ſame, tho' 'tis to the Prejudice of particular People, becauſe ſuch Cuſtoms may have a reaſonable Commencement; and therefore it has been held for a Lord, &c. to preſcribe that the Bread for all the Inhabitants in his Manor and Paſſengers there ſhould be baked at his Oven, and that no other Perſon time out of Mind, &c. had uſed a Bake-houſe there without his Appointment, &c.

F. N. B. 153. M. Reg 105. b. 'Tis for this Purpoſe that the Writ de ſecta ad molendinum doth lie, and in the Regiſter there is a Preſcription alledged, Ratione Dominii, which is a very extraordinary Claim, and goes farther than what was made by the Lord of a Manor.

In 8 Ed. 3. 37. b. The Defendant juſtified in Treſpaſs for pulling down of a Fold, as Servants to the Lady of the Manor of Haſtings, who by Reaſon of her Seigniory had a Freehold throughout the ſaid Hill, ſo that no other could fold there without her Leave; this extends as well to Strangers as to thoſe of that Hill, and yet it was held good.

Br. Abr. tit. preſcription placito 92. Cro. Eliz. 710. So in 21 H. 7. 16 a. The Mayor and Commonalty of Glouceſter preſcribed to have Toll of every Boat which paſſed by their City, &c. and this was adjudged a good Preſcription, altho' no Reaſon is given why they ſhould have that Toll.

Dyer 352. b. Many other Caſes might be cited wherein the Law was held to be the ſame, as in 18 Eliz. the Lord Mayor of London brought an Action on the Caſe, grounded upon a Cuſtom to have the 20th Part of the Salt of every Stranger who brought it to the Port of London, and there is no Reaſon alledged why he ſhould have that part, and yet the Mayor had Judgment.

In an Action on the Case the Defendant justified the taking of the Goods, for that the Bailiff of Yarmouth had used to have Toll of the Tenants and Inhabitants of Lastoff for any of their Goods brought thither by Sea to be sold; and upon a Demurrer he had Judgment, tho' it was upon a general Claim of Toll for all their Goods brought thither, without saying to the Port. Cro. Eliz. 227. 1 Leon. 231.

So in Trespass the Defendant prescribed to have 2 d. for every Score of Sheep of Strangers brought or driven per & trans villam de Melton Mowbray, and if that Toll was denied, to distrain for it; now tho' this was a Toll-thorough for which a Prescription cannot be alledged without shewing some Cause, that it may appear to have a reasonable Commencement, yet the Plea was held good by the Opinion of two Justices against Justice Popham, viz. That such a Toll might be claimed generally; for it being by Prescription, it cannot be intended that the Cause should be known why it began. Cro. Eliz. 711.

The Person who gathers the Toll is a standing Witness of the Alteration of the Property, and of the Fairness of the Contract.

Then as to the other Objection, That 'tis unreasonable for the Incertainty; 'tis a Customary Claim for a certain Thing in a certain Place, and the Custom hath fixed what is meant there by the word Sarcina; 'tis as certain as a Duty for a Piece of Cloath in the Book of Rates; and 'tis as certain as a Prescription to have a Halfpenny for every Porter's Burden laid upon Queenhithe to be conveyed from thence by Water, which hath been held good; and 'tis very well known that a strong Porter will carry more Goods than another. Hob. 85. Moor fol. 825. pl. 1124.

Curia. Not satisfied with this Prescription, because there was no Recompence for it, and every Prescription to charge the Subject with a Duty, must impart a Benefit or Recompence to him, or else some Reason must be shewed why a Duty is claimed.

The Case in Dyer seems to be very hard, for the Lord Mayor to have the 20th part of all Salt brought to London, and no Reason given why he should have it.

But as for the Case of Foldage, it was upon the Lands held of the Manor of Hastings, whereof the Tenants had the Feedings, and that may have a reasonable Commencement.

Hicks *verſus* Woodeſon.

2 Salk. 655. *Attachment upon a Prohibition.*

Somerſet. ff. NIcholaus Hicks qui tam pro Domino Rege & Domina Regina quam pro ſeipſo in hac parte ſequitur queritur de Samuele Woodeſon Clerico Rectore Eccleſiæ parochial. de Huntſpill in Com. Somerſet. præd. in cuſtod. Mar. Mareſc. Domini Regis & Dominæ Reginæ coram ipſis Rege & Regina exiſten. de placito quare ſecut. eſt in Curia Chriſtianitat. contra prohibitionem regiam ei prius inde in contrar. direct. & deliberat. pro eo videlt. quod cum parochia de Huntſpill in Com. præd. eſt antiqua parochia Cumq; præd. Nich'us per ſpatium quinq; annorum jam ult. elapſ. & amplius fuit & adhuc exiſtit inhabitans infra paroch. præd. & per totam idem tempus quadraginta acras terræ prati & paſturæ cum pertin.. exiſten. parcell. manerii de Huntſpill in dict. Com. Somerſet. infra paroch. præd. fineſq; limites & loca decimabilia ejuſdem parochiæ habuiſſet & occupaſſet Cumq; etiam infra eandem parochiam fineſq; limites & loca decimabilia ejuſdem parochiæ habentur & a tempore cujus contrar. memoria hominum non exiſtit habebantur tales conſuetudines & modi decimandi de & concernen' decimas agnorum infra parochiam præd. fineſq; limites & loca decimabilia ejuſdem parochiæ caden. part. & provenien. ac de & concernen. decimas vaccarum & juvencarum mulgibilium infra paroch. præd. fineſq; limites & loca decimabilia ejuſdem parochiæ cuſtodit. & depaſturat. ac de & concernen' decimas vitulorum infra paroch præd. fineſq; limites & loca dicimabilia ejuſdem parochiæ caden. part. & provenien. ac de & concernen. decimas pullorum infra paroch. præd. fineſq; limites & loca decimabilia ejuſdem parochiæ caden. part. & provenien. ac de & concernen. decimas fœni infra paroch. præd. fineſq; limites & loca decimabilia ejuſdem parochiæ creſen. renovan.& provenien. ac de & concernen. decimas gardinorum & pomariorum infra paroch. fineſque limites & loca decimabilia ejuſdem parochiæ exiſten. ac de & concernen. ſolution. oblacon omnium virorum & uxorum ſuarum infra paroch. ill. fineſq; limites & loca decimabilia ejuſd. paroch. inhabitan. videlt. quod quilibet occupator aliquarum terrarum ſive ten'torum infra paroch. ill. fineſq; limites & loca decimabilia ejuſdem

Antiqua parochia.

The Plaintiff an Inhabitant and Landholder in the Pariſh.

A Modus decimandi *ſet forth.*

For Lambs.

Milch Cows.

And Calves.

And Colts.

And Hay.

And Gardens or Orchards.

And Offerings.

The Modus *ſet forth.*

ejuſdem paroch. qui aliquam vaccam ſive juvencam mugibil' vel aliquas vaccas ſive juvencas mugibil' infra parochiam præd' fineſq, limites & loca decimabilia inde in aliquo anno cuſtodivit ſolvit & a toto tempore ſupradicto ſolvere uſus fuit & conſuevit Rectori Eccleſiæ paroch. de Huntſpill præd' ejuſve firmar. ſive deputat. Rectoriæ illius pro tempore exiſten' pro qualibet hujuſmodi vacca mugibil' tres denarios legalis monetæ Angliæ & pro qualibet hujuſmodi juvenca mugibil'unum denarium & obolum ſimilis legalis monetæ quolibet tali anno & non amplius pro omnibus decimis lactis earundem vaccarum & juvencarum eodem anno qdq; quilibet talis occupator ut præfertur qui in aliquo anno aliquem agnum vel aliquos agnos ſub numero ſeptem agnorum infra paroch'ill'fineſque limites & loca decimabilia inde part.& provenien' habuit ſolvit & a toto tempore ſuprad. ſolvere uſus fuit & conſuevit Rectori Eccleſiæ parochial. de Huntſpill præd. ejusve Firmar. ſive Deputat. Rectoriæ ill. pro tempore exiſten' eodē anno unum obolum talis legal. monet. pro quolibet tali agno ſic ſub numero ſeptē agnorū part.& provenien' in plena ſatisfactione ſolution' & contentacon' omnium decimarum agnorum ill. ſed ſi idem occupator in aliquo hujuſmodi Anno infra paroch. præd. fineſq; limites & loca decimabilia inde aliquos agnos ad plenum numerum ſeptem agnorum part. & provenien. habuit tunc idem occupator reddidit & deliberavit & a toto tempore ſupradict' reddere & deliberare uſus fuit & conſuevit Rectori Eccleſiæ parochial. de Huntſpill præd. ejuſve Firmar. ſive Deputat. Rectoriæ illius pro tempore exiſten' unum agnum eorundem ſeptem agnorum tali anno in plena ſatisfactione ſolutione & contentacon. & nomine & loco decimarum eorundem ſeptem agnorum & pro numero ſeptemdecim agnorum duos agnos & pro quolibet vitulo unum obolum ſi minus quam ſeptem vitulis & ſi ultra ſeptem tunc unum vitulum & duos vitulos pro ſeptemdecim vitulis & unum denarium pro quolibet pullo & duos denar. p̄ qualibet acra fœni & duos denar. p̄ quolibet pomario & gardino & pro quolibet homine ætatis ſexdecim annorum duos denar. & pro uxore duos denarios pro Oblationibus. Cumque Hundred' de Huntſpill & Puriton infra prædict' Com' Somerſet eſt & a tempore cujus contrar. memoria hominum non exiſtit fuit antiquum Hundredum infra quod quidem Hundred'præd'paroch' de Huntſpill eſt & a tempore cujus contrar' memoria hominum

Antiquum Hundredum.

num non exiſtit fuit antiquum hundred' infra qd' quidem hundred. præd' paroch' de Huntſpill eſt & a tempore cujus contrar. memoria hominum non exiſtit fuit * Cumq; infra idem Hundred. de Huntſpill & Puriton eſt & a toto tempore ſuprad' fuit' quædam antiqua conſuetudo a toto tempore ſupradict' uſitat. & approbat' qd. omnes inhabitantes infra Hundredum prædict' aliquas terras prati ſive paſturæ infra Hundred' præd. occupan' fuer liberi immunes & exonerat. & de tempore in tempus a toto tempore ſupradicto liberi immunes & exonerat. eſſe debuerunt de & a ſolucon' aliqnarum decimarum de aut pro depaſturacon. aliquorum averiorum minime mulgibil. ſeu aratro uſitat. Angl. **not employed to plough or pail** per ipſos depaſturat. in aliquibus terris pratis ſeu paſturis infra Hundred' de Huntſpill & Puriton præd. exiſten' ſcilicet apud Hundred. præd. Cumque prædict. Nicholaus per ſpatium ſeptem annorum proximorum ante exhibicon' billæ præfat Nicholai in Curia hic fuit & adhuc eſt inhabitans infra Hundred. præd. & infra præd' paroch de Huntſpill & per totum idem tempus præd' ſeptem annorum poſſidebat & occupabat diverſas terras prati & paſturæ infra Hundred' & Paroch. prædict. & ſuper eaſdem terras prata & paſturas & non alibi infra idem tempus diverſa averia minime mulgibil. nec aratro uſitat. Anglice **not employed to plough or pail** videlt' vaccas juvencas & pullos equorum depaſturavit p'd' tamen Samuel p'miſſ non ignarus ſed machinans & malitioſe intendens ipſum Nicholaū contra debitam legis formam & contra formam & effectum dictorum modorum decimandi & conſuetudinem prædict. minus juſte prægravare & opprimere ac conſuetudines & præſcriptiones modorum decimandi ill' injuſte violare necnon dict. Dominum Regem & Dominam Reginam nunc & coronam ſuam exhæreditare & cognition' placiti quæ ad dictum Dominum Regem & Dominam Reginam coron' & dignitat. ſuas regias ſpectat & pertinet ad aliud examen trahere ipſum Nicholaum coram venerabili viro Richardo Hely legum Doctore ſurrogat. venerabilis viri Edwin Sandys Clerici Archidiaconi Archidiac' Wellen. legitime conſtitut' ſurrogat' ſive legitimo deputat' dict' Archidiaconat. aut al. judice in hac parte competen' quocunq; de & pro ſubtraction' & non ſolucon' decimarum agnorum infra paroch. ill' fineſque limites & loca decimabilia inde caden' part. & provenien. Annis Domini 1689, 1690. &c. necnon menſibus Martii Aprilis Maii & Junii Anno Dom. 1693.

** Cuſtom for the Inhabitants within a Hundred to be diſcharged of Tithes of Meadow and Paſture for barren Cattel. Cuſtom in* non decimando *for all Cattle* non mugibil. *And not employed to the Pail or Plough.*

The Plaintiff an Inhabitant and Landholder within the Hundred.

And fed Cattle there.

Prædict. tamen *the Defendant* præmiſſor. non ignarus, &c.

Traxit in placitum coram *the Eccleſiaſtical Judge,*

For Non-payment of Tithes.

1693. jam curren. eorumve menſium & annorum quolibet uno ſive aliquo ac de & pro ſubtractione & non ſolucon. decimarum vitulorum infra paroch. præd. fineſq; limites & loca decimabilia inde (ſo for Colts, Cows, Heifers, Hay, Gardens and Orchards mutatis mutandis) per præd. Nicholaum Hicks poſſeſſ. ac de & pro ſubtraction. & non ſolucon' oblacon' omnium virorum & uxorum ſuarum inhabitan. infra paroch. ill. fineſq; limites & loca decimabilia inde annis & menſibus ſuprad. eorumve quolibet uno ſive aliquo traxit in placitum caute & ſubdole libelland. in eadem Curia Chriſtianitatis verſus præfat. Nicholaum Hicks in & per quoddam libellum & quandam Schedulam eidem libello ſubſcript. ſeu annex. verſus eundem Nicholaum Hicks in eadem Curia Chriſtianitat. exhibit' ſub forma ſequen videlicet Imprimis quod præfat' Magiſter Samuel Woodeſon Annis Domini 1789, 1690. &c. videlicet elapſis menſibus in eiſdem reſpective concurren. necnon menſibus Martii Aprilis &c. Anno Dni. 1693. jam curren. eorumve menſium & annorum quolibet uno ſive aliquo fuit & erat Rector Eccleſiæ Paroch. de Huntſpill præd' ac omnium & ſingularum decimarum jur. & emolument. Eccleſtaſticorum ad eandē Rectoriam ſpectan. & pertinen. dictamq; Rectoriam cum ſuis jur. membris & pertinen. univerſis rite legitime canonice aſſecut. & adept. fuit ipſamq; ſic aſſecut. cum ſuis jur. & pertinen. univerſis pacifice & quiete poſſedit & habuit prout in præſenti (ſalvis infraſcript.) poſſidet & habet proq; vero Rectore & legitimo poſſeſſ. ejuſd. fuit per tempus p̄d. ac etiam in præſenti eſt communiter dictus tent. habit. nominat' & reputat. palam publice & notorie ponit tamen, &c. ac ponit conjunctim & diviſim de quolibet Item quod tam de jure communi hujus incliti Regni Angliæ quam ex antiqua & laudabili legitimaque præſcript. conſuetud' a tempore & per tempus cujus initii ſive contrar. memoria hominum non exiſtit hucuſq; inviolabil. & inconcuſſe uſitat. & obſervat. ac in contradictor. judicio ſæpius ſeu ſaltem ſemel obtent' jus perpcipiend. recipiend. & habend. omnes & ſingulas decimas tam majores quam minores mixtas & minutas quaſcunq; cæteraq; jur. & emolumenta Eccleſiæ quæcunq; in Schedula præſentibus annex. contentum & ſpecificat. infra Parochiam de Huntſpill prædicta fineſque limites & loca decimabilia ejuſdem ubicunq; quandocunque quomodocunque & quotieſcunque provenien. creſcen. renovan. & contingen. ad Rector. ibidem quem-

The Libel.

quemcunq; pro tempore exiſten. ejuſve firmar. & ad dictum Magiſtrum Sam. Woodeſon Clericum Rectorem ibidem modernum ſpectavit & pertinuit ſpectat & pertinet ſicque ſpectare & pertinere debuit debet & debebit in futur. ac ponit ut ſupra Item quod a decem vigint. trigint. quadragint. quinquagint. & ſexaginta annis ult. elapſ. ultra & citra necnon a tempore & per tempus cujus initii ſive contrar. memoria hominũ non exiſtit Rector dictæ Rectoriæ Eccleſ. Paroch. de Huntſpill præd. temporibus ſuis reſpectivis ſucceſſive exiſten. dictusq; Magiſter Samuel Woodeſon Clericus Rector ibidem modernus ejuſve prædeceſſores & omnes & ſing. prædeceſſores ſui temporibus ſucceſſivis in eadem exiſten. in eadem fuer. prout eſſe debuere in quieta & pacifica poſſeſſion. ſeu quaſi juris percipiend. & habend' omnes & ſing. decimas præd. eaſq; per ſe vel ſuos prædeceſſores receper. habuer. & de & ſuper eiſdem libere & plenar. diſpoſuer. acq; ſic fuit & eſſe debeat percepit recepit & habuit diſpoſuit præfat. Magiſter Samuel Wodeſon Clericus Rector. antedict. toto & omni tempore incumben. ſuæ in eadem jur. & nomine Rectoriæ ſuæ uſq; ad & in tempus graminum infraſcript. ac ponit ut ſupra Item præd' Nicholaus Hicks annis & menſibus ſupradictis eorumve uno ſive aliquo omnes & ſingulas res decimabil. decimas fructus jur. & emoulumenta in Sched' præſent. annex. content. & ſpecificat. infra Paroch. de Huntſpill præd' fineſq; limites & loca decimabilia ejuſdem provenien. creſcen. renovan. & contingen. prout in eadem Schedula narratur & deducuntur (quæ quidem Schedula pro hic lecto & inſert. & haberi vult pars iſta proponens quatenus ſibi expedit & non al. neque tali modo) habuit tenuit poſſedit recepit percepit & ad uſum ſuum proprium convertebat & applicuit ac ponit pars iſta proponens de quolibet alio numero rerum reſpective decimabil' & decimarum in Schedula præſentibus ut præfertur annex. reſpective content. & ſpecificat. majore modo vel minori necnon de tali & tanto numero quali & quant. per probation' legitimas aut confeſſion' partis in eventu hujus litis plenius veniet comproband. ac ponit ut ſupra Item quod verus valor ſive eſtimatio cujuſlibet rei decimabil' rerum reſpective decimabil' in Schedula præd. præſentibus ut præfertur annex. content. & ſpecificat. quam decimarum ſive decimæ partis eorundem ad ſummas ſive reſpectivos valores in eadem Schedula mentionat. menſibus & annis ſupradictis eorumve un' vel aliquo communi

muni hominum eſtimation. notorie ſe extendebat & extendit ac ponit pars iſta proponens de qualibet al. ſumma ſive valore rerum reſpective decimabil. & decimarum medio vel minori necnon de tali & tanta ſumma ſive valore qual. & quant. per probationes legitimas in eventu hujus litis plenius veniet comproband. ac ponit ut ſupra Item quod præfat. Nicholaus Hicks ad ſolvend. tradend. & deliberand. prænominat. Samueli Woodeſon Rector. antedict. ſeu ejus in hac parte legitimo deputat. omnes & ſingulas decimas prædict. ſic ut præfert. ſolvi conſuetas ac præſertim decimas jura emolumenta Eccleſiaſtica prædict. præſentibus (ſic ut præfertur) annex' content. ſpecificat. vel aliter ad debite componend. cum eodem pro eiſd. ſeu ejus legitim. deputat. ſæpius ſeu ſaltem congrue & legitime requiſit. & interpellat. fuit qui ſic requiſit. & interpellat. præmiſſ. ſeu eorum aliquod facere non curavit neq; in præſenti curat ſed tenuit & ſolvere recuſavit ſed ſaltem plus juſte diſtulit & differt in præſenti in animæ ſuæ grave periculum dictique Magiſtri Samuelis Woodeſon Rectoris antedicti præjudicium non modicum & gravamen ac ponit ut ſupra Item qd. præfat. Nicholaus Hicks fuit & eſt inhabitan. Paroch. de Huntſpill. Bathon. & Wellen. Dioceſſ. & juriſ. præd. notorie ſubdit. & ſubject. ac ponit ut ſupra Item quod præmiſſa omnia & ſingula fuer. & ſunt vera notoria publica manifeſta parit. ac famoſa ac de & ſuper eiſdem laborarunt prout in præſenti laborant publica vox & fama unde facta fide de jure in hac parte requiſit. petit pars dicti Magiſtri Samuel. Woodeſon Rectoris antedict. jus & juſtitiam & ejus complementum ſibi fieri & miniſtrari cum effectu &c. in qua quidem Schedula libello prædict. ut præfertur annex. continetur hic Anglicanis verbis ſequen. videlicet Imprimis, That in the Months and Years aforeſaid, all, ſome or one of them, upon the Tenements, Eſtate and Lands which he the ſaid NicholasHicks had held, poſſeſſed and enjoyed in the ſaid Pariſh of Huntſpill, and titheable Places thereof there was kept feeding and depaſturing twenty Ewe-Sheep, and of them there was Yearly fallen twenty Lambs, each Lamb worth three Shillings, and the Tithe after that Rate: Item, that the ſaid Nicholas Hicks in the Months and Years aforeſaid, all, ſome or one of them, within the ſaid Pariſh of Huntſpill, and titheable Places thereof, had and kept feeding and depaſturing yearly four Cows and four Heifers, and for the Milk

of each Cow he is to pay 3 d. and of every Heifer three half pence according to the Custom of the said Parish; Item, That the said Nicholas Hicks of the said Cows and Heifers above-mentioned had fallen yearly six Calves which he bred up for the Pail, for each he is to pay one half Penny according to the Custom of the said Parish: Item, That the said Nicholas Hicks the Months and Years aforesaid, all, some, or one of them within the Parish of Huntspill, and titheable Places thereof had held and possessed 20 Acres of Meadow which he mowed, or caused to be mowed yearly, for each Acre of which there is yearly due, and he ought to pay to the Rector of Huntspill aforesaid, for and in lieu of Tithe-hay 2 d. according to the Custom of the said Parish: Item, That the said Nicholas Hicks the Months and Years aforesaid, all, some or one of them, within the said Parish of Huntspill aforesaid, had and possessed one Garden and two Orchards yearly, for which there is yearly due, and he ought to pay to the Rector of Huntspill aforesaid 3d. according to the Custom of the said Parish, viz. one Penny for his Garden and each Orchard: Item, That the said Nicholas Hicks the Months and Years aforesaid, all, some, or one of them, within the Parish of Huntspill, and titheable Places thereof had, and kept feeding and depasturing ten Colts above one Year old, which he sold away before they were used to the Plow the feeding and depasturing of each Colt the Months and Years aforesaid being monthly worth 4 s. and the Tithe after that Rate; and also had and kept feeding and depasturing the Months and Years aforesaid, all, some, or one of them in the said Parish ten Cows, ten Heifers, ten Steers and ten Oxen from the Time he bought them to the Time he sold them off, they were never employed to plow or pail, the Herbage and depasturing of each of the said Cows, Heifers, Steers, and Oxen being monthly worth 4 s. and the Tithes after that Rate: Item, That the said Nicholas Hicks, the Months and Years aforesaid, all, some, or one of them in the said Parish of Huntspill, and titheable Places thereof had and kept four Mares, and of them had fallen and received 4 Colts yearly, for the fall of each he is and ought to pay to the Rector of Huntspill aforesaid one Penny according to the Custom of the said Parish: Item, That the said Nicholas Hicks hath the Months and Years aforesaid, all, or some or one of them, dwelt in

the

the ſaid Pariſh of Huntſpill and he and his Wife have received, or at leaſt ought to have received the Holy Sacrament of the Lord's Supper at their own Pariſh Church for whoſe Offerings he is yearly to pay to the Rector at Eaſter or thereabouts 4 d. yearly, viz. 2 d. for each: Item, That the ſaid Nicholas Hicks the Months and Years aforeſaid, all, ſome, or one of them within the ſaid Pariſh and titheable Places thereof had kept and bred up 40 head of Cattle which he ſold before they came to the Plow or Pail the Herbage and depaſturing of each of the ſame being monthly worth 40 s. and the Tithe after that Rate: Item, That the ſaid Nicholas Hicks the Months and Years aforeſaid, all, ſome, or one of them within the ſaid Pariſh of Huntſpill, and titheable Places thereof had and kept 6 Cows, 6 Heifers 6 Steers, and ſix Oxen, after they had been turned off from Plow and Pail, the feeding and depaſturing until they were fat and looked on as ſuch, and then ſold off from the Grass the Herbage and depaſturing of the ſaid Cows Heifers, Steers and Oxen, being monthly worth 5 s. and the Tithe after that Rate: Item, that the ſaid Nich. Hicks the Months and Years aforeſaid, all, ſome, or one of them had and kept feeding and depaſturing 8 Cows and Heifers, and of them had fallen and received 8 Calves yearly each Calf at 7 weeks old (which is the Cuſtomary time for the Tithe calf) being worth 10 s. and the Tithes after that Rate, Prout per copiam libelli & Schedulæ præd. hic in Curia prolat. & lect. inter alia plenius apparet. Ipſumq; Nich. Hicks in præd. Curia Chriſtianitat. coram præfat. judice ſpirituali occaſione præmiſſor. comparere ac eidem Sam. Woodeſon de & ſuper præmiſſis reſpondere minus juſte aſtrinxit ac licet idem Nich. Hicks quolibet anno Annorum præd. quo ipſe idem Nicholaus aliquos agnos vitulos ſive pullos aliquas vaccas ſive juvencas mulgibil. aliquod fœnum aliqua gardina ſive pomaria infra Paroch. præd. fineſq; limites & loca decimabilia inde exiſten. creſcen. renovan. ſive provenien. habuit vel infra Paroch. præd. habitavit ſemper paratus fuit & obtulit & adhuc parat. exiſtit ad ſolvend. eidem Samueli prædict. ſeparal. denar. ſummas pro decimis agnorum vitulorum pullorum vaccarum & juvencarum mulgibil. fœni gardinorum & pomariorum & pro oblation. prædict. juxta formam & effectum ſeperal. modorum decimandi prædict. licetq; idem Nicholaus omnia & ſingula præmiſſa prædict. in ejus exoneration. ſolution. decimar. per

Prout per Copiam libelli apparet.

Parat. ad ſolvend. *the* Modus Decimandi.

Ac licet *the Plaintiff had pleaded all this matter in the Spiritual Court, yet the Judge refused to admit it, and proceeded.*

præfat. Samuel. petit in eadem Curia Chriſtianitatis coram præfat. Judice Spirituali placitavit & allegavit ac inevitabili teſtimonio probare ſæpius obtulit idem tamen Judex Spiritualis placitum allegacon. & probacon. ill. admittere ſeu recipere penitus recuſavit ac præd. Richardus Heley præd. Nicholaum per definitivam dictæ Curiæ Chriſtianitatis ſententiam de & ſuper præmiſſis in libello & Schedula prædict. content. condemnare & ad decimas præd. in forma prædict. petitas ſolvend. compellere totis ſuis viribus conatur ac indies machinatur in dict. Domini Regis & Dominæ Reginæ nunc contemptum coron. & dignitat. ſuarum & ipſius Nicholai Hicks grave dampnum præjudicium & depauperacon. manifeſt. & contra debitam legis formam & præſcription. & conſuetud. & modos decimandi prædict. ac licet præd. Nicholaus Hicks ultimo die Auguſti Anno Regni dict. Domini Willielmi & Dominæ Mariæ nunc Regis & Reginæ Angliæ &c. quinto apud Huntſpill præd. in Com. præd. Breve dictorum Domini Regis & Dominæ Reginæ de prohibition. in contrar. præfat. Samueli Woodeſon deliberavit Idem tamen Samuel Woodeſon placitum illud verſus præfat. Nicholaum proſequi non ceſſavit ſed placitum ill. ulterius in Curia Chriſtianitat. præd. proſecut. fuit (præd. breve de Prohibitione non obſtante) in dictorum Domini Regis & Dominæ Reginæ nunc contemptum & contra prohibition. prædict. unde idem Nicholaus qui tam pro Domino Rege & Domina Regina quam pro ſeipſo &c. dicit qd. ipſe deteriorat. eſt & dampnum habet ad valentiam 200 l. & inde tam pro Domino Rege & Domina Regina quam pro ſeipſo producit ſectam, &c.

Ac licet *a Writ of Prohibition was directed and delivered to him, yet he hath ſince proceeded.*

Et modo ad hunc diem ſcilt. diem veneris prox. poſt craſtin. ſanctæ Trinitatis iſto eodem Termino uſque quem diem præd. Samuel Woodeſon habuit licentiam ad bill. præd interloquend. & tunc ad reſpondend. &c. coram Domino Rege & Domina Regina apud Weſtm. venit tam prædict. Nicholaus Hicks qui tam &c. per Attorn. ſuum prædict. quam prædict. Samuel Woodeſon per Egidium Clerk Attorn. ſuum & idem Samuel defend. vim & injur. quando &c. & omnem contemptum & quicquid &c. Et dicit quod ipſe non eſt proſecut. pl'itum prædict. verſus præfat. Nicholaum in Curia Chriſtianitat. poſt prohibicon. dict. Domini Regis & Dominæ Reginæ ſibi inde deliberat. prout prædict. Nich'us qui tam &c. ſuperius ſuppon. & de hoc pon. ſe ſuper patriam Et prædict. Nicholaus qui tam &c. inde ſimiliter &c. ſed pro brevi Domini Regis & Dominæ

The Defendant imparles.

And pleads.

Iſſue.

minæ Reginæ de conſultatione quoad decimas agnorum pro quibus idem Samuel præd. Nicholaum in Curia Chriſtianitatis præd. coram præfato Judice Spirituali traxit in placitum habend. idem Samuel dicit qd' præd. Nicholaus menſibus & annis in narratione præd' ſpecificat. habuit cuſtodivit & depaſturavit ſuper terras & tenementa ſua infra parochiam de Huntſpill prædict. viginti oves matrices & ex illis habuit viginti agnos annuatim quemlibet eorum valoris 3 s. pro decimis quorum quidem agnorum eidem Samueli ut Rectori Eccleſiæ paroch. præd. debit. & ſolubil. idem Samuel ipſum Nicholaum in Curia Chriſtianitatis præd. coram præfat. Judice Spirituali ante proſecution' præd. brevis de prohibicon. traxit in placitum prout ei bene licuit abſq; hoc quod infra paroch. de Huntſpill præd. fineſq; limites & loca decimabilia parochiæ illius habetur & a tempore cujus contrar. memoria hominum non exiſtit habebatur talis conſuetudo & modus decimandi de & concernen. decimas agnorum ibidem caden. part. & provenien. videlt. quod quilibet occupator aliquarum terrarum ſive tenementorum infra paroch. præd. fineſq; limites & loca decimabilia ejuſdem paroch. qui in aliquo anno aliquem agnum ſive agnos ſub numero ſeptem agnorum infra paroch. ill. fineſq limites & loca decimabilia inde part. & provenien. habuit & ſolvit & a toto tempore ſupradicto ſolvere uſus fuit & conſuevit Rectori Eccleſiæ parochial. de Huntſpill præd. ejuſve Firmar. ſive Deputat. Rectoriæ illius pro tempore exiſten. eodem anno unum obolum ſimulis legalis monetæ Angliæ pro quolibet tali agno ſic ſub numero ſeptem agnorum part' & provenien' in plena ſatisfactione ſolucon' & contentacon. omnium decimarum agnorum ill. ſed ſi idem occupator in aliquo hujuſmodi anno infra paroch. ill. fineſq; limites & loca decimabilia inde aliquos agnos ad plenum numerum ſeptem annorum part. & provenien. habuit tunc idem occupator reddidit & deliberavit & a toto tempore ſupradicto reddere & deliberare uſus fuit & conſuevit Rectori Eccleſiæ paroch. de Huntſpil præd. ejuſve Firmar. ſive Deputat. Rectoriæ illius pro tempore exiſten. unum agnum eorundem ſeptem agnorum tali anno in plena ſatisfactione ſolucon & contentacon. & nomine & loco decimarum eorundem ſeptem agnorum ae ſi idem occupator in aliquo uno anno aliquos agnos ad plenum numerum ſeptemdecim agorum infra paroch. ill. fineſq; limites & loca decimabilia inde part. & provenien. habuit tunc idem occupator reddidit & deliberavit & a toto tempore ſupradicto reddere

Sed pro conſultatione habend. *he traverſes the Cuſtom for the Lambs.*

Traverſe.

reddere & deliberare uſus fuit & conſuevit Rectori Eccleſiæ paroch. de Huntſpill prædict. ejuſve Firmar. ſive Deputat. Rectoriæ illius pro tempore exiſten. duos agnos eorundem ſeptemdecim agnorum qnolibet tali anno pro decimis eorundē ſeptemdecim agnorum prout præd. Nicholaus ſuperius inde queritur Et hoc parat. eſt verificare unde pet. judicium & breve dicti Domini Regis & Dominæ Reginæ de conſultatione quoad decimas agnorum præd. ſibi in hac parte concedi &c. Et pro conſultatione habend. quoad decimas vitulorum prædict. pro quibus idem Samuel ipſum Nicholaum in Curia Chriſtianitatis præd. coram præfat. Judice Spirituali traxit in placitum IdemSamuel dicit quod præd Nicholaus in menſibus & annis præd. habuit cuſtodivit & depaſturavit ſuper terras & tenementa ſua infra paroch. præd' ſexdecim vaccas & juvencas & ex illis habuit quatuordecim vitulos annuatim caden. part. & provenien. quemlibet eorum vitulorum valoris decem ſolidorum pro decimis quorum quidem vitulorum eidemSamueli ut Rectori Eccleſiæ parocniæ præd. debit. & ſolubil. idem Samuel ipſum Nicholaum in Curia Chriſtianitat.p̄d.coram præfat. Judice Spirituali ante proſecution. præd brevis de prohibitione traxit in placitum prout ei bene licuit Abſq. hoc quod

So likewiſe for theCalves.

Traverſe.

infra paroch.de Huntſpil prædict. fineſq; limites &l locà decimabilia inde habetur & a tempore cujus contrar. memoria hominum non exiſtit habebatur conſuetudo quod quilibet occupator aliquarum terrarum ſive tenementorum infra paroch. præd. fineſque limites & loca decimabilia ejuſdem paroch. qui aliquem vitulum ſive aliquos vitulos ſub numero ſeptem vitulorum infra paroch' ill. fineſq; limites & loca decimabil.inde in aliquo anno part. & provenien' habuit & ſolvit & a toto tempore ſuprad' ſolvere uſus fuit & conſuevitRectoriEcleſiæ paroch. de Huntſpil prædict ejuſve Firmar. ſive Deputat. Rectoriæ illius pro tempore exiſten. quolibet tali anno unum obolum talis legalis monetæ pro quolibet eorumdem vitulorum in plena ſatiſfaction.ſolucon'&contentacon. omnium decimarum vitulorū illorum ſed ſi idem occupator (as before for Lambs) & pro conſultatione habend. quoad decimas pro depaſturation. pullorū vaccarū juvencorum juvencarum & bovum minime mulgibil. nec aratro uſitat. nec non al. averiorum infructiferorum infra paroch. præd. depaſturat. pro quibus idem Samuel præfat. Nicholaum in Curia Chriſtianitat. præd. coram præfat. Judice Spirituali traxit in placitum idem Samuel dicit quod. præd. Nicholaus in quolibet anno annorū prædict.

And ſo alſo for all the other Matters.

dict. habuit cuſtodivit & depaſturavit ſuper terras & tenementa ſua prædict. infra paroch. præd' pullos vaccas juvencas & boves minime mulgibil. ſeu aratro uſitat. & alia averia infructifera in narratione præd. mentionat. pro decimis quorum quidem averiorum depaſturatione eidem Samueli ut Rectori Eccleſiæ parochialis præd. debit. & ſolubil. idē Samuel ipſū Nicholaum in Cur. Chriſtianitat. præd. coram præfat. Judice Spirituali ante proſecution. præd. brevis de prohibition. ut præfertur traxit in placitum prout ei bene licuit abſq; hoc quod infra præd. Hundred. de Huutſpill & Puriton eſt & a toto tempore ſupradict. fuit antiqua conſuetudo a toto tempore ſupradicto uſitat. & approbat. quod omnes inhabitantes infra Hundred. præd. aliquas terras prata ſeu paſtur. infra Hundred. præd. occupentes fuer. liberi immunes & exonerat. & de tempore in tempus a toto tempore ſupradict. liberi immunes & exonerat. eſſe debuer. de & a ſolucon' aliquarum decimarum de aut pro depaſturacon' aliquorum averiorum minime mulgibil. ſeu aratro uſitat. Anglice **not employed to plough or pail** per ipſos depaſt. in aliquibus terris pratis ſeu paſtur. infra Hundred. de Huntſpill & Puriton p̄d. exiſten. put p̄d. Nicholaus ſuperius

Traverſe.

queriturEt hoc parat. eſt verificare unde pet'judicium & breve dict. Dom. Regis & Dominæ Reginæ de conſultatione quoad obligacon' & decimas pro depaſturation. averiorum minime mulgibil' nec aratro uſitat. & al infructiferorum averiorum pro quibus idē Samuel ipſum Nicholaum in Curia Chriſtianitat. p̄d. ut prefertur traxit in placitum ſibi in hac parte concedi, &c. Et p̄ brevi dict. Dom. Regis & Dom. Regine pro conſultatione habend. quoad oblation. præd. decimas vaccarum & juvencarum mulgibil. præd'decimas fœni præd. deciwas gardin. & pomar' & præd. decimas præd. quatuor pullorum in paroch. prædict. annuatim caden. pro quibus idem Samuel ipſum Nicholaum in Curia Chriſtianitat. prædict. traxit in placitum idem Samuel petit judicium de narratione præd. quia dicit quod narratio illa materiaq. in eadē content. minus ſufficien. in lege exiſtunt ad ipſum Samuel. ad narration. ill. quoad eaſdē oblation. & decimas reſpondere compellend.' Ad quam idem Samuel neceſſe non habet nec per legem terræ tenetur aliquo modo reſpondere Et hoc parat. eſt verificare unde pro defectu ſufficien. narracon. in hac parte idem Samuel petit judicium de narr. præd. & quod narratio illa quoad oblation. & decimas ill. caſſetur.

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& quod Breve dictorum Domini Regis & Dominæ Reginæ ei inde concedatur, &c. Et præd' Nicholaus dicit quod per aliqua per prædictum Samuelem ſuperius placitando allegat. idem Samuel Breve dict. Domini Regis & Dominæ Reginæ de conſultatione habere non debet quia quoad præd' placitum præd. Samuelis modo & forma placitat. quoad decimas agnorum pro quibus idem Samuel ipſum Nicholaum in Curia Chriſtianitatis præd. coram præfat. judicè Spirituali traxit in placitum idem Nicholaus ut prius dicit quod infra paroch. de Huntſpill præd. fineſq limites & loca decimabilia paroch. illæ habetur & a tempore cujus contrar. memoria hominum non exiſtit habebatur talis conſuetudo & modus decimandi de & concernen' decimis agnorum ibidem caden' part. & provenien. videlt. as before; the like modus for Calves as before, the like modus to be exempted in non decimando for the Inhabitants &c. as before, and a Joinder in Demurrer as to the reſt.

Hicks *verſus* Woodeſon.

2 Salk. 655.

IN a Prohibition the Plaintiff ſuggeſted, that the Pariſh of Huntſpill is an antient Pariſh, of which he was an Inhabitant, and uſed Lands there; that in the ſaid Pariſh there is a Cuſtom to pay ſeveral ſmall Sums to the Parſon in lieu of ſmall Tithes, which Sums are particularly ſet forth, that this Pariſh was within the Hundred of Huntſpill, and that there is a Cuſtom alſo for every Inhabitant and Occupier of Lands within the ſaid Hundred to be diſcharged of Tithes for the Paſture of barren and unprofitable Cattle.

The Defendant traverſed the Cuſtoms, and Iſſue being thereupon joined, it was found for the Plaintiff.

And now it was moved in Arreſt of Judgment, 1. that a Cuſtom alledged in non decimando in a whole Hundred, is void in Law.

(2.) Admitting it to be good, yet it was not well pleaded here, becauſe the Plaintiff had not ſhewn that there was a ſufficient Maintenance for the Parſon beſides thoſe Tithes.

First, it was argued, that this Cuſtom was againſt Common Right, becauſe there was never yet any Precedent of a Cuſtom to diſcharge a Layman in non decimando: 'Tis agreed as to Eccleſiaſtical Perſons ſuch a Cuſtom may be good, but not as to a Layman,

because he was not capable, at the Common Law to have Tithes, and therefore could not sue for them in the Spiritual Court, but now he is enabled by the Statute of 32 H. 8. c. 7.

And as Tithes in general are due of common Right, so this particular Tithe of Agistment of barren Cattle is due the rather, because those which are for the Cart are discharged by custom; 'tis the whole Profits of the Land out of which some things must be paid to the Parson.

A Layman is allowed to prescribe in modo decimandi, but not to be exempted from all Tithes in general, because some must be paid, and are due of Common Right, tho' the Quantity be ascertained by Custom and Usage.

If therefore Tithes are due of Common Right, such a Prescription either in a Hundred or County will not be good, because if it should be allowed, every Person in that Hundred or County might prescribe, nothing would be left for the Parson.

'Tis true, my Lord Rolle affirms the contrary, but denies it again in the same Line, which shews that Book to be of little Authority in this Case. 1 Roll. Abr. 653. pl. 9. 1 Roll. Abr. 654.

'Tis likewise said in the same Book, that a Prohibition was granted in a Case of the same Nature with this, which was thus; viz. A Man prescribed to a Custom within two Hundreds of Middlesex and Surrey, that if a Common Baker dwelling in either of these Hundreds, should erect a Mill there to grind Corn for his Trade, and sell it to Customers in or near those Hundreds for their Sustenance, that such a Baker should pay no Tithes for the Corn. Kidder *versus* Edwards.

But the Reason upon which that Case was adjudged, doth not suit with this; for the Parson there had more and greater Tithes out of the Lands of the Inhabitants, and of them who were sustained in those Hundreds, than he could have by the manual Occupation of a Miller.

In Michaelmas Term, 11 Car. and in the same Book 'tis mentioned, that a Prohibition was granted upon a Surmise, that Tithes ought not to be paid for Pheasants Eggs, or young Pheasants hatched in Woods enclosed in the Chiltern of Buckinghamshire, but that was because they were feræ Natura. 1 Roll. Abr. 636.

Such a Custom as is here alledged, could never have a reasonable Commencement, because of common Right, Tithes ought to be paid out of all Land; and tho' before the Council of Lateran no Person could claim them because there were no Parishes, yet still they were due to the Church, 11 Rep. Priddle *versus* Napier. Hob. 296.

tho' it was in the Power of the Donor to give them to what Spiritual Perſon he thought fit.

'Tis in favorem Eccleſiæ, that the Law will not allow a Preſcription in non decimando to prevail againſt her; 'tis true, a Preſcription ſtrengthens all other Titles, but is of no force when pleaded in Diſcharge of Tithes, becauſe the Law preſumes that a Layman cannot be abſolutely diſcharged without the Conſent of the Parſon, Patron and Ordinary; and then likewiſe the Grant of ſuch Diſcharge or Exemption muſt appear.

2 Bulſt. 285. This was the Opinion of Juſtice Doderidge grounded upon the Authority of Lyndewode and of the Author of the Doctor and Student: The whole Country may be diſcharged of Tithes, but that ſuch Diſcharge ought to have a reaſonable Commencement, which muſt be ſhewed.

Now it would be very ſtrange, that the Law ſhould reject a Preſcription to be diſcharged of Tithes in a particular Place, and yet to allow a Cuſtom in a whole Hundred in non decimando.

1 Roll. Abr. 654. pl. 12. Litt. Rep. 152. 2 Inſt. 653. One ſingle Inſtance may be given, where ſuch a Cuſtom hath been allowed; 'tis in my Lord Rolle's Abridgment, and it was for the Milk of Ewes; and probably the Reaſon might be, that ſuch Milk is of little value to the Parſon, and doth not much contribute to his Maintenance for which Tithes were originally ordained; but 'tis but one ſingle Caſe which doth not make a Law.

The Caſe of Ruſſel and Backhurſt which ſeems to give ſome Colour to ſuch a Cuſtom, is a controverted Caſe; it was 2 Bulſt. 285. thus, viz. The Parſon libelled for Tithe-wood, and the Defendant prayed a Prohibition by Reaſon of a Preſcription in non decimando for Wood growing in the Weld of Kent; 'tis true, the Preſcription there was denied, and no Prohibi- 1 Roll. Abr. tion granted: This was in Michaelmas Term 12 Jacobi, and 653. pl. 10. yet but two years afterwards there was a Trial at Bar in this Court upon a Prohibition, where ſuch a Preſcription was ſuggeſted to be diſcharged of Tithes of the Under-wood growing in the Weld of Suſſex, and it was found for the Plaintiff, and the Court held the Preſcription good.

But admitting ſuch a Preſcription in non decimando for Under-wood in a Weld be good, yet it will not affect this Caſe, becauſe in antient Times there were many Controverſies about ſuch Tithes; for at the Common Law Tithes were not to be paid for Trees, becauſe cutting them down

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is not an Encreaſe of their Growth (as in Corn) but a total Deſtruction; 'tis an uncertain Profit, and not ariſing yearly for the Maintenance of the Parſon, neither are thoſe Tithes due of Common Right, but by Cuſtom and Uſage; and therefore in thoſe Days, and in thoſe Places where Tithe-wood was due only by Cuſtom, the Pariſhioners procured Wood or other Lands for the Parſon and his Succeſſors in Satisfaction of all Tithe-wood in the ſame Pariſh. 13 Rep. 13.

Several Petitions have been made to the Parliament concerning the Right to ſuch Tithes, untill the Statute of Sylva cædua was made, by which all thoſe Controverſies were ended, it being enacted, that Tithes ſhould not be paid for Wood of twenty years Growth or more, which implies it ſhould be paid for all under that Age. 45 Ed. 3. ca. 3.

'Tis true, it was the Opinion of my Lord Coke, that ſuch a Preſcription in a County, not only for Wood, but for any other Tithe, is good; but that can be no Reaſon why it ſhould be allowed in an Hundred, becauſe the Court cannot judicially take notice what a Hundred is, or what it comprehends; 'tis a Liberty in its Commencement; 'tis to have a Juriſdiction over an Hundred, Mills, or ſo many Pariſhes; and therefore it hath been held, that a Leet could not be Parcel of an Hundred, becauſe they are both Liberties, and one Liberty cannot be Parcel of another. 2 Inſt. 645. 8 H. 7. 1. b.

But it doth not appear by the Pleading, that there are more than one Pariſh in this Hundred; if ſo, ſuch a Cuſtom in a Pariſh can never be made good.

Beſides, there is no Conſequence to ſay that there is ſuch a Cuſtom in a County, therefore it may be in a Hundred; becauſe there can be no Inference from one to the other, and even in that Caſe it will be very difficult to find a Reaſon how a County at firſt came to be exempted from Payment of Tithes.

My Lord Rolle uſes the words Province and County as ſynonymous; now a Province being only a Circuit within the Juriſdiction of an Archbiſhop, probably there might be an Agreement between the Clergy and the Laity, that ſuch a Place, &c. ſhould be exempted from the Payment of Tithes.

But there could be no ſuch Agreement in an Hundred, becauſe that was divided from the County, and became a particular Diſtrict, and the Inheritance of ſeveral perſons, but the Bailiwicks thereof were reunited to the Counties by the Statute of Ed. 3. 4 Ed. 3. c. 15. 14 Ed. 3. ca. 9.

1 R.Ab. 653. 2 Inſt. 645.

'Tis agreed on all ſides, that a Single Pariſh cannot have ſuch a Cuſtom; and this is a ſtrong Reaſon why a Hundred cannot, becauſe it conſiſts, and is made up of ſeveral Pariſhes; and 'tis as good a Reaſon that an Hundred cannot have ſuch a Cuſtom becauſe a Pariſh cannot, as 'tis to ſay a County may, and therefore an Hundred may have it.

(2.) But admitting an Hundred to be capable of ſuch a Cuſtom, yet it cannot be ſo large as this, becauſe there muſt be a ſufficient Maintenance left for the Parſon, which doth not appear in this Caſe, and ſo are all the Books where ſuch Preſcriptions have been allowed, which are very few, but never to have ſuch Effect as this, viz. to take away the Maintenance of the Parſon; and therefore the Plaintiff in the Prohibition ought to have ſhewn that there was Sufficient for him beſides, becauſe it is a Diſcharge againſt common Right, and no other Reaſon can ſupport it, but to ſhew that the Parſon hath uberiores decimas beſides the Tithes alledged to be exempted; and this was the only Reaſon of the Judgment in the Caſe of Kidder and Edwards, Roll. Ab. 1 part. 654.

Econtra. If there may be a Cuſtom (as 'tis admitted) to be diſcharged in a whole County of Tithe-Milk, and of Tithe-Corn ground at ſuch a Mill or Mills in an Hundred; there may be alſo a Cuſtom to be diſcharged of the Tithes of fat Cattel, and if the Parſon hath lived without ſuch Tithes time out of Mind, he may live ſo ſtill.

'Tis granted on the other Side, and an Authority was produced of a Cuſtom to be diſcharged of Tithes out of two Hundreds, and there can be no Reaſon, if that is Law, why ſuch a Cuſtom may not be good in one Hundred. It has been objected, that a Layman cannot preſcribe in non decimando, but no good Reaſon can be given for it.

It cannot be becauſe of any Diſabillility in his Perſon; for as to this matter there is no Difference between a Layman and a Clerk; it muſt therefore be in favorem Eccleſiæ, and introduced by Eccleſiaſtical Perſons who were formerly Judges here, as part of the Canon Law, who had in thoſe Days ſuch a Power over the Laity, that they would not ſuffer ſuch a Preſcription to be tried by them, neither would they ſuffer them to ſue for Tithes in their Courts.

This is the Reason why 'tis generally said in our Books that a Layman cannot prescribe in non decimando; but tho' he cannot prescribe, &c. yet there may be a Custom to exempt him from Tithes, and such a Custom is of as good Authority as a Prescription; for if 'tis established by long Usage and by common Consent of our Ancestors, it passes into a Law of that Place, and is of equal Force with a Prescription.

Such is the Custom of Gavelkind, and Borough-English, which is the Law of England, and as antient as the Common Law in the Places where these Customs prevail. 40 Ass. pl. 27. 21 Ed. 4. 52 a.

'Tis true, where a Custom of a publick Nature is alleged in a particular Hill or Place, it must be shewed, that 'tis an antient Hill; as, where a Man claimed Lands on the South Side of a Hill, setting forth, that they were Time out of Mind devisable; and so derived a Title to himself by a Feoffment from the last Devisee; this was held void, because it being a Custom against Common Law, he ought to set forth that the Hill was an antient Hill.

But if he had alledged, such a Custom in a Borough, which ex vi termini imports a Place of Antiquity, it had been good.

Now in this Case 'tis alledged That the Parish of Huntspill is an antient Parish, and then the Custom is set forth, which is agreeable to the Authority before mentioned.

And if the Custom is not contrary to Reason and Justice the Judges never enquire into the Commencement of it.

No Man can say, That this Custom is unreasonable, because it goes only in Discharge of a single Duty; now all the Books which condemn Prescriptions in non decimando, either in a County or in a Parish, are where they are made generally of all Tithes, but they are seldom denied for a particular Thing as in this Case.

And therefore a Custom to pass in a Ferry-boat Toll-free hath been adjudged good (tho 'tis far more unreasonable than this) because 'tis only a Discharge to the Person claiming it, and may be a Charge to another.

So there are many Things which are not titheable of Common Right, as Fish taken in the Sea, Rabbits and Pidgeons spent in the House, &c. and yet by Custom Tithes of those Things have been paid to the Parson; if therefore 'tis a reasonable Custom for the Clergy to charge the Laity with Tithes of such Things which of common Right ought not to be chargeable, 'tis as reasonable that a Layman may discharge himself by a Custom in a Place where none have been usually paid. Cro. Car. 264. 1 Roll. Abr. 642, 646.

Such

Dr. and Student 67. 13 Rep. 13.

Such a Cuſtom (as has been obſerved) is not good in a Pariſh, not becauſe 'tis inconſiſtent with the Law; the Reaſon is, a ſingle Perſon or Pariſh are not capable of ſuch a Cuſtom. Beſides, the Law requires, that the Pariſhioners ſhould ſhew what Recompence the Parſon hath in Lieu of his Tithes, by which it may appear that the Cuſtom had a reaſonable Commencement; but no ſuch Thing is required of a whole County, becauſe it cannot with any Shadow of Reaſon be pretended, That all the Inhabitants could or can conſpire to defraud their reſpective Parſons.

But there are Books which allow a Cuſtom or Uſage to be good in Places of as large Extent, which Cuſtoms will not bind when alledged in a Will; as in a Ceſſavit per biennium, the Lord ſhewed the Cuſtom of the Place to be, that where the Tenant did not pay his Services in two Years, he might enter and hold the Lands till he was ſatisfied of the Arrears; this was held to be void, becauſe the Uſage was alledged in a particular Will only, and not ſhewed, that it was cuſtomary ſo to do in the Wills round about.

43 Ed. 3. 32. pl. 30.

But a Cuſtom in an Hundred in Kent, that if any one be charged to have gotten Children in Adultery, and cannot acquit himſelf by Law, that then he ſhall forfeit all his Goods to the King; this was held a good Cuſtom.

1 Roll. Abr. 562.

So a Cuſtom in an Hundred, if a Waif or Eſtray be eſloigned, and 'tis preſented that it came to the Poſſeſſion of any dwelling within the Hundred, that the Lord may diſtrain 'till he make Reſtitution.

44 Ed. 3. 19. pl. 14
21 Ed. 4. 24.

So a Cuſtom that an Infant of the Age of 15, may make a Feoffment, and ſell his Lands; all theſe are againſt Common Law; but being uſed in an Hundred or County, are thereby become the Laws of the Places where they obtain.

But to come nearer to the Caſe, it will not be denied that a Cuſtom alledged in a Pariſh, for all Underwood to be diſcharged of Tithes, which is uſed in that Pariſh for fencing Corn, is good; but then you muſt ſhew that the Tithe of that Corn is paid to the Rector; but it may be alledged in a County, Weld or Country without any Conſideration at all.

1 Saund. 141.

Br. Abr. tit. Diſmes pl. 14. March 25. 1 Roll. Rep. 22.

And therefore Brook in his Abridgment referring to the Author of Doctor and Student ſaith, That a Man cannot preſcribe in a Will to be diſcharged of Tithes, becauſe 'tis too particular; but ſuch a Preſcription is good in a whole County or Hundred, becauſe 'tis the Cuſtom of the Place.

It

It has been objected, that a Custom in non decimando may be good in a County, but not in a Hundred, because of the Uncertainty of its Extent: Sure that is a Reason of very little Force, for the Limits of a County are altogether as incertain as those of a Hundred; but a Hundred is a known Precinct, and not barely a Liberty (as has been said) tho' there may be many Liberties therein; for when granted to a Subject, 'tis a Liberty, but when it remains part of the County 'tis otherwise; and therefore in an Abowry a Man may prescribe by a Que estate to have a Leet in an Hundred; but if a Quo warranto be brought against the Hundred, he must then set forth his Title.

Besides, if the Words Province and County are synonimous, a County and Hundred are so too; and that in the Meaning of the Law, as may plainly appear; for all Issues are to be tried by Jurors of the County, that is, by Jurors of the Hundred; for it was a good Challenge at the Common Law if there were no Hundredors of the Jury. 2 H. 4. 6. 11 H. 4 2.

In the Statute of Winton, these Words are used promiscuously; it appoints, that Inquests of Felonies and Robberies shall be taken in Towns, Hundreds, Franchises and Counties, so that the Offender may be attainted; and if the County will not answer for him, then it shall be answerable for the Robbery done, so that the whole Hundred where the Robbery is committed, shall be liable. 13 Ed. 1. c. 2.

Such a Custom in a Hundred hath never yet been condemned, for it never came in Judgment but in the Case for Tithe-wood, and there it was held to be a good Custom, even in a whole Weld; and what Reason can be given why it should not be good in an Hundred as well as in a Weld, which is as antient as the other, especially when it cannot be denied but such a Discharge might begin by Composition.

'Tis objected, That Tithe-wood is not due of common Right, as all other Tithes are, and therefore a Custom in non decimando for Wood in an Hundred may be good.

But Tithe-wood is due of common Right; if not, to what Purpose was the Statute de Sylva cædua made? It was to ascertain what Wood should pay Tithes, and what should be exempted; and why did the Nobility and Commons prefer several Petitions to the King after the making that Statute that it might be explained what was meant by Sylva cædua, if no Tithes were due for Wood, which is an Admission, that Tithes had been paid for it before that Act. 1 Roll. Abr. 638, 639. 2 Inst. 643.

Agreeable

Agreeable to this is the common way of demanding Tithes for Wood at this Time; for the Libel is always general, which shews that the Party hath a Right to demand; for if he had not, then he must allege a Custom, and yet Prohibitions are never granted upon such general Libels.

Suggestions are also made always in the Affirmative, but if they were due by Custom, and not of Right, then they ought to be in the Negative viz. to deny that there is any such Custom.

2. Point. Then as to the Objection, that it doth not appear that the Parson hath a sufficient Maintenance left, the Pleading seems to be otherwise; for there are several modus's set forth for Tithes yearly arising in the Parish, which may give him a convenient Maintenance every Year; and if he hath a sufficient Provision by any one Modus, 'tis not material by whom he receives it.

Curia. It will be difficult to shew a non decimando for any Tithes besides those of Wood; for all the Cases which incline to such a Custom, are put generally, viz. that a County or a Hundred may thus prescribe, but do not mention what Tithes are in Question.

Now if Tithes of Wood had been due of common Right, to what Purpose was that Canon made by Archbishop Stratford, 17 Ed. 3. that Tithes of Sylva cædua shall be paid: Against which Canon there was a Petition made to the Parliament in that very Year reciting the antient Usage to be, that Tithes should not be paid for Wood; and the Petition was answered, that a Prohibition should be granted against the Canon, where Tithes of Wood have not been accustomed to be paid,

Doctor & Student 164. a. 169. b. Godolph. 467.

'Tis true, the Ecclesiastical Courts do hold, that Tithes are due of common Right for every Thing, nay, even for Stones or Gravel digged out of Pits, but the Common Law is otherwise; for Tithes of common Right are due only for such Things which arise by annual Profits; now tho' Trees are renewing yearly, yet they yield no annual Profit, and therefore Tithes are not paid for them.

Therefore where Tithes are paid for Things which do not arise by such means, they must be due by Custom.

But such a Custom in non decimando cannot be good, and therefore a Consultation was granted.

Rex & Regina *verſus* Trobridge.

A Writ of Error to reverſe a Judgment in an Indictment for erecting of a Cottage, and not laying of four Acres of Land to it, Et ulterius jur. &c. Præſentant, that the Defendant did continue it contra formam Statuti. 1 Sal. 371.

The Errors aſſigned were,

(1.) In the Return which is uncertain, for it was returnable ad proximam Seſſionem ubicunq; whereas it ſhould have been ad proximam generalem Seſſionem pacis: Sed non allocatur; for one is as uncertain as the other.

(2.) 'Tis for erecting and continuing of a Cottage, but doth not ſay pro habitatione; and 'tis no Offence unleſs it is inhabited, for the Statute was made to prevent the building of Cottages for the Habitation of poor People; ſed non allocatur, for if 'tis applied to any other uſe than a Dwelling-houſe, the Defendant muſt ſhew it, or otherwiſe it ſhall be intended to be built for his Habitation.

(3.) 'Tis an Indictment for two Offences viz. for erecting and continuing; 'tis ſaid præſentat. exiſtit. that he did erect, &c. and then about the middle of the Indictment 'tis, ulterius præſentant, that he did continue, and then concludes, contra formam Statuti. Now the Offences being ſeveral, and being divided by the Words ulterius præſentant, &c. the Concluſion ſhall only go to the Offence laſt mentioned, which was the continuing, and not the erecting of the Cottage; 'tis as diſtinct as if it had been a new Indictment, and therefore it doth not appear that the Defendant was indicted for erecting, &c.

'Tis not like the Caſe in my Lord Coke's Entries, where contra ligeanciæ ſuæ debitum went to the whole Indictment, in which, tho' there were many Overt-Acts laid, yet there was but one Treaſon, but here are two diſtinct Offences; for which Reaſon the Indictment was quaſhed. Fol. 361.

Robinſon *verſus* Smith.

Trin. 6 Willielmi, *Rot.* 192.

TReſpaſs for taking and impounding of his Cow.

The Defendant pleaded, that at the Time of the Treſpaſs, &c. he was ſeiſed of ſeveral Lands parcel. manerii de Muſgrave parva, unde quoddam clauſum vocat. Lowhill Meadow eſt & fuit parcel. ut de ſtatu cuſtumario hæreditario deſcendible from Anceſtor to Heir, according to the Cuſtom of the ſaid Manor, and that the Plaintiff's Cow was in the ſaid Cloſe doing Damages, &c.

The Plaintiff demurred generally.

(1.) It was ſaid for him, that it did not appear by the Plea, that Lowhill was Parcel of the Land of which the Defendant was ſeiſed, but Parcel of the Manor; for the Word unde being a Relative, refers ad proximum Antecedens, which is the Manor.

(2.) 'Tis ſaid he was ſeiſed de ſtatu hæreditario deſcendible, &c. and doth not ſhew of whoſe Grant; for tho' it may not appear who was the firſt Grantee, it being ſo long ſince the Copyhold was granted, yet the Admittance of an Heir upon a Surrender or Deſcent, doth amount to a Grant, and ought to be ſo pleaded.

2 Cro. 103. 4 Rep. 22 b.

Econtra. The Defendant doth not juſtifie by reaſon of a Title, but for a Wrong done; and therefore though he ſaith ſeiſitus fuit, &c. and doth not ſhew how, or in what manner, yet ſince it was only a Tort with which he was charged, 'tis well enough, and it muſt have been agreed to be ſo, if he had ſaid poſſeſſionatus fuit inſtead of ſeiſitus.

But the Court were of another Opinion, for where Seiſin in Fee is pleaded of a Copyhold Eſtate by way of juſtifying of an Offence with which the Defendant is charged, he muſt ſet out the Commencement of his Eſtate; and therefore the Plaintiff had Judgment.

2

Allen

Allen *verſus* Symonds.

Paſch. 6 Willielmi *Rot.* 299.

AN Action on the Caſe was brought againſt the Defendant by the Name of Symonds.

He pleaded in Abatement, that from the Time of his Birth to the Time of the Action brought, he was known by the Name of Symms; and traverſed that he was known by the Name of Symonds.

The Plaintiff replied, that the ſaid Defendant was known as well by the one Name as by the other; and upon a Demurrer the Court inclined that this Plea was a good Plea. Raſt. Ent. 616. Vet. Entr. 27.

But at another Day they being of Opinion that the Precedents were both ways upon a Traverſe, the Defendant was adviſed to take a new Declaration, which he conſented to do accordingly; but without Coſts.

Crump *verſus* Halford.

Hill. 4 & 5 Willielmi & Mariæ. *Rot.* 939.

TReſpaſs for taking and detaining of a Silver Tankard.

Upon Not guilty pleaded, the Jury found a ſpecial Verdict to this Purpoſe, viz.

They find the Statute of 1 Willielmi & Mariæ prohibiting all Trade and Commerce with France, in which there is a Proviſo, That no Perſon ſhall after the 10th Day of September then next following demand or take more than 6 d. for a Quart of French Wine. ante

Then they find the Act of 2 W. & M. for more effectual putting in Execution the former Act, whereby 'tis enacted, That if any Perſon after the firſt Day of *February* 1690. ſhall ſell Wine by Retail in Glaſs Bottles, or in any other Meaſure not made with Pewter, &c. or ſhall ſell the ſame for a greater Price than appointed by the former Act, and ſhall be convicted thereof by Confeſſion, or the Oath of two Witneſſes, being proſecuted within 30

Days after the Offence committed, ſhall for every Offence pay 50 s. and if not paid upon Demand, then to be levied by Diſtreſs by Warrant under the Hand and Seal of ſuch Juſtice &c. before whom the Conviction was made; which Warrant the Juſtice is required to grant to the Conſtable, &c. who is authorized to levy the ſame &c. and for Want of ſufficient Diſtreſs, to commit the Offender untill he pay the Penalty, and all neceſſary Coſts to be tared by the Juſtice of Peace before whom the Conviction is made.

They find, that 3 Auguſti 4 W. & M. Sir Richard Bulkley being a Juſtice of Peace of the County where the Offence was committed, did direct his Warraut to the Conſtable of the Pariſh, &c. which they find in hæc verba; by which it did appear, that the Defendant was convicted before him, for that he 9 Julii inſtantis did ſell Wine in eighteen Glaſs Bottles, for which he had forfeited to the Informer 50 s. for each Bottle; and by this Warrant the Conſtable was commanded to levy 45 l. and Coſts by Diſtreſs of the Plaintiff's Goods, and for Want of ſufficient Diſtreſs, to apprehend him. It was dated in Auguſt.

They find that the ſaid 2 Julii 4 Willielmi the Plaintiff was a Retailer of Wines, and that the Warrant of the Juſtice of Peace was directed to the Defendant Halford, who by Virtue thereof levied the ſilver Tankard, for which the Action is now brought, and ſo they make a general Concluſion, &c.

It was argued for the Plaintiff, that he was entitled to the Action, and that neither the Act of Parliament, or the Warrant of the Juſtice could excuſe the Defendant for this Wrong done.

(1.) Becauſe the Warrant is illegal,
(2.) Becauſe the Defendant, tho' an Officer, yet in this Caſe ſhall be puniſhed for acting under a void Warrant.

1. That the Warrant was illegal, it was thus argued, viz. there are two Acts of Parliament found by the Verdict; the firſt ſettles the Offence, the ſecond reduceth the Forfeiture to 50 s. for the Benefit of the Informer; but in both 'tis to be levied for every Offence, viz. not for every Bottle drunk at one Sitting, if twenty or more, for that is but one Offence being but only at one Time, and not for every Bottle; but the Warrant directs that eighteen Penalties ſhall be levied for one Offence.

2. The

2. The Offence is laid to be committed 9 Julii inſtantis and the Warrant is dated in Auguſt, but it doth not appear when that 9th of July was, and therefore non conſtat, whether the Proſecution was within the 30 Days limited by the Act,

3. The Statute allows Coſts, where there is not ſufficient Diſtreſs to be made, and it muſt be after the Commitment of the Offender; but this Warrant directs Coſts to be paid for the original Offence.

2d. Point. The Warrant tho' directed to the Defendant as an Officer will not excuſe him.

'Tis true where a Court hath a general Juriſdiction of the Cauſe, and ſendeth a void or an illegal Warrant to the Officer, he ſhall be excuſed in executing it.

So likewiſe if a Juſtice of Peace proceeds irregularly, and it doth not appear ſo upon the Face of the Warrant; as, if he ſends it to apprehend a Felon without Oath made of the Felony committed, and the Officer executes it, he ſhall be excuſed; but the Juſtice is a Treſpaſſer.

But where a Defect appears in the Body of the Warrant it ſelf, as in this Caſe, the Officer is bound to take Notice of it at his Peril, tho' he is not equally bound to take Notice of little Niceties.

And to prove this the Caſe of Nichols againſt the Churchwardens of Hatfeild was cited as an Authority in point; it was thus, viz. Tateridge was a Pariſh in Reputation for 60 Years, tho' antiently parcel of Hatfeild; the Churchwardens of Hatfeild imagining, That they had Power by Virtue of the Statute of 43 Eliz. cap. 2. to tax the Inhabitants of Tateridge to the Relief of their Poor did tax them accordingly, and upon Refuſal to pay the Rate procured a Warrant to levy it, which was done upon Nichols the Plaintiff who brought the Action; and the Church-wardens juſtified under the Warrant, and it was adjudged that it would not excuſe them. Cro. Car. 394. 2 Roll. Abr. 560.

'Tis true, the Church-wardens went out of the Pariſh to levy that Rate, but that was not the Reaſon of the Judgment; it was becauſe the Juſtices of Peace had only a particular Power to make Warrants to levy Rates, which were well aſſeſſed, and therefore the Church-wardens at their Peril ought to take Notice whether the Juſtices had executed their Power according to Law; and it appearing that the Rate was illegally taxed, the Warrant of the Juſtice

Juſtice will not excuſe the Church-wardens in taking the Diſtreſs.

1 Vent. 273. 2 Lev. 139. This Caſe is good Law at this Day, and the Authority of it was never ſhaken, no not by the Caſe of Webb and Batchelor, where the Defendant juſtified in Treſpaſs under the Warrant of a Juſtice of Peace for diſtraining of a Parſon's Cattle, becauſe he did not ſend out Labourers, &c. to amend the Highways: The Parſon pretending that Clergymen were exempted from that Duty, it was there ſaid, that if for that Reaſon the Warrant had been unduely made, yet the Officer had been excuſed in the Execution of it, becauſe he is not Judge but to execute the Precept: But 'tis likewiſe ſaid the Matter muſt be within the Juriſdiction of the Juſtice, which was ſo in that Caſe but not in this.

Hards 480. Agreeable to this is a later Reſolution in the Exchequer in the Caſe of Terry and Huntington: where in Trover the Defendant juſtified under a Warrant of the Commiſſioners of Exciſe, &c. and it was held by my Ld. Hale, That where a particular Juriſdiction exceeds its Authority, the Officer is liable, becauſe all is void; for every limited Authority implies a Negative, viz. That they ſhall not proceed any otherwiſe than according to the Authority they have; but if they commit a Miſtake in any Thing which is in their Power or Juriſdiction, it will be an Excuſe to the Officer; but what the Juſtice did in the Caſe at Bar did far exceed his Power, for he is to cauſe one Penalty to be levied for one Offence, and he has ſent out his Warrant to levy no leſs than 45 l. which is 18 Forfeitures for one ſingle Offence.

Suppoſe this Court ſhould hold Pleas in Formedons, all the Proceedings would be void, becauſe 'tis confined by Magna Charta to the Court of Common Pleas alone.

The Offence here is created by Act of Parliament, of which all People are to take Notice at their Peril, and to ſee that the Proceedings are purſuant to the Authorities and Powers thereby given.

6 H. 6. cap. 5. 5 Rep. 99. b. The Statute of 6 H. 6. enacts, That no Perſon ſhall be ſpared towards the Repairs of Banks who have any Manner of Benefit by keeping them in Repair; the Commiſſion of Sewers which is grounded upon this Statute is very extenſive, viz. that the Commiſſioners may do therein according to their Diſcretion; but yet it has been held that they ought not to tax that Man alone whoſe Land adjoins to the River, but all others whoſe Lands are in Danger to be overflowed with Water; and therefore a Tax being laid upon a ſingle Perſon, and a Diſtreſs taken for Non-payment,

is tortious, because it being given by Virtue of a general Law, the Officer at his Peril must examine and enquire into the Authority.

By this it appears that there is a Difference between Things done by a Justice of the Peace quatenus such, and by Virtue of his Authority, and those which are done by him by Virtue of an Act of Parliament, and of a particular restrained Power to him given thereby; for in the one Case the Officer must not examine but execute his Warrants, and in the other he must enquire into his Power, because 'tis by Virtue of the Statute that Obedience is given to his Authority.

Now tho' the Rule is true, viz. Qui jussu judicis aliquid fecerit non videtur dolo malo fecisse, quia parere necesse est, yet that must be understood where the Judge hath a proper Jurisdiction; but here the Authority of the Justice was limited by the Act to grant his Warrant in a particular Case, of which he had no general Jurisdiction, and he having made a void and an illegal Warrant was therefore no proper Judge of the Matter, whose Authority is no more to be obeyed than that of a Stranger; for the Rule also is, judicium non a suo judice datum nullius est momenti. 9 Rep. 76. b.

To make this yet more plain, suppose the Justice had issued out his Warrant directed to the Defendant to levy 500 l. for this Offence, or to take and imprison the Offender during Life, certainly he had been a Trespasser if he had executed such a Warrant.

The Statute gives Power to the Justice to convict, but doth not make him a Judge either to declare the Forfeiture, or to levy it, so that his granting a Warrant for that Purpose is purely a ministerial Act at the Instance of the Informer who is to demand it after Conviction, and if not paid, then to apply himself to the Justice for his Warrant to levy it.

So that upon the Face of this Warrant the Constable is left without Excuse; for both the Acts being therein recited 'tis a sufficient Direction for him to look into them; and to take Care at his Peril not to exceed his Authority.

2. There are many other Faults both in the Warrant, and in the Execution of it, viz. Costs are awarded when in truth the Party is to pay none till after Commitment, and the Defendant was not committed: So likewise the Demand of the Forfeiture ought to be previous to granting the Warrant; but that doth not appear; then it commands the Defendant to demand it of Crump the Plaintiff, and he demanded it of his Wife, when it ought to have been personally

ſonally of him, and no Diſtreſs ought to have been made before ſuch a perſonal Demand; but theſe Faults were not inſiſted on, only mentioned.

The Warrant therefore being illegal, and the Defendant acting under it (tho' he was an Officer) yet he is a Treſpaſſer.

Econtra. Serj. Pemberton argued on the other Side, viz. That the Queſtion was not whether the Juſtice of Peace had done well or not, nor whether his Warrant was regular; but admitting it not to be well grounded upon the Act, then the Queſtion will be, Whether the Conſtable who is appointed to execute it is puniſhable for the Miſtake of the Juſtice of the Peace?

Conſtables, Bailiffs and Sheriffs, are always favoured by Law in Execution of their Proceſs, they have been encouraged by ſeveral Acts of Parliament, which direct them when ſued for any Matter relating thereunto, that they ſhould plead the general Iſſue and give the ſpecial Matter in Evidence, and if they have a Verdict, or the Plaintiff in ſuch Suits is non-ſuited, they ſhall have treble Damages.

This ſeems highly reaſonable, becauſe the Execution of Proceſs is the Life of the Law; and if Men ſhould be proſecuted for any ſmall Miſtake it would obſtruct the Execution of Juſtice by diſcouraging of Officers, and by great Delays in all Proceedings, which muſt neceſſarily follow if the Officer before he executes the Proceſs muſt adviſe whether 'tis legal or not.

19 Rep. This Queſtion was long ago ſettled in the Caſe of the Marſhalſea, there being then a ſolemn Judgment given, that a ſubordinate Officer ſhall be excuſed in the Executing of an erroneous Proceſs, Quia parere neceſſe eſt.

'Tis true, there have been ſeveral Queſtions ſince that Judgment concerning the Execution of Proceſs, all which depend upon this ſingle Point, viz. Whether the Court out of which ſuch Proceſs did iſſue had an Original Juriſdiction of the Matter or Cauſe?

But it ſeems very hard that Officers who for the moſt part are illiterate Perſons ſhould take Notice whether that Court, out of which the Proceſs iſſued hath a Juriſdiction of the Matter or not; and therefore ſince that Caſe of the Marſhalſea, all ſubſequent Cauſes of that Nature have been governed by that Judgment.

2 Roll. Rep. 493. To inſtance in ſome, viz. In Hillary Term 22 Jacobi an Action of Treſpaſs was brought in this Court, for taking the Plaintiff's Goods, &c.

The Defendant pleaded, that the Earl of Southampton was seized in fee, &c. and that he had a Court-Baron, &c. in which a Plaint was levied, and a Debt recovered against one Britton, and thereupon an Attachment was awarded against him directed to the Defendant being a Bailiff, who by Virtue thereof took the Goods out of the Custody of the Plaintiff to whom they were fraudulently conveyed by Britton on Purpose to deceive his Creditors.

To this an Exception was taken, because the Process was irregular, (viz) An Attachment first, which cannot be in a Court-Baron, for the Process there is Summons, Attachment, and Distress; yet it was held that the Court, having an original Jurisdiction of the Matter the mis-awarding of the Process shall not make the Officer guilty in executing of it.

So where an Action was brought in an inferiour Court, and a third Person bound both his Lands and Goods by Recognizance that the Defendant should render his Body, &c. or that he would pay the Debt; and afterwards Judgment was had against the Defendant, and a Precept in the Nature of a Capias ad satisfaciend. was directed to the Bailiff, &c. to take the Defendant, and if he was not to be found, then to take him who entred into the said Recognizance: But notwithstanding that, and altho' one and the same Capias would not lie against the Principal and Bail at the same Time; and this appearing in the Precept it self to be contrary to Law, of which the Officer might have taken Notice, yet since that Court had an original Jurisdiction of the Cause, he shall not be punished for obeying an illegal Process. 2 Roll. Abr. 560.

Likewise in Sir Thomas Orby's Case who was High Sheriff of Lincoln, and one Hale a Justice of Peace did by Virtue of the Statute of 22 & 23 Car. 2. Cap. 20. discharge a Prisoner who was in Custody for 100 l. tho the Discharge was illegal, yet upon an Escape brought against the Sheriff in the Common Pleas, he was excused, because the Justice of Peace had a Jurisdiction and Authority by the Statute to discharge a Prisoner in such Manner as is therein directed, and tho' he had exceeded his Power, yet the Sheriff is not to be punished.

It appears therefore upon these Authorities, and many more which might be cited, that when Officers are punished for executing erroneous Process, 'tis always where the Court out of which it issueth hath not an original Jurisdiction of the Cause; so was the Case of Terry and Huntington in the Exchequer mentioned on the other Side, and so is Nichol's Case; the Reason of the Judgment in that last Case Mo. 480.

was, because the Churchwardens of one Parish had no Power to tax Inhabitants of another, and the Justices are only to confirm lawful Rates.

It must therefore be agreed that where the Court hath a Jurisdiction and acts illegally, the Officer shall be excused: If so, the Justice of Peace had a Jurisdiction in this Case, and therefore the Officer shall not be punished.

And that he hath a Jurisdiction appears upon the Frame and Construction of this Act.

(1.) It prohibits selling of Wine in Glass Bottles.
(2.) It imposeth a Forfeiture upon the Seller after a Time limited.

It creates a new Offence, and inflicts a Penalty, but it gives the Justices Power to convict, and send out their Warrants to levy it, so that they have Cognizance of the Cause.

It must also be agreed, That an erroneous Warrant of a Justice, &c. is within the same Reason with an illegal and void Process of any Court whatsoever; but when 'tis objected, That 'tis so when the Warrant is general, but not where Irregularities appear upon the Face of it, as there are two in this Warrant.

(1.) 'Tis to levy 50 s. for every Bottle, when all is but one Offence.
(2.) 'Tis to levy the Costs before the Penalty.

Answ. As to the first, it doth not appear that there is any Irregularity in it, because by the very Words and Meaning of the Act the Defendant is to pay 50 s. for every Glass Bottle in which he sold Wine, and if he sell it in 100 Bottles to several People those are several Offences, and non constat, but the 18 Bottles of Wine, for which he is convicted, were so sold at several Times, and not all at once.

'Tis plain that it was the Opinion of the Justice that the Offences were several; and it seems unreasonable that the Constable should have Power to controul his Judgment; he is not to dispute but submit.

Then as to the Costs, 'tis likewise plain they are given upon the Conviction, and not upon the Commitment of the Offender; however 'tis a little too nice to put the Constable upon examining that Matter.

It

It has been said, that the Statutes being recited in the Warrant, and the Defects appearing so plain therein, might be some Intimation or Direction to the Constable to look into these Laws; but admitting he doth, he may not understand them; and the other side will scarce allow a Constable to be a proper Judge of an Act of Parliament.

The Cause was adjourned, but the Plaintiff dying, no Judgment was given in it.

Peers *versus* Lucy. *Trin.* 6 Willi. *Tertii*, *Rot.* 178.

Memorandum. *War. ff.* MEmorand. quod alias scilt. Termino Paschæ ult præterit. coram Domino Rege & Domina Regina apud Westm. venit Tho. Peers Armiger per Johannem Lilly Attorn. suum & protulit hic in Curia dictorum Dom. Regis & Dominæ Reginæ tunc ibm. quandam billam suam versus Georgium Lucy Armigerum Edm. Lord Johannem Westerman Johannem Dickins Johaunem Hawkes juniorem & Ricum. Perkins in Custodia Mar. &c. de plito transgr. & sunt pleg. de pros. scilt. Johannes Doe & Ric' Roe quæ quidem Billa sequitur in hæc verba scilt. Warr. ff. Thomas Peers Ar. queritur de Georgio Lucy Ar. Edmundo Lord Johanne Westerman Johanne Dickins Johe. Hawkes jun. & Rico. Perkins in Custod. Mar. Maresc. Dom. Regis & Dnæ. Reginæ coram ipsis Rege & Regina existen. de eo quod ipsi decimo septimo die Aprillis Anno Regni Domini Willielmi & Dom. Mariæ nunc Regis & Reginæ Angliæ &c. sexto vi & Armis &c. clausum ipsius Thomæ Peers voc. Cliftebank apud paroch. de Alveston in Com. Warr. præd. freger. & intraver. & herbam ipsius Thomæ Peers in eodem clauso adtunc crescen. ad valentiam quadraginta solidorum pedibus suis ambulando conculcaver. & consumpserunt necnon de eo qd. ipsi postea scilicet eisdem die & Anno supradictis vi & Armis &c. in seperal. piscar. ipsius Thomæ Peers in Rivo de Avon in paroch. de alveston præd. in Com. Warr. præd. piscat. fuerunt & pisces de piscaria sua præd videlt. decem mille Rubilliones Anglice Roaches decem mille apuas Anglice Daces quinque mille percas Anglice Perches decem mille Anguillas Anglice Eels quinque mille lucios Anglice Pikes & viginti mile gobiones Anglice Gudgeons ad valentiam Centum librarum adtunc & ibm. invent.

Count in Trespass.

Clausum fregit.

Et in seperali piscaria piscat. fuer.

invent. ceper. & aſportaver. & alia enormia ei adtunc & ibidem intulerunt contra pacem dictorum Dom. Regis & Dnæ. Reginæ nunc & ad damnum ipſius Tho. Peers ducent. librarum & inde producit ſectam, &c.

Imparlanee. Et modo ad hunc diem ſcilt. diem veneris prox. poſt Craſt. ſanctæ Trinitatis iſto eodem Termino uſque quem diem præd' Georgius Edmund. Joh'es Weſterman Jo'hes Dickins Joh'es Hawkes & Richard' Perkins habuer. licentiam ad billã p̃d. interloquend. & tum ad reſpondend. &c. coram Domino Rege & Domina Regina apud Weſtm. venit tam præd. Thomas per Attorn. ſuum præd. quam præd' Georgius Edmundus Joh'es Weſterman Joh'es Dicikns Joh'es Hawkes & Ricus per Carolum Ballet Attorn. ſuum & iidem Georgius Edm' Joh'es Weſterman Joh'es Dickins Joh'es Hawkes & Richardus defend. vim & injur. quando &c. Et quoad venire vi & armis ſeu quicquid quod eſt contra pacem dictorum Dom. Regis & Dominæ Reginæ nunc necnon totam tranſgreſ. præd. præter fraction. & intrationem clauſi præd. & herbam præd. pedibus ambulando conculcation. & conſumption. in narratione præd. ſuperius fieri ſuppoſit. dicunt quod ipſi non ſunt inde culpabiles & de hoc ponunt ſe ſuper patriam & præd. Tho. inde ſil'ter &c. Et quoad fraction. & intration. clauſi præd. & herbæ præd. pedibus ambulando conculcation. & conſumptionem iidem Georgius (and all the Defendants) dicunt quod prædict. Thomas Peers actionem ſuam prædict. inde verſus eos habere ſeu manutenere non debet quia dicunt qd. diu ante p̃d. tempus quo ſupponitur trangreſſ. illam fieri ſcilt. primo die Decembris Anno tertio Regni Domini Edwardi nuper Regis Angliæ ſexto, &c. quidam Johannes Comes Warwick ſeiſit. fuit de & in manerio de Hampton præd. cum pertin. in prædict. Com. Warr. unde una acra terræ aqua cooperta in parochia de Alveſton præd. in Com. præd. prox. & contigue adjacen. pred' clauſo in quo ſupponitur tranſgreſ. præd. fieri eſt & prædict. tempore quo &c. necnon a tempore cujus contrar. memoria hominum non exiſtit fuit parcel. in Dominico ſuo ut de feodo prædictq; nuper Rex Edwardus ſextus adtunc ſeit. fuit de & in clauſo præd. in quo &c. in Dominico ſuo ut de feodo in jure Coronæ ſuæ Angliæ quodq; præd. comite de manerio præd. cum pertin. unde &c. ſic ut præfertur ſeit. exiſten. idem Comes & omnes illi quorum ſtatum idem Comes tunc habuit de & in manerio præd. cum pertin. unde &c. a tempore cujus contrar. memoria hominum non exiſtit uſi fuer.

Quoad venire vi & armis non culp.

Et quoad *the Treſpaſs in the Cloſe.*

Seiſin pleaded in the Earl of Warwick.

E. 6. *ſeiſed in Fee* jure Coronæ.

* *It ſhould have been* tanquam ad manerium predict. ſpectan.

fuer. & conſuever. habere neceſſariñm eaſiament'ſequen'pro caption. piſcium in aqua prædict. exiſten. videlt. pro ſe & ſervis ſuis de tempore in tempus & ad omnia tempora ſeſionabilia piſcacon' in aqua præd. ad libita ſua in clauſo

* *It ſhould have been* uſi fuer. & conſuever. intrare.

præd' in quo &c. * intrare & retes & al' ingen' neceſſar. pro caption. piſcium in aqua illa exiſten. ibm. prope Ripas aquæ præd' aperire & in aquas præd. dimittere & in aqua illa & extra aquas illas trahere pro neceſſar. capiend. piſces in aqua præd' exiſten' prædictoq; nuper Rege Edwardo ſexto de præd. clauſo in quo &c. ſic ut præfertur ſeit. exiſten' præfatoque Com'War' de præd. manerio cum pertin' Unde &c. in forma præd. ſeit' exiſten' idem Comes poſtea & ante præd' tempus quo &c. ſcilt' 24 die Decembris Anno Regni dicti nuper Regis tertio apud Weſtm' in Com. Midd' per quandam Indenturam inter ipſum Comitem ex una parte & dictum nuper Regem ex alteia parte factam ſigillo ipſius comitis ſigillat. & in Curia Cancellariæ dictorum Dom. Regis & Dominæ Reginæ nunc apud Weſtm. præd. in Com. Midd. præd. de recordo irrotulat. remanen' cujus dat. eſt eiſdem die & Anno conceſſit dicto nuper Regi inter alia manerium præd' cum perin. Unde &c. hend. & tenend. manerium illud cum pertin. Unde &c.

Comes Warr. per Indentur. irrotulat. conceſſit E. 6. manerium præd.

eidem nuper Regi hæred' & ſucceſſoribus ſuis in perpetuum per quod idem nuper Rex in præd' manerium cum perin' Unde &c. intravit & fuit inde ſeiſit. in Dominico ſuo ut de feodo in jure Coronæ ſuæ Angliæ præfatoq; nuper Rege Edwardo ſexto ſic inde de prædict. clauſo in quo &c. ſeit' exiſten' poſtea & ante tempus præd' quo &c. apud paroch. de Alveſton præd. ſic inde ſeit. obiit per cujus mortem præd. manerium cum pertin. Unde &c. Et clauſum præd' in quo deſcendebat Dominæ Mariæ nuper Reginæ Angliæ ut ſorori & hæred. dicti nuper Regis Edwardi ſexti per quod eadem nuper Regina Maria in præd. manerium cum pertin. Unde &c. & clauſum præd. intravit & fuit inde ſeiſit. in Dominico ſuo ut de feodo in jure Coron. ſuæ Angliæ Et ſic inde ſeit' exiſten' eadem nuper Regina Maria diu ante præd. tempus quo &c. apud Alveſton p̃d. cepit in virum Philippum tunc Regem Hiſpanicum per quod idem Philippus ut Rex Angliæ in jure ipſius nuper Reginæ & eadem nuper Regina ſeit. fuer. de & in præd' manerio cum pertin' Unde &c. & præd' clauſo in quo &c. in dominico ſuo ut de feodo in jure Coronæ ſuæ Angl. Et ſic ſeit. exiſten. iidem nuper Rex Philippus & nuper Regina Maria poſtea & ante præd' tempus quo &c. ſcilt. 12 die Junii Annis Regnorum

Who entred and was ſetſed in Fee jure Coron.

Rex obiit ſeiſit.

And the ſame deſcended to Queen Mary, *who entred and was ſeiſed.*

Grant by Letters Patent.

nornm ſuorum Angliæ tertio & quarto apud Weſtm. præd. in Com. Midd. per Literas ſuas Patentes ſub magno ſigillo ſuo Angliæ ſigillat. geren. dat. apud Weſtm præd. eiſdem die & Anno quas pred. Georgius &c. hic in Curia proferunt conceſſer. cuidam Thomæ Lucy Armigero inter alia præd. manerium cum pertin. unde &c. ac omnia & ſingula vias commoditates emolumenta & hereditamenta quæcunque in præd' paroch. de Hampton Epiſc. in dicto Com. Warr. ac alibi ubicunque in eodem Com. dicto manerio de Hampton Epiſc. unde &c. ſeu alicui parcel. inde quoquo modo ſpectan' ſive pertin. aut ut membr. partes vel parcel. ejuſdem manerii unde &c. habit. cognit. accept. uſitat. reputat. dimiſſ. ſeu occupat. exiſten. aut cum eodem vel aliqua parcel' inde uſitat. vel gaviſ. adeo plene libere & integre ac in tam amplis modo & forma prout aliqua perſona quæcunque ante tunc manerium præd. cum pertin. unde &c. unquam habuit tenuit vel graviſ. fuit ſeu habere tenere vel gaudere debuit hend. & tenend. eidem Thomæ Lucy Hæred. & aſſign' ſuis in perpetuum per quod idem Thomas Lucy in præd. manerium cū pertin. unde &c. poſtea & diu ante præd. tempus quo &c. intravit & fuit inde ſeit. in dominico ſuo ut de Feodo præfatoque Thoma Lucy de manerio præd. cum pertin. unde &c. ut præfertur ſeit exiſten. idem Thomas poſtea & diu ante præd. tempus quo &c. apud paroch. de Alveſton præd. ſic inde ſeit. obiit per cujus mortem manerium præd' cum pertin' unde &c. deſcendebat cuidam Thomæ Lucy militi ut filio & hæredi præd. Thomæ Lucy patris per quod idem Thomas Lucy filius poſtea & ante præd. tempus quo &c. in præd. manerium cum pertin. unde &c. intravit & fuit inde ſeit. in dominico ſuo ut de feodo eodemque Thoma Lucy filio ſic de manerio præd' cum pertin. unde &c. ſeit. exiſten' idem Thomas Lucy poſtea & diu antea præd' tempus quo &c. apud paroch. de Alveſton præd' ſic inde ſeit' obiit per cujus mortem manerium præd. cum pertin' unde &c. deſcendebat cuidam Thomæ Lucy militi ut filio & hæredi præd' Thomæ Lucy militis patris ipſius per quod idem Thomas Lucy filius poſtea & ante præd' tempus quo, &c. in manerium præd' cum pertin. intravit & fuit inde ſeit' in dominico ſuo ut de feodo eodemq; Thoma Lucy filio ſic de manerio prædict. cum pertin. unde &c. ſeit. exiſten. idem Thomas Lucy filius poſtea & diu ante præd' tempus quo &c. apud paroch. de Alveſton predict. ſic inde ſeit. obiit per cujus mortem manerium præd' cum pertin. unde &c. deſcendebat

Dying ſeiſed, and a Diſcent.

And another dying ſeiſed.

The Grantee entred and was ſeized.

Another dying ſeiſed.

debet cuidam Roberto Lucy ut filio & hæredi ejuſdem Thomæ Lucy per quod idem Robertus Lucy poſtea & diu ante præd. tempus quo &c. in præd. manerium cum pertin' unde &c intravit & fuit inde ſeit. in Dominico ſuo ut de feodo eodemque Roberto ſic de manerio præd' cum pertin' unde &c. ſeit. exiſten. idem Robertus Lucy poſtea & diu ante præd' tempus quo &c. apud Alveſton præd' ſic inde ſeit' obiit ſine hærede maſculo de corpore ſuo per cujus mortem manerium præd' cum pertin. unde &c. deſcendebat cuidam Bridget' Lucy ut filiæ unicæ & hæred. prædict. Roberti Lucy per quod eadem Bridget' poſtea & diu ante præd. tempus quo &c. in manerium præd. cum pertin. unde &c. intravit & fuit inde ſeit. in dominico ſuo ut de feodo prædictaq; Bridgetta ſic de manerio prædict' cum pertin' unde &c. ſeiſit. exiſten. eadem Bridgetta poſtea & diu ante præd. tempus quo &c. inde feoffavit quendam Richardum Lucy Armigerum patruum ipſius Brigettæ habend. & tenend. eidem Richardo & heredibus & aſſign' ſuis in perpetuum per quod idem Richardus fuit ſeiſit' de manerio præd. cum pertin. unde &c. in dominico ſuo ut de feodo præfatoq; Richardo Lucy ſic inde ſeiſit. exiſten. idem Richardus poſtea & diu ante p̄d. tempus quo &c. apud paroch. de Alveſton præd' ſic inde ſeit. obiit per cujus mortem manerium præd' cum pertin. unde &c. deſcendebat cuidam Thomæ Lucy Armigero ut filio & hæredi ejuſdem Richardi Lucy per quod idem Thomas Lucy poſtea & diu ante præd' tempus quo &c. in manerium præd. cum pertin. unde &c. intravit & fuit inde ſeiſit. in dominico ſuo ut de feodo prædictoque Thoma Lucy ſic inde ſeiſit. exiſten' idem Tho. Lucy Poſtea & diu ante præd' tempus quo &c. ſcilt. decimo die Novembris Anno Regni Domini Caroli nuper Regis Angliæ ſecundi triceſimo ſexto apud paroch. de Alveſton prædict. debita legis forma condidit teſtamentum & ultimam voluntatem ſuam in ſcriptis & per eandem deviſavit manerium præd' cum pertin' unde &c. quibuſdam Johanni Mordant Baronetto Roberto Wheatley Armigero & Edwardo Willee Gen' hærd. & aſſign. ſuis in perpetuum poſteaq; & diu ante præd. tempus quo &c. idem Thomas Lucy apud Alveſtom præd. ſic ut præfertur ſeiſit. obiit poſt cujus mortem & diu ante præd' tempus quo &c. præd. Johannes Mordant Robertus Wheatly & Edwardus Willee virtute deviſationis præd' in manerium præd' cum pertin. intraverunt & fuerunt inde ſeiſit. in dominico ſuo ut de feodo prædictoq; Johanne Mordant Roberto Wheatley & Ed-

Died without Iſſue-male;

And deſcended to another,

Who enfeoffed A. B.

Dying ſeiſed, and a Diſcent.

And made his Will, and deviſed the Premiſſes in Fee.

Deviſees entred by virtue of the Deviſe.

Edwardo Wallee ſic inde ſeiſit' exiſten. iidem Johannes Mordant Robertus Wheatley & Edwardus Willee poſtea & diu ante præd' tempus quo &c. ſcilt. primo die Julii Anno Regni Domini Jacobi nuper Regis Angliæ ſecundi primo inde feoffaver. quendam Davenport Lucy Armigerum habend' & tenend eidem Davenport Lucy hæred. & aſſign. ſuis in perpetuum per quod idem Davenport fuit ſeiſit' de manerio præd' cum pertin' unde &c. in Dominico ſuo ut de feodo præfatoq; Davenport ſic inde ſeiſit. exiſten' idem Davenport poſtea & diu ante prædict. tempus quo &c. apud paroch. de Alveſton præd. ſic inde ſeiſit. obiit ſine aliquo exitu de corpore ſuo exenn. per cujus mortem manerium præd' cum pertin. unde &c. deſcendebat præd. Georgio Lucy ut fratri & hæredi præd. Davenport per quod iidem Georgius poſtea & ante præd' tempus quo &c. in manerium prædict' cum pertin. unde &c. intravit & fuit & adhuc eſt inde ſeiſit. in Dominico ſuo ut de feodo per quod idem Georgius in jure ſuo proprio & præd. Edmundus Johannes Weſterman Johannes Dickins Johannes Hawkes & Richardus ut ſervien. ipſius Georgii & per ejus præcept. præd' tempore quo &c. exiſten' tempore ſeſionabil. piſcationis in aquapræd' in clauſum præd. in quo &c. prope ripas aquæ præd. intraverunt & ibidem retes præd. Georgii pro neceſſaria captione piſcium in aqua illa exiſten' aperuerunt & in aquas præd. demiſerunt & in aqua illa & extra aquas illas traxerunt & perinde herbam præd. in eodem clauſo adtunc creſcen' pedibus ſuis ambulando conculcaverunt & conſumpſerunt tam parvum quam potuerunt dampnum ibidem facien' prout eis bene licuit quæ ſunt eadem fractio & intratio clauſi prædict. in quo &c. & herbæ ibidem pedibus ambulando conculatio & conſumptio unde prædict' Thomas Peers ſuperius inde verſus eos queritur Et hoc parat. ſunt verificare unde pet' judicium ſi præd. Thomas actionem ſuam præd. inde verſus eos habere ſea manutenere debeat &c.

And enfeoffed A. B.

Who died ſeiſed.

A Deſcent to his Heirs.

And the Defendants entred as his Servants.

Juſtifie the Treſpaſs.

Quæ eſt eadem fractio & intratio.

Et præd. Thomas quoad placitum ipſorum Georgii Edmundi Johannis Weſterman Johannis Dickins Johannis Hawkes & Richardi quoad fractionem & intration. clauſi prædict & herbæ præd. pedibus ſuis ambulando conculcation' & conſumptionem modo & forma præd. ſuperius placitat. dicit quod ipſe per aliqua per prædict Georgium Edmundum Johannem Weſterman Johannem Dickins Johannem Hawkes & Richardum placitando allegat. ab actione ſua prædict. inde verſus eos habend' præ-

The Plaintiff demurs.

præcludi non debet quia proteſtando quod præd. Georgius Lucy non fuit ſeiſit. de præd. una acra terræ aqua cooperta in paroch. de Alveſton præd' in Com. præd. in Dominico ſuo ut de feodo proteſtando que etiam quod eaſiament. præd in placito præd. ſuperius mentionat. non eſt neceſſar. eaſiament. pro captione piſcium in aqua præd. pro placito tamen idem Thomas dic. quod placitum prædictum per prædict. Georgium Edmundum Johannem Weſterman Johannem Dickens Johannem Hawkes & Ricard. modo & forma præd. ſuperius placitando allegat. materiaq; in eodem content. minus ſufficien. in lege exiſtunt ad ipſum Tho' ab actione ſua præd' verſus præfat. Georgium Edmundum Johannem Weſterman Johannem Dickens Joh'em Hawkes & Ricardum habend. præcludend, quodq; ipſe ad placitum ill. modo & forma p̄d. placitat. neceſſe non habet nec p̄ legem terræ tenetur aliquo modo reſpondere Et hoc parat. eſt verificare unde pro defectu ſufficien. reſponſ. in hac parte idem Thomas pet. Judicium & dampna ſua occaſione tranſgr. ill. ſibi adjudicari, &c.

And the Defendants join in Demurrer.

Et præd Georgius Edmundus Joh'es Weſterman Joh'es Dickins & Ricardus dicunt qd' pl'itum præd. quoad fraction. & intration. clauſi præd. & herbæ p̄d. pedibus ambulando conculcation. & conſumption. per ipſos Georgium Edmundum Johannem Weſterman Johannem Dickins Joh'em Hawkes & Richardum modo & forma præd. ſuperius plitaddo allegat. materiaque in eodem content. bon. & ſufficien. in lege exiſtunt ad præd. Thomam ab actione ſua p̄d. inde vers' ipſos Georg' Edmundum Johannem Weſterman Johannem Dickins Joh'em Hawkes & Ricum. hend. præcludend. quod quidem pl'itum materiamq; in eodem content. idem Georgius Edmundus Joh'es Weſterman Johannes Dickens Johannes Hawkes & Ricus. parat. ſunt verificare & probare prout Curia &c. Et quia præd. Thomas ad pl'itum ill. non reſpond. nec ill. hucuſque aliqualiter dedicit iidem Georgius Edmundus Johannes Weſterman Joh'es Dickens Johannes Hawkes & Ricus. ut prius petunt judicium & quod idem Thomas ab actione ſua p̄d. verſus ipſos Georgiū Edm' Jo' Weſterman Joh'em Dickens Johannem Hawkes & Ricum hend' præcludatur ſed quia Curia Domini Regis & Domimæ Reginæ nunc hic de judicio ſuo de & in præmiſſis unde partes præd. ſuperius in eadem Curia ſe poſuerunt reddend. nondum adviſatur dies inde dat. eſt partibus prædict. coram Domino Rege & Domina Regina apud Weſtm. uſque diem prox. poſt

Continuance.

Ven fac. *awarded* tam ad triand. exitum quam ad inquirend. de dampnis.

de judicio ſuo de & ſuper præmiſſis illis audiend. eo quod Curia Domini Regis & Dominæ Reginæ nunc hic inde nondum &c. & quoad tam ad triaco. exit. præd. inter partes præd. ſuperius junct. per patriam triand. quam ad inquirend. quæ dampna idem Thomas ſuſtinuit occaſione tranſgreſſionis præd. unde partes præd. ſuperius in Judicio Curiæ ſe poſuer. ſi contingat judicium pro eodem Thoma verſus præfat. Georgium Edmundum Joh'm Weſterman Joh'em Hawkes & Ricum. inde reddi ven inde jurat. coram Domino Rege & Domina Regina apud Weſtm. die prox. poſt Et qui nec &c. ad recog. &c. quia tam &c. idem dies dat. eſt partibus præd. ibidem &c.

Peers *verſus* Lucy & al.

TReſpaſs for the Breaking and Entring the Cloſe of the Plaintiff, and Treading down of his Graſs, and Fiſhing in his ſeveral Fiſhery.

The Defendants, as to the Force and Arms, plead Not guilty; and as to the Breaking and Entring of the Cloſe, and Treading the Graſs, they ſay that John Earl of Warwick. Anno 3 Ed. 6. was ſeiſed in Fee of the Manor of Hampton, wherof one Acre covered with Water was Parcel, and likewiſe contiguous to the ſaid Cloſe, that the ſaid Earl and all thoſe whoſe Eſtate he had in the ſame Manor Time out of Mind, were accuſtomed to have a neceſſary Eaſement for themſelves and Servants to catch Fiſh in the ſaid Water at ſeveral Times, and for that Purpoſe to enter into the ſaid Cloſe and ſpread Nets, &c.

That afterwards the ſaid Earl granted this Manor to King Edward the ſixth in Fee, after whoſe Death both the ſaid Manor and Cloſe deſcended to Queen Mary as his Siſter and Heir, who married Philip King of Spain, and ſo they became ſeiſed thereof, &c. who by Letters Patents granted the ſaid Manor to Thomas Lucy in Fee, with all Ways, Emoluments, Commodities and Hereditaments thereunto belonging, &c. in as full and ample Manner as any Perſon before had enjoyed the ſame, and ſo derives a Title to himſelf from the ſaid Thomas Lucy, and juſtifies in his own Right, and the other

other Defendants as his Servants, and by his Command for entring into the said Close, and spreading of his Nets, and casting them into the Water for the necessary catching of Fish, &c.

The Plaintiff by Protestation replies, that the Defendant was not seised in Fee of that one Acre covered with Water, and that the Easement which he had pleaded was not a necessary Easement for catching of Fish, and then demurred generally to the Plea, and the Defendants joined in Demurrer.

Those who argued for the Plaintiff insisted, that this Plea was not good, either as to the Matter or Form of pleading.

First, As to the Matter; for probably this Prescription might have been good, if the Defendant had derived to himself a Title from the Earl of Warwick; but he being seised of the Manor, and the King of the Close, and having granted the Manor to the King, the Easement by this means was extinguished, because 'tis inconsistent for one Person to have both a general and particular Property in the same Thing at the same Time.

Many Cases were cited to prove that this Easement was destroyed by Unity of Possession.

As in Trespass, where the Defendant justified for a Way belonging to his House in D. to go to a Wood in C.

The Plaintiff replied, that one N. in the Time of King Richard the first, &c. was seised both of the Land through which the Defendant claimed the Way, and likewise of the Wood; and tho' in 3 H. 6. 31. it was a Question whether this Way was extinguished by Unity of Possession; yet Brook in abridging of the Case, seems to be clear of Opinion that it was extinguished. Tit. Chimin. pl. 13. Br. Abr. tit. Nusance pl. 11.

So Unity of Possession of a Mill and Water-course to which a Way is appendant, and of that Land over which the Way is, will extinguish the Way it self. 1 Roll. Abr. 935.

So in the Case of Surry and Piggot, it was agreed that all private Ways are extinguished by Unity of Possession; but when the Thing is of necessity and essential to the Grant, in such Case, if there is once an Unity of Possession, it shall revive again; as if there is a Water-course to a House through the Ground of another Person, that is of Necessity, and shall not be extinguished by Unity of Possession. 3 Bulst. 340. Poph. 166. Latch. 153. Benl. 184. 2 Sid. 39, 111. Hob. 131.

This is an Easement in the Nature of a Way, and if a Way can be extinguished, why not this? Especially when 'tis not pleaded, that it was necessary for catching of Fish; 'tis only said it was a necessary Easement, &c. which is a very insignificant Expression, 'tis neither a Grammar Word, or a Word of Art and Skill; it should

have been, that they conſueverunt habere quandam viam or quoddam privilegium ſive libertatem intrare, &c. And tho' 'tis an inſenſible Word, it cannot be rejected as Surpluſage upon the Statute of Demurrers, becauſe 'tis the Giſt of the Action; but if that Sentence ſhould be rejected, then 'tis uſi fuerunt & conſueverunt clauſum intrare, which may be with Leave.

Neither is it revived by the Grant of all Ways, Emoluments and Hereditaments, &c. to Thomas Lucy, Anceſtor of the Defendant, for the only Word which may give any Colour to ſuch an Opinion, is the Word Hereditaments, but that muſt be intended only of ſuch as were in being at the Time of the Grant made.

Yel. 189. 1 Brownl. 173. 2 Cro. 253. Cro. Eliz. 794. contra.

To prove that it was revived by ſuch general Words the Caſe of Marſhal and Hunter was cited as an Authority full to the Purpoſe, which was thus, viz. A Copyholder for Life having Common, &c. purchaſed the Fee of his Copyhold, which was granted to him by the Lord cum pertinentiis, and it was reſolved, that by the Unity of Poſſeſſion his Common was deſtroyed, and that it was not revived by theſe general Words cum pertinentiis.

(2.) The ſecond Point was not much inſiſted on, which was, that the Plea was inſufficient, as to the Manner of Pleading; for 'tis ſaid that the Earl of Warwick 3 Ed. 6. was ſeiſed in Fee of the Manor of Hampton, &c. and of one Acre of Ground Parcel thereof covered with Water, and then preſcribes that he and all thoſe, &c. uſed to have a neceſſary Eaſement, but doth not ſay tanquam ad manerium præd. ſpectan. and therefore have not claimed it as an Eaſement belonging to the Manor.

Econtra. Thoſe who argued on the other Side agreed the Caſes before cited to be Law, viz. where any Matter of Intereſt or Charge is claimed upon Mens Eſtates, as Rents, Commons, &c. ſuch are always extinguiſhed by Unity of Poſſeſſion, and never revived.

But theſe Caſes do not come up to the Matter now in Queſtion, becauſe there is a great Difference between Matters of Charge and Eaſement in all Caſes, excepting only that of a Way which is of Neceſſity; and this is the very Difference made in all our Books.

Such were all the Caſes before mentioned in the Behalf of the Plaintiff, and ſuch was the Reſolution in Surry and Piggot's Caſe where all the Authorities are quoted, viz. it was an Action on the Caſe for ſtopping of a Water-courſe which uſed to run from one Place to another, and which

filled the Pond of the Plaintiff with Water for the neceſſary watring of his Cattle; there the Water was held to be a neceſſary Eaſement; and tho' there was an Unity of Poſſeſſion, yet for that Reaſon Judgment was given, that the Watercourſe was not extinct.

The Defendants in like Manner by pleading have ſhewed this to be a neceſſary Eaſement, and the Plaintiff hath confeſſed as much by his Demurrer, for they have no way of catching Fiſh, but as ſet forth in this Plea.

(2.) But if this Eaſement was once extinguiſhed by Unity of Poſſeſſion, yet the Grant of the King and Queen de novo to Thomas Lucy revives it; for 'tis granted to him tam amplis modo & forma prout aliqua perſona quæcunq; antetunc manerium &c. habuit, which are relative Words, and give new Life to this Eaſement. Cro. Eliz. 570.

As in Treſpaſs, the Defendant pleaded that B. was ſeiſed of the Place where, &c. in Fee, and that F. was ſeiſed of a Houſe, and ſo preſcribed to have Common appurtenant in the Place where &c. and that F. made a Feoffment of his Houſe to B. who made a Leaſe thereof to the Defendant with all Commons thereunto appertaining, or occupied or uſed with the ſaid Houſe; it was adjudged, that by the Unity of Poſſeſſion the Common was extinguiſhed, yet by both thoſe Words a good Grant was made of a new Common. 9 Rep. 26. a.

So where a Copyhold Meſſuage eſcheated to the Lord where the Copyholder had Common by Preſcription in ſixty Acres of the Demeſnes, and the Lord granted all Commons to the ſaid Meſſuage belonging or let with the ſame. It was adjudged, that by theſe Words the Grantee had a Common in the ſaid ſixty Acres, tho' it was once deſtroyed by Unity of Poſſeſſion. 2 Cro. 253. contra. Cro. Eliz. 794. 2 And. 161. Hob. 131.

As to the Objection, that the Words neceſſary Eaſement, are inſignificant, and neither Words of Art or Skill, that may receive this Anſwer, viz. The Word Eaſment is known in the Law; 'tis defined in the Terms thereof, 'tis a Genus to ſeveral Species of Liberties which one Man may have in the Soil of another, without claiming any Intereſt in the Land it ſelf; 'tis uſed in * Gateward's Caſe, where it was held to be a good Cuſtom for an Inhabitant of a certain Pariſh to have a Way over another Man's Ground, either to Church or to the Market, becauſe 'tis an Eaſement and no Profit: 'Tis uſed alſo by my Lord * Hobert, who makes a Difference between Intereſts and Profits, &c. ſuch as Rents and Commons, &c. and Eaſements, ſuch as Lights, Air, &c. the laſt of which, tho' they may be deſtroyed or extinguiſhed * 6 Rep. 52. 25 Ed. 4. 29. Cro. Car. 419. * Hob. 131.

guiſhed for a Time by Unity of Poſſeſſion (for a Man may do what he pleaſeth with his own) yet if no Alteration is made thereof when 'tis in one Hand, upon the Dividing it again the Intereſt and Right to ſuch Eaſement doth revive.

* Dyer 72.a. My Lord * Dyer uſeth this Word, where he tells us, that Leſſee for Life or Years, or Tenant at Will, or an Inhabitant of a Pariſh who is Tenant at Will, cannot preſcribe to a Common in their own Names, becauſe of the Meanneſs of their Eſtates and Capacity, but they may preſcribe to be exempted from Toll, or to have a Way to Church over another Man's Ground, becauſe ſuch are only Eaſements.

'Tis a Word alſo uſed in pleading in almoſt all the Books of Entries, as in Co. Entr. 19. Robinſon's Entries 18 Winch. 46. Vidian 6, 28. Hern. 74. and 'tis mentioned alſo in 2 Brownlow, Caſe 24.

Curia. The Word Eaſement is known in Law, but here the Thing it ſelf is ſet forth, viz. to catch Fiſh &c. and certainly no Inſtance can be given of a Preſcription for ſuch a Liberty by ſuch a Word or Name; therefore the Defendants were directed to ſet the Preſcription right, and try the Merit of the Cauſe.

Rex & Regina *verſus* Armſtrong.

1 Vent. 304. 3 Mod. 47. A Motion being made to reverſe an Outlawry in Treaſon, there being a Writ of Error brought, and the Error aſſigned, viz. that it doth not appear where the Huſtings were held, for 'tis at a Court of Huſtings, &c. omitting pro Civitate London.

The Court inclining to reverſe it for this Error, one of the Judges objected, that there ought to be a Scire fac. to the Lords mediate and immediate before the Outlawry ſhould be reverſed.

To which it was anſwered, that it was not neceſſary in Treaſon, becauſe the Forfeitures do not belong to them, but to the King; whereupon the Outlawry was reverſed.

Anonymus.

Anonymus.

A Motion was made for a Prohibition to the Eccleſiaſtical Court of London, for calling of a Woman Whore, upon a Suggeſtion that the Words were actionable there by Cuſtom of the Place. 1 Vent. 352. 1 Show. 131.

But the Court would not grant a Prohibition without Oath made, that if any ſuch Words were ſpoken, it was in London and not elſewhere. Fareſl. 29.

Ruſh *verſus* Tory.

IN a Judgment upon a mutuatus, the Bill appeared to be filed on a certain Day, viz. Memorand. quod die Veneris, &c. which Day happened to be before the Debt became due.

This was aſſigned for Error upon a Writ of Error brought to reverſe this Judgment; and now the Court was moved in Behalf of the Plaintiff to make the Memorand. of another Day, ſo that it might agree with the Judgment; but it was denied. 5 Mod. 286.

Jones *verſus* Comitem Bath.

A Trial at Bar was appointed in this Cauſe on Wedneſday the 12th of November; and the Day before the Trial the Plaintiff moved to put it off, becauſe he wanted a Witneſs to prove a Deed.

The Court denied the Motion, thereupon the next Day the Attorney refuſed to bring in the Writ, it being only a Contrivance of him to prevent a Nonſuit.

But the Court ordered the Roll to be brought in, that they might take Notice there was ſuch a Writ; and the Counſel of the Defendant informed them that my Lord Chief Juſtice Hale had committed an Attorney for the like Practice, which was likewiſe done now.

Rex

Rex & Regina *verſus* St. *John's* College in *Oxon.*

UPon an Alias Mandamus to admit Mr. King to the Place of a Scholar in the College, being nominated thereunto by the Mayor, &c. of Briſtol, to whom the Right of Nomination pro hac vice pleno jure did appertain, upon the Reſignation of one Baskervile.

The Subſtance of the Return was, viz. That the College was founded by Sir Thomas White; that the Biſhop of Winton for the Time being, was the local Viſitor thereof; that Baskervill reſigned, and that after the Nomination of Mr. King by the Mayor, &c. of Briſtol, the Preſident of the ſaid College and ten Senior Fellows thereof aſſembled to conſider of his Qualifications, and for that it was their Opinion upon Proof of ſeveral Facts, inconſiſtent with good Manners, and committed by Mr. King, he was by them refuſed as incapable of the Scholarſhip, and therefore they admitted another.

It was argued in his Behalf, that there was nothing in this Return to hinder this Court from granting farther Proceſs to compel the College to admit Mr. King, becauſe the Reaſon of their Refuſal was not poſitive but general; and therefore 'tis impoſſible to try the Falſhood of it in a collateral Action, becauſe there is no Fact returned.

In ſome Caſes a general Return hath been held ſufficient, but then it was fortified by ſomething of Credit, as the
1 Mod. 82. Return in Daniel Apleford's Caſe viz. that he was convicted of enormous Crimes, and nothing in particular ſet forth; but becauſe the Viſitor had given Sentence, therefore a Mandamus was denied, which would not have been if the Mandamus had been pray'd before Sentence.

2 Roll. Abr. 113, 218. So if the High Commiſſion-Court by Virtue of their Letters Patents had deprived a Miniſter for divers Contempts to his Ordinary, not ſhewing any in particular; this hath been held good, becauſe before the Statute of 1 Eliz. c. 1. which firſt gave them Authority, the King might grant Commiſſions to Perſons to proceed according to the Eccleſiaſtical Law, and they having proceeded againſt a Spiritual Perſon, and by an Eccleſiaſtical Cenſure, tho' not according to the Statute, the Court will give Credit to their Sentence without ſhewing a particular Cauſe.

The

The Return is, that having refused Mr. King they did choose another, and before the first Writ of Mandamus came to them, they did admit the Person so chosen; but if Mr. King was refused without Cause, then they had no Power either to choose or admit another.

That that part of the Return which concerns the local Visitor is very immaterial, viz. That if Mr. King hath any Wrong done him he may appeal to the Visitor, and therefore this Court should not interpose, untill his Sentence is given.

For tho' probably the Right may be within the Jurisdiction of the Visitor, yet this Court may compel an Admittance to entitle the Person to a Right, for till then he hath none, and therefore it cannot be reasonable to send him to the Visitor.

But he hath no Jurisdiction in this Case for two Reasons.

(1.) Because he is only a private Judge appointed by the Founder, or the Law, to determine Offences against the Laws of the College or Place where he is Visitor, so that his Power extends only over Collegiate Persons and Things; but Mr. King is not of the College before Admittance.

(2.) His Power is also to determine Rights upon the Statutes of the College, but not upon Grants, which must be tried at the Common Law; and the Question here arises upon the Grant of the Founder to the City of Bristol.

If there is any Cause or Truth in this Return, the College may turn him out after he is admitted, for the very same Reasons they now refuse to admit him; but if he is not to be admitted at all, then the Right of the City of Bristol is wholly defeated.

'Tis as reasonable that this Court should grant a Mandamus to the College to admit Persons, as to grant such Writs to Corporations, or to a particular Company to make a Man free thereof, or to the Ordinary to compel him to grant Administration to the next of Kin; for where the Cases are alike, the Remedies should also concur. Adjornatur.

Rex & Regina *verſus* Lawrence.

THIS was a Writ of Error to reverſe an Attainder, &c. The Error aſſigned was, viz. The Enquiry is on the Behalf of the King for the County, &c. and they are ſever'd in the Judgment, which was, pro Domino Rege & pro corpore Com. It ſhould have been, pro Domino Rege pro corpore Comitatus, and the Particle Et ſhould have been omitted; for which Cauſe it was reverſed.

DE
Term. Sanct. Hill.

Anno 6 W. III. Regis in B. R. 1694.

Cradock *verſus* Radford.

NOTA, a Judgment of 20 Years ſtanding came this Term to be revived by Scire fac. againſt the Heir and Tertenants, it was quod præd. Thomas recuperet, inſtead of præd. Arthurus; it was prayed that the Roll might be brought into Court and amended, becauſe it was only the Fault of the Clerk.

The like Amendment was in the Common Pleas, Mich. 33 Eliz. where the Judgment was quod idem Johannes ſit in miſericordia inſtead of Thomas. Cro. Eliz. 299, 864, 609. contra Roll. Abr. 201.

So where the Judgment was, quod præd. Georgius capiatur, it ſhould have been Elias; for where the Parties are named right in the Record, and the Name of one of them miſplaced or miſtaken for the other, 'tis reaſonable, that the Record ſhould be amended to entitle the Plaintiff to an honeſt Debt. Cro. Car. 594

It hath been ruled to be amended in a much ſtronger Caſe, viz. the Miſpriſion of the Clerk hath been in the very Point of the Judgment, as in Ejectment the Plaintiff had a Verdict for a Meſſuage, 10 Acres of Meadow, and 13 of Paſture; now there was no Land in the Verdict, and leſs 2 Cro. 632. Palm. 258. Roll Abr. 201, 162.

8 H. 6. cap. 12. Meadow and Paſture than in the Judgment, yet it was amended upon the Statute, for the Verdict is to guide the Judgment, and ſo it ought to have been entred accordingly.

But on the other Side this was oppoſed; for that it was not amendable, being an Error in Judgment, which muſt be imputed the Act of the Court, and not of the Clerk; as, where a Capiatur is entred inſtead of Miſericordia, or conceſſum eſt per curiam, inſtead of conſideratum eſt; Cro. Eliz 609. for theſe are erroneous in Point of Law, and the very ſame Caſe with this was held not to be amendable in Eaſter Term, 40 Elizabethæ.

So where the Judgment was, quod querens recuperet 100 l. per juratores aſſeſſ. and 5 l. pro miſ. per jurat. hic de incremento adjudicat. when it ſhould have been per Curiam; it was not amended, becauſe it was the Fault of the Court in the Judgment it ſelf.

But upon the Reaſon of the Authorities cited for the Amendment, the Court rul'd this ſhould be amended, which was done accordingly.

Curry *verſus* Stephenſon.

Hill. 1693. *Rot.* 37.

Ebor. ſſ. MEmorandum quod die Martis prox. poſt Octab. Sancti Hillarii iſto eodem Termino coram Domino Rege & Dna. Regina apud Weſtm. veniunt Willielmus Curry & Anna uxor ejus Adminiſtratrix omnium & ſingulor. bonorum & catallorum jur. & creditornm quæ fuer. Chriſtoferi Jackſon defunct. tempore mortis ſuæ qui obiit inteſtat. per Willielmum Blackaller Attorn. ſuum & protulerunt hic in Curia dictorum Dni. Regis & Dominæ Reginæ tunc ibidem quandam billam ſuam verſus Johannem Stephenſon in Cuſtod. Mar. &c. de placito tranſgr. ſuper caſum & ſunt pleg. de proſ. ſcilicet Johannes Doe & Richardus Roe quæ quidem Billa ſequitur in hæc verba ſſ. Ebor. ſſ. Willielmus Curry & Anna uxor ejus Adminiſtratrix omnium & ſingulorum bonorum & catallorum jur. & creditorum quæ fuere Chriſtoferi Jackſon defunct. tempore mortis ſuæ qui obiit inteſtat. queruntur de Johanne Stephenſon in Cuſtod. Mar. Mareſch. Dni. Regis & Dominæ

Indebitatus Aſſumpſit *for Money due to the Plaintiff as Adminiſtratrix.*

Dominæ Reginæ coram ipſis Rege & Regina exiſten. pro eo videlicet quod cum p̃d. Johannes primo die Auguſti Anno Regni Dni. Williel. & Dominæ Mariæ nunc Regis & Reginæ Angliæ &c. quarto apud Beedall in Com' præd. indebitat. fuiſſet eiſdem Willielmo & Annæ ut Adminiſtratrici bonorum & catallorum præfat. Chriſtoferi in 25 l. legalis monetæ Angliæ pro tant. denariorum ſumma per ipſum Johannem ad uſum præfat Willielmi & Annæ ut Adminiſtratricis bonorũ & catallorum dicti Chriſtoferi ante tempus ill. habit. & recept. & ſic indebitat. exiſten. præd. Johannes in conſideratione inde ſuper ſe aſſumpſit & eiſdem Willielmo & Annæ adtunc & ibidem fideliter promiſit quod ipſe idem Johannes præd. 25 l. præfat. Willielmo & Annæ cum inde poſtea requiſit. eſſet bene & fideliter ſolvere & contentare vellet præd. tamen Johan. promiſſion. & aſſumption. ſuas præd' in forma præd. fact. minime curans ſed machinan. & fraudulenter intendens ipſos Willielmum & Annam in hac parte callide & ſubdole decipere & defraudare præd. 25 l. ſeu aliquem inde denarium præfat. Willielmo & Annæ (cui quidem Annæ adminiſtratio omnium & ſingulorum bonorum & catallorum jur. & creditorum quæ fuerunt præd. Chriſtoferi tempore mortis ſuæ per Richardum Sterne Artium magiſtrum ſcaccar. reverendiſſimi in Chriſto Patris & Domini Johannis Providentia Divina Eborum Archiepiſcopi Angliæ Primat. & Metropolitan. legitime fulcit. cui commiſſio adminiſtration. ill. in hac parte de jure pretinuit 29 die Julii Anno quarto ſupradicto apud Beedall præd. in Com. prædict. debito modo commiſſa fuit) licet ſæpius requiſit. non ſolvit nec eis pro eiſdem aliqualiter contentavit ſed ill. eis hucuſq; ſolvere omnino recuſavit & adhuc recuſat unde præd. Willielmus & Anna dicunt quod deteriorat. ſunt & dampnum habent ad valenc' 40. l. & inde producunt ſectã &c. & profer. hic in Curia iidem Willielmus & Anna literas Adminiſtrator. præd. quæ commiſſion' Adminiſtrationis præd' eidem Annæ in forma præd. teſtantur, &c.

For ſo much by the Defendant to the Uſe of the Plaintiff as Adminiſtrator to J. S. had and received.

Adminiſtration committed to one of the Plaintiffs.

Proferunt in Curia literas adminiſtratorias.

Et præd. Johannes Stephenſon per Nicholaum Harding Attorn. ſuum venit & defend. vim & injur. quando &c. Et dicit quod præd. Willielmus & Anna Action. ſuam præd. inde verſus eum habere ſeu manutenere non debent quia dicit quod billa ipſorum Willielmi & Annæ primo exhibita fuit 23 die Januarii Anno Regni Domini & Dominæ Willielmi & Mariæ nunc Regis & Reginæ Angliæ &c. quinto & non antea

The Defendant pleads, That Cauſa actionis non accrevit infra ſex annos & 91 dies prox. ante exhibit. bille.

tea quodq; cauſa actionis præd. in narratione præd' mentionat' non accrevit præfat. Willielmo & Annæ ad aliquod tempus infra ſex Annos & nonaginta un' dies prox. ante diem exhibitionis billæ præfat. Willielmi & Annæ modo & forma prout iidem Willielmus & Anna ſuperius inde verſus eum queruntur & hoc parat. eſt verificare unde petit judicium ſi præd. Willielmus & Anna actionem ſuam præd. inde verſus eum habere ſeu manutenere debeant &c.

The Plaintiffs reply, that the Inteſtate died 1 Apr. 2 Jac. 2d.

Et præd. Willielmus & Anna dicunt quod ipſi per aliqua per præd. Johannem ſuperius placitando allegat. ab actione ſua præd' inde verſus eum habend precludi non debent quia dicunt quod præd. Chriſtoferus Jackſon in narratione præd. ſuperius nominat. apud Beedall præd. primo die Aprilis Anno Regni Domini Jacobi Secundi nuper Regis Angliæ, &c. ſecundo obiit inteſtat. quodq; adminiſtratio bonorum & catallorum Jurium & creditorum quæ fuerunt prædicti Chriſtopheri tempore mortis ſuæ non fuit commiſſa alicui pſonæ cuicunq; uſq; præd. 29 diem Julii Anno Regni dictorum Domini Regis & Dominæ Reginæ nunc quart. ſuprad. quo die adminiſtratio omnium & ſingulorum bonorum & catal. Jurium & creditor. quæ fuer. præd. Chriſtopheri tempore mortis ſuæ per præfat. Richardum Sterne Artium Magiſtrum Scaccar. Reverendiſſimi in Chriſto Patris Domini Domini Johannis Providentia Divina Eborum Archiepiſcopi Angliæ Primat. & Metropolitan. legitime fulcit. cui commiſſio Adminiſtrationis ill'in hac parte de jure ptin. apud Beedall præd. eidem Annæ tunc & adhuc uxor. ipſius Willielmi Curry primo commiſſa fuit & ſic iidem Will'us & Anna dicunt quod cauſa actionis p̄d' in narratione præd' mentionat. primo accrevit eiſd. Willo' & Annæ infra ſex Annos prox. ante diem exhibitionis Billæ ipſorum Willielmi & Annæ præd. ſcilicet præd' viceſimo nono die Julii Anno quarto ſupradicto apud Beedall præd. & hoc pet. quod inquiratur per patriam.

Et prædict. Johannes Stephenſon dic' quod placitum præd. per ipſos Willielmum & Annam modo & forma præd. ſuperius replicando placitat. materiaq; in eodem content. minus ſuffic. in lege exiſtunt ad ipſos Will'um & Annam ad action. ſuam præd. inde verſus ipſum Johannem habend. manutenend. ad quod idem Johannes neceſſe non habet neque per legem terre tenetur aliquo modo reſpondere, Et hoc parat. eſt verificare unde pro defectu ſufficien. replication.

I

on. in hac parte idem Johannes ut prius pet. Judicium & quod præd. Willielmus & Anna ab actione ſua præd' inde verſus ipſum Johannem habend. præcludantur &c. & pro cauſis morationis in lege ſuper placito illo idem Johaunes ſecundum formam Statut. in hujuſmodi caſu nuper edit. & proviſ. oſtendit & Cur. hic demonſtrat has cauſas ſubſequen' viz. eo quod placitum ill. ſuperius replicando placitat. non manutenet narration. præd' ſed recedit ab eadem & eſt argumentativum incertum duplex in ſe repugnans & caret forma &c.

Et præd. Willielmus & Anna dicunt quod placitum prædict. per ipſos Willielmum & Annam modo & forma præd' ſuperius replicando placitat. materiaq; in eodem content. bon. & ſufficien. in lege exiſtunt ad ipſos Willielmum & Annam ad action. ſuam præd' inde verſus ipſum Johannem habend. manutenend. quod quidem placitum materiamque in eodem content. ipſi idem Johannes & Anna parat. ſunt verificare & probare prout Cur. &c. Et quia præd' Johannes ad placitum ill. non reſpondet nec ill' hucuſq; aliqualit. dedic. ipſi iidem Willielmus & Anna pet. judicium & dampna ſua occone præmiſſ. præd. ſibi adjudicari &c. ſed quia Cur. dictor. Domini Regis & Dominæ Reginæ nunc hic de judicio ſuo de & ſuper præmiſſis reddend. nondum adviſatur dies inde dat. eſt partibus præd. coram Dno' Rege & Dna' Regina apud Weſtm. uſq; diem Mercur' prox' poſt Quinden' Paſch' de judicio ſuo de & ſuper præmiſſ ill. audiend. eo quod Cur' dictor' Dni' Regis & Dnæ' Reginæ nunc hic inde nondum &c. (Et ſic Continuat. uſque diem Martis prox. poſt Tres Mich.) *Continuances.* Ad quem diem coram Domino Rege & Dna' Regina apud Weſtm. ven. partes præd. per Attorn. ſuos præd' ſed quia Cur' dictor' Dni. Regis & Dominæ Reginæ nunc de Judicio ſuo de & ſuper præmiſſis reddend' nondum adviſatur dies inde dat' eſt partib' præd' coram Dno. Rege & Dna' Regina apud Weſtm. uſq; diem Mercur. prox' poſt Oct. Hill. ante quem diem dicta Dna. Maria Regina diem *Death of the Queen.* ſuum clauſit extremum Ad quem diem coram Domino Rege Willielmo Tertio apud Weſtm. ven. partes præd. per Attorn. ſuos præd. ſuper quo viſ. & per Cur. dicti Dni' Regis nunc hic plenius intellectis omnibus. & ſingulis præmiſſ. maturaq; deliberation. ſuper inde habita videtur Cur. dicti Domini Regis nunc hic quod placitum præd' per ipſos Willielmum & Annã ux. ejus ſuperius modo & forma præd' ſuperius replicando placitat. materiaq;

riaq; in eodem content. minus ſufficien. in lege exiſt. ad ipſos Willielmum & Annã ad actionem ſuam præd. inde verſus ipſum Johannem habend. manutenend. Ideo Conſideratum eſt quod præd. Willielmus & Anna Nichil capiant per billã ſuam præd' ſed pro falſo Clam' ſuo ſint inde in Mia &c. Et præd. Johannes eat inde ſine die &c.

Judgment for the Plaintiff.

Nil cap. per billam.

Curry & Ux. *verſus* Stephenſon.

2 Salk. 421.

THE Plaintiff William Curry and Ann his Wife as Adminiſtratrix of one Jackſon brought an Action on the Caſe againſt the Defendant, in which they declared, that the Defendant was indebted to them in the Sum of 25 l. for ſo much Money received by him for the Uſe of the ſaid Ann, as Adminiſtratrix, &c. and being ſo indebted, promiſed to pay it, &c.

The Defendant pleaded, Quod cauſa Actionis non accrevit infra ſex Annos prox. ante exhibitionem Billæ.

The Plaintiff replied, That Adminiſtration was granted prout in the Declaration, ſo that the Cauſe of Action did ariſe within ſix Years, &c, and concludes to the Country, and upon a Demurrer to the Replication, and Joinder in Demurrer, Judgment was given for the Defendant.

Becauſe the Plaintiffs ſhould have averred their Replication, and not have made that Concluſion, for by that means the Defendant had no Opportunity to anſwer it.

It was alſo objected that the Plaintiffs had not well entitled themſelves to this Action, becauſe it was not in the Right of the Man, but of his Wife as Adminiſtratrix.

But to that it was anſwered, that the Precedents and Authorities were otherwiſe, for in Hillary Term, 3 Willielmi, an Adminiſtrator brought an Action againſt an Executor, and declared in an Indebitatus aſſumpſit for ſo much Money by the Teſtator for the Uſe of the Plaintiff, ut adminiſtrator, had and received, and Judgment was affirmed upon a Writ of Error in this Court.

Lamb *verſus* Mills.

Trin. 6 Willielmi, *Rot.* 560.

TRespaſs for taking of a Mare, &c.

The Defendant as to the Force, &c. pleaded not guilty, and as to the reſt he juſtified, viz. That before the Treſpaſs, &c. Sir John Smith was ſeized in Fee of the Manor of Bedminſter in the County of Somerſet, &c. and that he and all thoſe whoſe Eſtate he had in the ſaid Manor, ſemper habuerunt Curiam legalem, held for the ſame Manor twice in a Year, to which Court ſuch Perſons who were Tenants of the ſaid Manor uſed to reſort.

That ſuch alſo who had a Right of Common there the Steward did uſually appoint to be of the Jury.

That By-Laws were accuſtomed to be made there, and that all ſuch Perſons who have Common, &c. did obey thoſe Laws, or pay a Forfeiture of a reaſonable Sum to be impoſed on them, &c.

That at a Court of the Lord of the ſaid Manor held there upon reaſonable Warning, a Jury was ſworn, and a Law made, That every Perſon who had Common there ſhould pay 40 s. for Depaſturing his Cattle, where any Corn was ſtanding or growing within the Manor.

That the Plaintiff held 40 Acres of Land of the ſaid Manor and ſo he had Right of Common there.

That a Ground called Knowles Knapp in the Manor was ſowed with Corn, and that the Plaintiff permitted his Sheep to depaſture in the ſaid Corn.

That this Offence was preſented at the next Court, &c. and that the Defendant Ballivus Domini Manerii præd. did take the ſaid Mare for the Forfeiture, &c.

Upon a Demurrer to this Plea ſeveral Objections were made,

(1.) That there cannot be a lawful Court to which the Tenants uſed to reſort; if it had been Curia legalis generally, it might have been good.

But this Objection was not much inſiſted on, it being very immaterial, and only mentioned.

(2.) The Juſtification was by Virtue of an Authority which the Defendant had not ſufficiently ſet forth; for 'tis tanquam Ballivus Domini, &c. which is very uncertain, for he may be his Bailiff of another Manor: He ſhould have ſet forth a * Precept and Mandate directed to him, and that he tanquam Ballivus Domini Manerii ſui pd. did take the Mare, &c.

* Raſt. Entr. 445. b. 606. Brownl. Precedent 181. Co. Entr. 666.

Econtra. But on the other Side it was ſaid that the Defendant need not ſhew any Authority; as where a Tenant in Antient Demeſne of the Village of Laſtoff preſcribed to be exempted from Toll throughout the Realm, and brought an Action againſt one for taking of his Goods at Yarmouth, who juſtified that it was an antient Town, &c. and preſcribed to have Toll of the Tenants of Laſtoff, and ſhews for what, and the Sum demanded, which being refuſed to be paid, he diſtrained; and it being objected in that Caſe, that the Defendant had not ſet forth any Authority in himſelf to demand the Toll, and the Taking of it being againſt Common Right, he ought for that Reaſon to ſhew an expreſs Power; but notwithſtanding this Objection the Defendant had Judgment.

1 Leon. 231. Cro. Eliz. 227.

Curia. There is a great Difference between the taking of Toll and the Diſtraining for a Penalty incurred as a Forfeiture upon the Breach of a By-Law, becauſe in the later Caſe 'tis the Preſentment of the Jury which makes the Duty

If this had been in Replevin, tanquam Ballivus Domini, or per mandatum, &c. it had been good: But in Treſpaſs a particular Power and Authority muſt be ſet forth; for the Bailiff cannot take a Forfeiture ex officio: There muſt be a Precept directed to him for that Purpoſe, which he muſt ſhew in pleading; and 'tis not ſufficient to ſay that he took it per mandatum, &c.

3 Mod. 131. 1 Salk. 108. 1 Show. 61. 3 Lev. 206.

In Treſpaſs the Defendant juſtified the taking per mandatum of the Sheriff, and this was held not good in the Caſe of Matthews and Curry, Mich. 1 Willielmi in this Court; whereupon Judgment in this Caſe was given for the Plaintiff.

Roop *verſus* Scritch.

IN an Action of Treſpaſs ſeveral Treſpaſſes were ſet forth, and the Defendant was found not guilty as to all but one, which was pedibus ambulando, and the Damages 5 s. and no more.

This Cauſe began originally in an inferior Court, and was removed hither; and the Court allowed full Coſts, 'tho the Damages were ſo ſmall: quod nota. Fareſl. 129.

Rex & Regina *verſus* Buggs.

THE Defendant was indicted before the Juſtices of Peace in their Seſſions, upon the Statute of 2 & 3 of Philip and Mary cap. 11. he being a Clothworker, and not living in a City, Borough or Town-corporate, and yet keeping in his Houſe more than one Woollen Loom, by Reaſon whereof he had forfeited 40 s. per Week.

An Exception was taken to this Indictment, for that the Juſtices had not Power to take it before them; for they cannot by Law hold Cognizance of Pleas upon penal Statutes, without an expreſs Power given them by theſe Acts, and here being no ſuch Authority allowed by this Act, the Indictment was for that Reaſon quaſhed.

Roberts *verſus* Cook.

AN Ejectment was brought in the Common Pleas, and a Verdict for the Plaintiff, but he had no Coſts; and now the Defendant in that Action brought a new Ejectment in B. R. againſt the ſame Plaintiff, and Sir Francis Winnington moved, that he might have his Coſts before he ſhould be compelled to plead to the new Action.

But it was not granted, becauſe he had no Vexation, the Verdict being for him; but if it had been againſt him, or that he had been nonſuited, he ſhould not have brought another Action before the Coſts of the firſt had been paid, becauſe it was a Vexation to bring a new Action.

Kiffin *verſus* Willis & Evans.

TROVER was brought againſt two Defendants; one pleaded Not guilty, and a Verdict againſt him: The other pleaded a Releaſe of all Actions, &c. and had a Verdict for him. 2 Roll. Abr. 412.

Sir William Williams moved for Judgment against the other Defendant who was found guilty; but it was denied, because the Trover being joint, a Releaſe of all Actions diſcharged both. Vide the Preface to Hobart's Reports in Cook *verſus* Jennour.

Tippin *verſus* Coſon.

1 Vent. 272. 1 Mod. 98, 121, 150, 237. 2 Lev. 75. 2 Salk. 675. Show. Par. Ca. 104. ante 153. Davis & Speed.

IN Ejectment upon the Demiſe of Lucretia Tippin, a ſpecial Verdict was found to this Purpoſe, viz.

That Edward Coſon being ſeized in Fee of the Lands in Queſtion, did in the Year 1656. in Conſideration of a Marriage then intended to be had between him and Frances Try, and of 1000 l. Portion, &c. make a Feoffment in Fee to the Uſe of himſelf and his Heirs, until the ſaid Marriage ſhould take Effect, and afterwards to Frances his intended Wife for Life, then to Truſtees and their Heirs during the Life of Edward, to ſupport contingent Remainders; then to the firſt, ſecond, &c. and ſo to the tenth Son of his Body in Tail-male, then to the Heirs Males he ſhould have by any other Wife; and for Want of ſuch Iſſue, then to the Heirs of the Body of the ſaid Edward; and for Want of ſuch Iſſue, then to his own Right Heirs.

In which Deed there was a Covenant to levy a Fine, which was levied accordingly to the ſaid Truſtees to the Uſes aforeſaid.

The Marriage took Effect, and Edward had Iſſue by the ſaid Frances, an only Daughter named Elizabeth, who married George Tippin by whom ſhe had Iſſue Lucretia Tippin the now Leſſor of the Plaintiff.

Elizabeth dying in the Life-time of Edward Coſon her Father, he levied another Fine, and made a new Settlement of the Lands, viz. to himſelf for Life, then to his Wife for Life, Remainder to the Defendant and his Heirs with Warranty, &c.

The Queſtion was, what Eſtate was veſted in Edward by the firſt Settlement, that is, Whether the Heirs of his Body ſhall take by Purchaſe or by Deſcent? For if by Purchaſe, then the Fine which he levied afterwards, is no Bar to them.

It was argued for the Plaintiff, that they muſt take by Purchaſe, becauſe where the Anceſtor has no Eſtate for Life, as in this Caſe he hath not, thoſe cannot be Words of Limitation.

That Edward had no Eſtate for Life precedent to theſe Words, if he had, it muſt be either,

(1.) By expreſs Limitation.
(2.) Or by Operation of Law.

'Tis not by expreſs Limitation, for the Eſtate which is limited to him, is gone by the Marriage, and then 'tis immediately in the Wife, and he is not ſo much as named again but in the Limitation where the Inheritance upon Failure of having Iſſue-male, is fixed in the Heirs of his Body.

Neither can any Eſtate ariſe to him for Life in Right of his Wife by Operation of Law, but only ex poſt facto, viz. after the Death of his Wife.

Object. The only Authority which looks to the contrary, is the Caſe of Fenwick and Mitford, which was a ſpecial Verdict in Ejectment upon a Leaſe made by Anthony Mitford, who being ſeiſed in Fee, conveyed the Lands to the Uſe of Jaſper his eldeſt Son and his Wife, and to the Heirs males of the Body of the ſaid Jaſper, Remainder to his own right Heirs. 2 Cro. 321. Moor Caſe 437. Co. Lit. 22. b. Dyer 54 b.

Jaſper had Iſſue Mary only, and died; now tho' Anthony had no particular Eſtate, yet the Remainder limited to his right Heirs, was in him as his ancient Reverſion, and was never out of him, but it did not veſt in his right Heirs as a Remainder, by Way of Purchaſe, becauſe the Law created an Uſe in him during his Life (tho he had departed with the whole Fee) till the Future Uſe ſhould ariſe; and where-ever the Anceſtor takes an Eſtate for Life, be it how it will, either by expreſs Limitation or Operation of Law as in that Caſe, and then follows a Limitation to his right Heirs, they ſhall not take by Purchaſe, but by Deſcent.

Anſw. But the Caſes are not parallel, or guided by the ſame Reaſon, for the Eſtate moving from Anthony Mitford, ſo much of the Uſe as was not limited was in him as a Reverſion, which was the very Reaſon of that Judgment; but here Edward hath expreſly limited all the Eſtate to Truſtees during his own Life, and the Remainder being afterwards limited to the Heirs of his Body, that muſt be a new created Eſtate, and conſequently the Heirs muſt take by Purchaſe.

'Tis true, a Man cannot make his own right Heirs Purchaſers by the Name of Heirs, either in a Conveyance by Way of Uſe, or by his laſt Will, but he may make them ſo when an Eſtate Tail is given, becauſe that is a new created Eſtate different from what the Law makes.

As

1 Rep. 95. b. Shelley's Caſe.

As if a Feoffment in Fee be made to the Uſe of the Feoffor for Life, then to the Uſe of his Heirs, and of the Heirs males of their Bodies. The Word Heirs here is a Word of Purchaſe; for if it ſhould not, then the Words which follow, viz. the Heirs males of their Bodies, would be void.

1 Mod. 226, 237.

There is a Reſolution in Southcott and Stowell's Caſe, which ſeems to the contrary, viz. Thomas had Iſſue two Sons, Sir Popham his eldeſt Son, William his youngeſt Son.

Upon the Marriage of his eldeſt Son he covenanted to ſtand ſeized to the Uſe of his ſaid Son, and of the Heirs males of his Body; and for Want of ſuch Iſſue, to the Heirs males of the Body of the Father, Remainder to his own right Heirs.

Sir Popham had Iſſue Edward, and four Daughters.

Thomas the Father died, and Edward the Grandſon died without Iſſue.

It was argued in that Caſe, That if Thomas had any Eſtate it muſt be a Fee-ſimple, upon Suppoſition that the old Uſe remained in him, and that William who was the Heir male of the Family, ſhould not take by Deſcent, becauſe his Father had no Eſtate for Life to ſupport the Remainder limited to the Heirs males of his Body, and therefore it ought to go to the Daughters who were the Heirs general.

But it was adjudged, that William their Uncle ſhould take by Deſcent as Heir male of the Body of Thomas who had an Eſtate for Life (as they held) by Implication, and ſo the Tail was executed in him.

1 Mod. 121, 159.

The like Reſolution was in Michael Mitford's Caſe; he had Iſſue, Robert by a firſt Venter.

Afterwards he married a ſecond Wife named Jane: By her he had Iſſue, Ralph, who had Iſſue Robert. Michael upon his ſecond Marriage covenants to ſtand ſeiſed to the Uſe of his Heirs males to be begotten on the Body of Jane, Reverſion to his own right Heirs.

It was held that Michael had an Eſtate for Life by Implication, and the Tail likewiſe executed in him.

But neither of theſe Caſes come up to the Point now in Queſtion, but differ very much; becauſe here the Fee-ſimple was abſolutely veſted in the Truſtees during the Life of Edward; ſo that he could not have an Eſtate for Life either by Implication, or by Operation of Law.

(2.) A ſecond Point was made viz. If it ſhould be adjudged that they take by Purchaſe, then whether a collateral Warranty will not bar the Plaintiff, who is an Infant?

But this was not much inſiſted on, for it was generally agreed, that the Warranty could not have any Effect, becauſe it was in the Caſe of an Infant, and that if ſhe had been of full Age, it would not have prevailed, becauſe theſe collateral Warranties are not much favoured in Law.

Econtra. Thoſe who argued for the Defendant made theſe Points:

(1.) If no Eſtate for Life was expreſly limited to him, yet ſuch an Eſtate he had by Way of reſulting Uſe.

(2.) And that the laſt Limitation to him and his Heirs will make ſuch an Eſtate.

As to this Matter it was ſaid, that if Edward had an Eſtate for Life, by Way of reſulting Uſe, then his Heirs could not take by Purchaſe; and that it was plain he had ſuch an Eſtate, becauſe the Reverſion of the Fee being not diſpoſed by him, it muſt neceſſarily follow, that the Uſe of that Fee continued ſtill in him, and cauſed an Eſtate for Life, till the future Uſe ſhould ariſe; which Eſtate for Life being always in eſſe, was executed by the Statute to the Poſſeſſion.

And tho' the Limitation to his right Heirs comes after the Heirs of his Body, yet that will make no Alteration, becauſe not only Words but Sentences may be tranſpoſed to make the Deed anſwer the Intent of the Party.

But admitting there could not be any ſuch Tranſpoſition by the Rules of Law, then it was ſaid, that the Limitation to the right Heirs of Edward was void, becauſe 'tis no more than what the Law would have caſt upon them without thoſe Words; and that the precedent Limitation, viz. to the Heirs of his Body, ſhall not be taken as a new created Eſtate, and different from what he had before in the Land, but as the antient Uſe thereof, which was never ſeparated from his Perſon; for the Heirs of his Body are included in himſelf, and by Conſequence ſuch a Limitation muſt carry the Uſe to him; and this is ſufficient to create an Eſtate for Life in him, as reſulting out of the antient Fee; and therefore his Heirs muſt take by Deſcent.

This

This was the very Reaſon of the Judgment in Fenwick and Mitford's Caſe, in which there was a ſolemn Reſolution made upon Conference with all the Judges of England, the Authority of which Judgment hath not been yet ſhaken.

No Man will deny, that if a particular Eſtate for Life had been limited to him by his own Act, and afterwards to the Uſe of his Iſſue in Tail; and for Default of ſuch Iſſue, to his own right Heirs; but that the Reverſion of that Fee expectant upon the Determination of the Tail, had been ſtill in him; for tho' he had departed with the Fee, as Edward did to the Truſtees in this Caſe, yet he did not paſs away the Reverſion of that Fee, for that was limited to his right Heirs.

Now if ſuch a Limitation is not void for the Reaſon above-mentioned, then it muſt neceſſarily create an Uſe in him for Life until the future Uſe ſhould happen, becauſe he could have no right Heirs during his own Life: And my Lord Coke tells us 'tis the ſame Thing where the Eſtate is created by Implication of Law, or by the Act of the Party; for which way ſoever it be, an Eſtate for Life he had; and the Contingency never happening, he had by that means an Eſtate-tail in him which was barred by the ſecond Fine.

1 Mod 122. Agreeable to this was the Opinion of my Lord Hale in a later Caſe of the ſame Nature; he held, That by the Limitation to his own right Heirs, no new Eſtate was raiſed, but the Reverſion of the old Eſtate in Fee was qualified in the Feoffor or Covenantor by Operation of Law, and made an Eſtate for Life in him to ſerve the Limitation: Theſe are his very Words.

Note, There was no Judgment given in this Caſe upon the firſt Argument; but the Court enclined, that no Eſtate for Life did ariſe to Edward to ſupport the ſubſequent Limitations; ſo that the Fee-tail was not executed in him, and by Conſequenee the Fine no Bar.

Walter *verſus* Rumball.

Hill. 4 & 5 Willielmi & Mariæ. *Rot.* 272.

The Placita. 1 Salk. 147.

Placita coram Domino Rege & Domina Regina apud Weſtm. de Termino ſancti Hillarii Anno Regni Domini Willielmi & Dominæ Mariæ nunc Regis & Reginæ Angliæ, &c. 4 & 5. Rot. 272.

Memorandum.

Southton. ff. MEmorand. quod alias ſcilt. die Sabbati prox. poſt Octab. Sancti Martini Termino Sancti Michaelis Anno Regni Domini Willielmi & Dominæ Mariæ nunc Regis & Reginæ Angliæ &c. tertio coram iiſdem Domino Rege & Domina Regina apud Weſtm. venit Willielmus Walter Clericus per Ricum. Hill. Attorn. ſuum & protulit hic in Curia dictorum Domini Regis & Dominæ Reginæ tunc ibidem quandam billam ſuam verſus Edmundum Rumball in Cuſtod. Marr. &c. de plito. tranſgreſ. ſuper caſum & ſunt pleg. de proſ. ſcilt. Johannes Doe & Richardus Roe quæ quidem Billa ſequitur in hæc verba ff. Southton ff. Willielmus Walter Clericus queritur de Edmundo Rumball in Cuſtod. Mar. Mareſc. Domini Regis & Dominæ Reginæ coram ipſis Rege & Regina exiſten. pro eo videlt. quod cum præd. Willielmus primo die Novembris Anno Regni Domini Willielmi & Dominæ Mariæ nunc Regis & Reginæ Angliæ &c. tertio apud Andover in Com. præd. poſſeſſionat. fuit de Averiis bonis & catallis ſequen. videlt. de ſex porcis duodecim porcellis Anglice **Pigs** tribus vaccis duobus juvencis Anglice **Bullocks** quatuor equis centum & duobus ovibus pretii centum librar. legalis monetæ Angliæ & de duabus ſtruibus fœni Anglice **Stacks of Hay** una ſtrue hordei una ſtrue piſarum & una ſtrue tritici ad valentiam al. Centum librarum ſilis. legalis monetæ Angliæ ut de averiis bonis & catallis ſuis propriis & ſic inde poſſeſſionat. exiſten. præd. Willielmus poſtea ſcilt decimo die Novembris Anno tertio ſuprad. apud Andover præd in Com. præd. averia bona & catalla præd. extra manus & poſſeſſion. ſuas caſualiter perdidit & amiſit quæ quidem averia bona & catalla ſic amiſſa poſtea ſcilt die anno & loco ult. ſupradict. ad manus & poſſeſſionem ipſius Edmundi per inventionem devenerunt præd. tamen

Trover for Cattle, Goods and Chattels.

Edmundus ſciens averia bona & catalla præd. fore averia bona & catalla ipſius Wilielmi propria & ad ipſum Willielmum de jure ſpectare & pertinere machinans tamen & fraudulenter intendens eundem Willielmum in hac parte callide & ſubdole decipere & defraudare averia bona & catalla præd. licet ſæpius requiſit. &c. eidem Willielmo nondum deliberavit ſed præd. Edmundus averia bona & catalla illa poſtea ſcilt. duodecimo die Novembris anno tertio ſupradicto apud Andover præd. in Com. præd. in uſum & commodum ſuum proprium convertit & diſpoſuit unde idem Willielmus dicit qd. ipſe deteriorat. eſt & dampnum habet ad valentiam ducentarum librarum Et inde produc. Sectam, &c.

Imparlance. Et modo ad hunc diem ſcilt. diem Lunæ prox. poſt Octab. Sancti Hillarii iſto eodem Termino uſque quem diem præd. Edmundus habuit licentiam ad Billam præd. interloquendi & tunc ad reſpondend. &c. coram Domino Rege & Domina Regina apud Weſtm. venit tam præd. Willielmus per Attorn. ſuum præd. quam præd. Edmundus per Hen. Curle Attorn. ſuum & idem Edmundus defend. vim & injur. quando &c. Et dicit quod ipſe non eſt inde culpabilis Et de hoc ponit ſe ſuper patriam & præd. Willielmus inde ſimilit. &c. Ideo ven. inde jur. coram Dom' Rege & Domina Regina apud Weſtm. die Lunæ 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 prædict. de placito præd. per jur. poſit. inde inter eos in reſpectum coram Domino Rege & Domina Regina apud Weſtm. uſque diem Mercurii prox. poſt quinden. Paſchæ extunc prox. ſequen. niſi Juſtic. Domini Regis & Dominæ Reginæ ad Aſſiſas in Com. præd. capiend. aſſign' prius die Martis undecimo die Aprilis apud Caſtrum Winton' in Com' præd. per formam Statuti &c. ven. pro defectu Jur. &c. Ad quem diem coram Domino Rege & Domina Regina apud Weſtm venerunt partes præd. per Attorn. ſuos præd. & præfat. Juſticiarii dict. Domini Regis & Dominæ Reginæ ad Aſſiſas coram quibus &c. miſ. hic recordum ſuum coram eis habitum in hæc verba ſcilt. Poſtea die *The Poſtea.* & loco infracontent. coram Willielmo Dolben milite un. juſticiar. Domini Regis & Dominæ Reginæ ad placita coram ipſis Rege & Regina tenend. aſſign. & Johanne Powell mil. un Juſticiar. dicti Domini Regis & Dominæ Reginæ de Banco Juſticiar. eorundem Domini

Not guilty pleaded.

mini Regis & Dominæ Reginæ ad Aſſiſas in Com. Southton. capiend. aſſign. per formam Statuti &c. ven. infranominat. Willielmus Walter Clericus per Attorn. ſuum infracontent. & infraſcript Edmundus Rumball licet ſolempniter exact. non venit ſed defalt. fecit Ideo Jur. unde infra fit mentio capiatur verſus eum per defalt. & jur. jurat. illius exact. quidam eorum viz. Johannes Hale Franciſcus Kent &c. venerunt & in jur. ill jurat. exiſtunt & quia reſid. jur. ejuſdem Jur. non comperuer. ideo al. de circumſtantibus per Vic. Com. præd. ad hoc elect. ad requiſitionem ipſius Willielmi Walter ac per mandat. Juſticiar. prædict. de novo apponuntur quorum nomina panello infraſcript. affilantur ſecundum formam Statuti in hujuſmodi caſu inde nuper edit. & proviſ. ac Jur. ſic de novo appoit. videlt. Ricardus Hawes & Joſephus Watts exact. ſimiliter venerunt qui ad veritat. de infracontent' ſimul cum aliis Juratoribus prædict. prius ad hoc impanellat. & jurat. dicend. elect. triat. & jurat. dicunt ſuper ſacramentum ſuum quod quidam Johannes Smith Armiger decimo ſexto die Octobris Anno Regni Domini Caroli ſecundi nuper Regis Angliæ &c. viceſimo octavo ſeiſit. fuit in dominico ſuo ut de feodo de & in uno horreo & ducentis Acris terræ cum pertin. jacen. & exiſten. in Foreſta de Chute una parte inde infra hundred. de Kinnerſley in Comitatu Wilts. & altera parte inde infra hundred. de Andover extra in Com. Southton & ſic inde ſeiſit. exiſten. poſtea ſcilicet decimo ſeptimo die Octobris iſto eodem anno per quandam indenturam ſuam ſigillo ſuo ſigillat. & Jur. præd. modo hic in evidentias oſtenſ. geren. datum eodem decimo ſeptimo die Octobris dimiſit tenementa præd. cum pertin. cuidam Willielmo Walter patri p̄d. Willielmi Walter modo querentis pro termino 21 annorum abinde prox. ſequen. & plenar. complend. & finiend. reddend & ſolvend. proinde durante eodem termino eidem Johanni Smith hæredibus & aſſignatis ſuis annual. reddit. quadraginta & trium librarum & decem ſolidorum legalis monetæ Angliæ annuatim & quolibet anno ad Feſtum Annunciationis beætæ Mariæ Virginis & ſancti Michaelis Archangeli per equales portiones quodq; virtute dimiſſionis illius præd. Willielmus Walter pater poſtea ſcilt. eiſd. die & anno in dimiſſa præmiſſa intravit & fuit inde poſſeſſionat. pro & durante termino præd. reverſion. inde eidem Johanni Smith adtunc & adhuc ſpectan. quodque quadraginta & ſex libræ & octo denar. de redditu præd. viceſimo primo

And eight more.

Tales de circumſtantibus.

Special Verdict.

Seiſin in Fee.

And demiſed by Indenture.

Leſſee entred and was poſſeſt.

die Octobris Anno Domini Milleſimo ſexenteſimo nonageſimo primo eidem Johanni Smith aretro fuerunt & minime ſolut. per quod præd. Edmundus Rumball eodem viceſimo primo die Octobris per mandatum & ordinem cujuſdam Henrici Garnons adtunc & continue poſtea hucuſque exiſten. Ballivus præfat. Johannis Smith eodem Johanne Smith adtunc & continue poſtea hucuſq; exiſten. in partibus tranſmarinis bona & catalla in narratione infraſcript. interius ſpecificat. adtunc exiſten. bona & catalla ipſius Willielmi Walter modo querentis in & ſuper dimiſſa præmiſſa adtunc levan. & cuban. exiſten. videlicet unam partem inde ſuper iſtam partem dimiſſorum præmiſſorum præd' quæ jacet infra præd. hundred. de Kinnerſly in Com. Wilts & alteram part. dimiſſor. p̄miſſor. præd. quæ jacet infra præd' hundred. de Andover extra in Comitatu Southamp. pro. redditu præd. ſic in aretro exiſten. diſtrinxit & deinde & de cauſa diſtrictionis ill. eidem Willielmo eiſdem die & Anno notitiam dedit juxta formam ſtatuti in hujuſmodi caſu nuper edit. & proviſ. intitulat. **An Act for the Enabling the Sale of Goods diſtrained for Rent in caſe the Rent be not paid in a reaſonable Time,** Et jur. præd. ſuper ſacramentum ſuum præd. ulterius dicunt quod ad aliquod tempus poſt diſtriction. præd. præd. Willus Walter modo queren. non tulit vel p̄ſecut' fuit aliquod Breve ad replegiand. bona & catalla præd. per quod poſt quinq; dies elapſ. & expirat. fuiſſent poſt notitiam præd. eidem Willielmo & ante exhibitionem billæ ipſius Willi ſcilicet ſecundo die Novembris Anno Domini 1691. ſupradicto præd. Edmundus Rumball ſimul cum Conſtabulario hundred. de Kinnerſley præd. pro tempore tunc exiſten. cauſavit bona & catalla præd. in narratione præd. interius mentionat. infra hundred. de Kinnerſly præd. appretiari per duos appreciatores ad appreciand. eadem vere ſecundum optimam intelligentiam eorum infra hundred. ill. jurat. per Conſtabularium ejuſdem hundredi de Kinnerſley præd. in præſentia Conſtabularii hundred. de Andover extra præd. quodq; poſt appreciation. iſtam bonorum & catallorum præd. & ante exhibitionem billæ ipſius Wilielmi Walter præd. Edmundus Rumball quandam parcellam bonorū & catallorum ill. quibuſdam perſonis juratoribus præd. ignotis vendidit ſed iidē Juratores ſuper ſacramentum ſuum præd. ulterius dicunt quod bona & catalla ill. ſic vendit. non fuerunt ad valentiam reddit. præd ſic ut præfertur aretro exiſten. nec ad valentiam reddit. ill. ſic aretro

Rent Arrear.

And the Defendant by order of the Landlord's Bailiffs (the Landlord being beyond the Seas) diſtrained for the Rent-Arrear upon the Lands ſet in two Hundreds (the Lands lying in two Hundreds.)

The Act for Diſtreſſes for Rent.

No Replevin ſued out.

The 5 days being expired.

The Defendant with a Conſtable cauſed the Goods to be appraiſed.

And afterwards ſold the Goods.

The Goods were not of the Value of the Rent

aretro exiſten. vendit. fuerunt & juratores pred ſuper ſacrum ſuum prædict. ulterius dicunt quod bona & catalla præd. appretiat. fuerunt modo & forma præd. & non aliter vel alio modo quodq; prædict. Edmundus Rumball reſid. bonorum & catallorum prædict. non vendit. poſt appreciation. præd cepit & aſportavit ad vendendum cum opportunum eſſet & bona & catalla illa adhuc in cuſtodia ſua detinet ſed utrum ſuper tota maneria prædict. per juratores prædict. modo & forma præd. compert. præd. Edmundus Rumball culpabilis ſit de præmiſſis ei interius per narrationem illam impoſit. iidem juratores penitus ignorant & pet. inde adviſamentum CuriæDomini Regis & Dominæ Reginæ nunc hic & ſi ſuper materia illa videbitur Curiæ hic quod p̄d Edmundus Rumball ſit culpabilis de præmiſſis ei interius per narrationem præd. impoſit.

And the Reſidee unſold he hath yet in his Cuſtody.

tunc iidem juratoresdicunt ſuper ſacram. ſuum quod præd. Edmundus Rumball eſt culpabilis inde prout præd. Wilſus Walter interius inde verſus eum queritur & tunc aſſidunt dampna ipſius Wilſi Walter occaſione inde ultra miſ. & cuſtag. ſua per ipſum circa ſectam ſuam in hac parte appoſit. ad octoginta & ſex libras & pro miſis & cuſtagiis illis ad quadraginta ſolidos Et ſi ſuper tota materia prædict. per juratores præd. modo & forma præd. compert. videbitur Curiæ hic qd. præd. Edmundus Rumball non eſt culpabilis de præmiſſis ei interius per narrationem præd. impoſit. tunc iidem Jnratores ſuper ſacramentum ſuum præd. dicunt quod præd. Edmundus Rumball non eſt culpabilis de præmiſſis ei per narrationem præd. interius impoſit. prout præd. Edmundus Rumball interius inde placitando allegavit Et quia &c.

Walter

Walter *verſus* Rumball.

The Caſe.

1 Salk 147. IN Trover, upon not guilty pleaded, a ſpecial Verdict was found, viz. That John Smith Eſq; was ſeized in Fee of a Barn, and 200 Acres of Land in the Foreſt of Chute, whereof part was in the Hundred of Kinnerſly in Wiltſhire, and the other part within the Hundred of Andover in Hampſhire.

That being ſo ſeized on the 17th of October in the 28th Year of the Reign of King Charles the Second, he did demiſe the ſame to William Walter the Father of the Plaintiff for 21 Years, under the yearly Rent of 43 l. 10 s.

That by Virtue of that Demiſe the ſaid Walter entred; and that 46 l. 8 d. was in arrear for Rent, and that the Defendant by the Order of the Bailiff or Steward of Mr. Smith who was beyond Sea diſtrain'd the Goods in the Declaration, for Rent, &c. being Levant and Couchant upon the Lands demiſed.

That part thereof was within the Hundred of Kinnerſly, and the other part within the Hundred of Andover.

That the Defendant gave Notice of the Diſtreſs made by him, and that the Plaintiff did not replevy the Goods.

That five Days after ſuch Notice, the Defendant with the Conſtable of the Hundred of Kinnerſly, and in the Preſence of the Conſtable of the Hundred of Andover, cauſed the Goods ſo diſtrained as aforeſaid to be appraiſed by two Perſons ſworn for that Purpoſe by the Conſtable of the Hundred of Kinnerſly, and in the Preſence of the Conſtable of the Hundred of Andover.

That after the Appraiſement the Defendant ſold ſome part, but not to the Value of the Rent in arrear.

That he carried away ſuch Goods, which remained unſold, in order to ſell them when he ſhould have an Opportunity; and ſo make a general Concluſion.

Thoſe who argued for the Plaintiff took ſeveral Exceptions to the Verdict, viz.

That it was not found that the Goods were ſold with the Concurrence of the Sheriff, or Conſtable, which they ſaid was contrary to the Act; for by it they are required to be preſent as well at the Sale as the Appraiſement; the Reaſon is, becauſe if there ſhould be any Overplus, it muſt be left in their Hands.

Another Objection was, That 'tis not found that the Goods were sold for the best Price which could be gotten for the same, and if sold at an under Rate, such Sale shall not conclude the Party.

Another Objection was, That 'tis not found the Defendant had any Direction to sell the Goods; 'tis only said that he took them by the Authority of the Landlord, who must be intended the Party distraining, and he might have kept them still as a Distress.

But these Things were not much insisted on, the material Exceptions were two,

(1.) 'Tis not found that Notice was left at the most notorious Place of the Premises, but only that it was given to the Plaintiff himself, who was Owner of the Goods, when it should have been given to the Tenant of the Lands by the express Words of the Act,

(2.) That he hath not caused the Goods to be appraised pursuant to the Statute.

As to the first Point, if the Statute was out of the Case, here is enough found to make the Defendant Guilty; for at the Common Law no Man was to be divested of his Property, but by the Judgment of his Peers by the Law of the Land.

'Tis true, this Statute hath made some Alteration of the Common Law; but if the Authority thereby given is not pursued, or if the Party abuse such Power which the Act invests him withall, he is a Trespasser ab initio.

'Tis like the Case where a Defendant as Bailiff of a Manor, to which Waifs and Estrays did belong, justified the taking of a Gelding as an Estray, which he kept till the Plaintiff releised him. 2 Cro. 156. 8 Rep. 146. b.

The Replication was, that before the Releizure the Defendant worked the Gelding, and upon a Demurrer he had Judgment; for 'tis an Abuse to work an Estray, because the Defendant had it only by Authority of Law, and the Abuse thereof makes him a Trespasser ab initio.

But because this Case will depend upon the Construction of the Statute, 'tis necessary to consider the Words, viz.

It requires that where Goods are distrained for Rent, and the Tenant or Owner shall not within 5 Days next after such Distress, and Notice thereof, &c. left at the chief Mansion-house, or other most notorious Place on the Premises repleby the same, that then after such Distress and Notice, and

and five Days expired, the Perſon diſtraining may with the Sheriff, Under-Sheriff or Conſtable of the Hundred, Pariſh, or Place where ſuch Diſtreſs was taken, cauſe the Goods to be appraiſed by two Men, to be ſworn by them to appraiſe them truly, and after ſuch Appraiſement may ſell the ſame for the beſt Price that can be gotten, &c. leaving the Overplus in the Hands of the Sheriff, Under-ſheriff, or Conſtable, &c.

Now the Defendant hath not purſued the Authority given by this Clauſe either within the Words or Meaning thereof; and tho' it is a remedial Law, yet conſidering the hard Methods it doth preſcribe, it ought to be taken as a penal Law, and ſo to be conſtrued very ſtrictly.

That the Defendant hath not purſued the Authority given, &c. appears thus, viz.

'Tis found that the Goods belonged to the Plaintiff, and that Notice was given to him of the Diſtreſs, when by the expreſs Words of the Act, it ought to have been given to the Tenant of the Lands, for otherwiſe the Deſign of this Law is not ſatisfied, becauſe the Tenant of the Lands might have paid the Rent, and ſaved the Goods; and if not, he might have replevied them; and 'tis not found that he refuſed to replevy them; ſo this Circumſtance is not purſued.

That a bare Poſſeſſion without a Property will entitle one to a Replevin, will not be denied; for 'tis frequent in our Books, that Treſpaſs will lie for him in whoſe Poſſeſſion Agiſtments are againſt any one who ſhall take them away.

9 H. 4. 23. b.
14 H. 4. 28. b.
48 Ed. 3. 20. b.
Br. tit. Treſpaſs 68.

'Tis true, the Act mentions the Owner who hath a ſpecial Property as well as the Tenant, who hath a general Property in the Goods; but it ſeems plain, that upon the Frame and Conſtruction of this Clauſe the Perſon who hath the general Property ought to have Notice of the Diſtreſs, becauſe (as it has been obſerved) he might have replevied; and ſince no Man can diſcharge the Duty ſo well as the Tenant, therefore he ought to have the firſt Notice of the Diſtreſs.

He is likewiſe to be conſidered in the Conſequence of this Caſe; for if his Cattle are taken away, he cannot cultivate the Land.

2d Point. He hath not cauſed the Goods to be appraiſed purſuant to the Statute.

Becauſe a joint Authority is given to the Perſon diſtraining and to the Sheriff, Under-Sheriff and Conſtable of the Hundred, &c. where the Diſtreſs is taken, to ſee the Goods appraiſed: Now if the

the Appraisement was without them, or the Appraisers not sworn, or if sworn but not by a proper Officer, all is void.

And as to that the Distress was taken in two Hundreds, and the Appraisement by Persons sworn by one Constable and not of that Hundred where part of the Distress was taken; now the Statute requires the Constable of the Hundred where the Goods were taken, to see them appraised; so that both the Constables of both Hundreds had an Authority over this Distress, because taken in two Hundreds, and the Constable of one Hundred alone had no Power over the Goods taken out of his Hundred.

If a Man grant the Manor of Dale in the County of Wilts, and it extends as well into Berks as the other County, yet no more passeth than what is in Wilts. 2 Roll. Abr. 50.

The Statute of W. 2. gives Process in an Action of Waste against Guardians, Tenants in Dower, &c. and enacts, That if the Defendant do not appear upon the Summons, Attachment and Distress, the Sheriff shall take with him twelve Men, and go to the Place wasted to enquire of the Waste; this cannot be done by any other Person than the Sheriff, and it must be done at the very Place wasted, and no where else. Cap. 14.

So the Statute of Merton enacts, That where a Man is disseised, and recovereth in an Assize of Novel disseisin, and is again disseised, by the former Disseisor, that there he may have a Writ of Redisseisin directed to the Sheriff, commanding him, that assumptis secum coronatoribus he shall go to the Land in Person, &c. 20 H. 3. c. 5.

The Sheriff took with him but one Coroner, the other being sick; and upon Error to reverse a Judgment in Redisseisin, it was reversed for that very Reason, because the Authority given by the Statute was not strictly pursued, and yet that was a remedial Law. 2 Bulst 93.

The Distress in this Case is in Nature of an Execution, and therefore being taken in several Hundreds, the Constables of both these Hundreds should have caused the Appraisement to be made.

Econtra. The Questions do arise upon the Construction of this Statute, the Preamble whereof shews that it was made for the Benefit of the Landlord, and not of the Tenant, and therefore Notice to the Person of the Owner of the Goods is sufficient; for what Reason can be given why it should be left at the Mansion-house, but that the Owner might have Notice by his Tenant to replevy; and it could never be intended that Notice should be given to both, because 'tis in the Power of either of them to make a Replevin.

'Tis the Owner of the Goods that is principally concerned, and therefore a personal Notice to him is much better than to be left either at the Dwelling-house, or any other notorious Place upon the Lands from which the Distress was taken.

2. As to the second Point, the Act justifies the Sale; for 'tis not in the Nature of a penal Law, and so to be strictly pursued, but 'tis a remedial Law, and must be construed according to Equity.

It proposes a Grievance, and then provides a Remedy by Appraisement and Sale of Goods, if not replevied within a certain Time therein limited.

This Appraisement was made by the Direction of one Constable in the Presence of the other, and the Concurrence of both or either of them seems not to be so necessary in any Thing relating to the Appraisement, as to the giving the Oath to the Appraisers.

The Constable is a known Officer in the Law; all which he is required to do by this Act may be done by Parol, viz. he may give Directions that the Appraisement may be duly made; and therefore his Presence only is sufficient.

His Assistance is for the Benefit of the Landlord, in order to prevent any Breach of the Peace, and for that Reason this Law ought to have the most favourable Construction that can be made.

A small Matter will amount to an Aiding or Assisting in a criminal Matter, but much smaller in a civil Act, especially where 'tis for the Benefit of the Party; and here the Constables of both Hundreds being present, and one administring the Oath in the Presence of the other, shews this was not only the Consent, but the Act of both, for they both had Authority to do it; and 'tis sufficient if done by one, because there was no Necessity of administring two Oaths.

Neither is it material that the Constable of Andover was out of his Hundred, because he having a sufficient Authority given him by the Statute may execute it in any Place; and tho' he should administer an Oath out of the Hundred, the Court will make a Construction of the Statute so as to give a Remedy to the Party, if no Inconvenience is likely to ensue.

Then as to the driving of the Cattle out of the Hundred, 'tis but one Distress, and must be taken as such; and the Driving, &c. is but the Continuance of the Taking.

5 Curia.

Curia. Notice to the Owner is ſufficient; if not, 'tis ſupplied after a Verdict by the Words juxta formam Statuti notitiam dedit, &c.

It ſeems to be at the Election of him who diſtrans, to give Notice either to the Tenant, or to the Owner of the Goods.

Then as to the Diſtreſs, tho' it was taken in two Hundreds, they being contiguous, 'tis but one entire Diſtreſs, eſpecially ſince it was taken at one and the ſame Time, and for one entire Rent, and it ought to be put in one Pound; and therefore the Place where the Diſtreſs was driven, is the proper Officer within this Statute.

In Treſpaſs for taking of his Cattle in D. the Defendant juſtified for Damage-feaſant in his Freehold in S. from whence he brought them to the Pound in D. and traverſed, that he took them there; this was adjudged repugnant, becauſe the Driving them to the Pound in D. was only a Continuance of the firſt Taking. Latch. 60.

Judgment was given for the Defendant.

Rex & Regina *verſus* Walcott.

A Writ of Error was brought by John Walcott to reverſe an Attainder for a Treaſon committed by Thomas Walcott his Father. 1 Salk. 371. Caſes in Parl. 127.

Many Errors were aſſigned, this Caſe depending ſeveral Terms in Court, but the moſt material Error was in the Judgment it ſelf, viz. quod interiora ſua extra ventrem ſuum capiantur, omitting ipſoq; vivente comburentur. 2 Salk. 153, 106, 134. 632, 162. 167, 200. 261.

Theſe Words upon the firſt Argument ſeemed very eſſential, and ſeldom or never omitted in any of the Precedents of Judgments for Treaſon.

Thoſe who claimed the Eſtate under the King's Grant, perceiving this to be of ſome Weight, did in another Term move, that Mr. Tanner Clerk of the Indictments for London, might attend, which he did, and produced the Record of the Attainder of Mr. Walcott in Court, and alſo the Indictment upon which he was tried; and it appearing that thoſe Words were amongſt the Minutes taken by him, and indorſed on the Indictment, it was prayed that the Omiſſion might be rectified, and the Record amended by the Minutes.

But this was oppoſed by the Counſel on the other Side, becauſe if theſe Words ſhould be inſerted, there would be then two Records; and it could not be a Queſtion upon which of thoſe Words this Writ was brought; for certainly it muſt be upon the Record entred at length, and ſettled by Advice of Counſel, and not upon theſe ſhort Minutes taken by the Clerk.

1 Roll. Abr. 196. In the 14th Year of Caroli I. a Man was attainted of Murder before the Juſtices of Aſſize; he brought a Writ of Error, and aſſigned for Cauſe, that the Record certified by the Clerk of the Aſſize, was, viz. That he was indicted before the Juſtices, &c. on the 18th of March, and tried before the 20th of the ſame Month, which was an Error in Fact, becauſe it did not appear that there was any Continuance entred between thoſe Days, and tho' it was only a Miſpriſion in the Clerk in tranſcribing the Record, yet the Court would not ſuffer it to be amended, it being a Criminal Caſe.

If there is an Error in Drawing up the Record, this Court cannot amend it, but it muſt be done by that Court where the Judgment was given.

'Tis true, a Record of B. R. may be amended by another of the Common Pleas, but the Reaſon is, becauſe of Diminution alledged, which cannot be to the Seſſions of Gaol-delivery.

The Record not being amended, it was thus argued for the Plaintiff in the Writ of Error, viz. That the Omiſſion of theſe Words was in a neceſſary and not in a formal Part of the Judgment.

But in criminal Caſes, even Matters of Form are eſſential, and ſo held in this Court in the Caſe of the King and Tucker; and certainly if the Law takes Care that the Indictments ſhould be exact in Form, a much greater Care ought to be taken in the ſubſtantial Parts of the Judgment.

Ever ſince the Reign of H. 7. in almoſt all the Precedents theſe Words are in the Judgment: There are ſome few Caſes where they are omitted, but thoſe were either drawn up in Haſte, or might be purpoſely left out, when the King's Pardon was intended for the Criminal.

'Tis likewiſe true, that this is a Treaſon at the Common Law; and that the Statute of Ed. 3. preſcribes no Form of a Judgment in Treaſon; but yet this Judgment ſhall not be conformable to thoſe at the Common Law before the Reign of H. 7. becauſe all thoſe Judgments were defective and entred only in ſhort Notes, which was the true Reaſon of making the Statute of 29 Eliz. cap.

2. to confirm all Attainders of Treason made before that Time, which (as the Statute takes Notice) were either defective by Corruption, or negligent Keeping the Records.

The like may be said of the Year-Books, which mention only some short Notes of the Judgments in Treason; 'tis true, that of Humfrey Stafford is at length, but that Book and Brook in abridging of it are both mistaken; for the Roll is. that ante mortem corda scindantur. 1 H. 7. 24.

Judgments in Treason, which is the highest Offence that can be committed, ought to be certain and very exact; they were never yet discretionary, for that would be to give the Judges a Power to favour some, and pronounce more severe Sentences against others, which they never did, or will undertake to do; they only are to give such Judgments which are directed by Law.

Some Variances may be found both in my Lord Coke and Justice Staundford in Judgments of Treason, but they differ only in immaterial Circumstances, such as drawing on a Hurdle, &c. but agree in all other Parts; and where they are entred at length, these Words are always inserted. 3 Inst. 210. 211. Co. Entr. 361. b. 423,, 699. Rast. Entr. 413. b.

So that these Words are necessary or not; if not necessary, then those Judgments in which they are inserted, are all wrongful; but if necessary, then the Omission of them is short of what is required by Law, and by consequence the Judgment is erroneous.

Econtra. Those who argued for the King, held, that drawing, hanging and quartering are the substantial Parts of the Judgment, and the other Words are only in terrorem, and may be therefore omitted.

That the Precedents of Judgments in Treason are various, viz. some Things which have been actually done, as drawing on the Hurdle, have been omitted in the Judgment.

In that Judgment mentioned by my Lord Coke in 3 Inst. quod secreta membra amputentur are left out, and yet those Words are necessary in the Execution of the Judgment it self.

They are inserted in the Judgment in Staundford, but the Prince of Wales's Case doth not agree either with my Lord Coke or Staundford, for the Judgment there is only combustus, &c. but doth not say in conspectu suo. Fleta lib. 1. cap. 16. 2 Inst. 195.

In all the antient Precedents these Words are left out, and with great Reason; for 'tis inconsistent in Nature for a Man to be living after his Entrails are taken out of his Body.

In

31 Car. 2. Rot. 1. Rot. 343.

In 26 Car. Rot. 56. in the Notes of the Clerk of the Peace of Middlesex these Words are omitted.

So they are in Owen's Case, where the Court recited the Judgment at large.

The Statute of 25 Ed. 3. enacts what shall be Treason; yet that is declarative of the Common Law, and mentions no express Form of a Judgment for that Offence; so that notwithstanding that Act, the Judgment in Treason must be as it stood at the Common Law.

If so, there is no certain Judgment for this Crime found in any of the ancient Law-Books; for they vary from the Records, and differ from each other.

If the Judgment in Staundford is Law, which agrees with this, saving only in the Omission of these Words, then my Lord Coke is mistaken by leaving out that Circumstance of drawing upon a Hurdle.

From this it may be reasonably collected, that he had seen all the Records; and upon Consideration of the Judgments, it was his Opinion, that they did and might differ in Form according to the Circumstances of the Case.

But if either the Year-book of H. 7. or the Abridgment of that Case is Law, then Staundford and my Lord Coke are both mistaken; the Judgment there is at length, 'tis that he be sent back to the Tower, and put upon a Hurdle, and drawn through London to Tyburn, and there hanged; that his Heart be cut out before he is dead, his Head cut off, and his Body divided into four Parts, and left to the Will of the King.

Now this Judgment differs in many Things from the Judgment in my Lord Coke, for 'tis not said quod suspendatur per collum, nor quod vivus ad terram prosternatur, nor quod interiora sua extra ventrem capiantur, ipsoque vivente comburentur.

'Tis true, the Judgment in the Earl of Leicester's Case agrees with that in the 3d. Inst. but in Anno 5 R. 2. a Man was convicted before Tresilian Chief Justice, for conspiring the Death of the King, and the Judgment was quod viscera de corpore suo extrahantur, & igne comburantur, which might be after he was dead.

Neither have these Words been in all the later Precedents, but if they had, it can be no Objection in this Case because this Judgment is at the Common Law, and therefore to argue from modern Precedents, is not to the Purpose.

Beſides, the greateſt part of theſe Records vary from Staundford and my Ld. Coke, and yet they ſtand good in Law; and it cannot be ſhewed where the Omiſſion of theſe Words was ever objected; much leſs where an Attainder was ever reverſed for this Reaſon.

Therefore if this Judgment ſhould be erroneous for the Cauſe now objected againſt it, many more may be reverſed for the Omiſſion of more material Circumſtances.

Curia. The Attainder ought to be reverſed for the Omiſſion of theſe Words.

As this is the greateſt Crime, ſo it deſerves the greateſt Puniſhment, and it ſeems very agreeable to natural Juſtice that there ſhould be ſome Proportion between them.

Now tho' Death is ultimum ſupplicium, yet that is the Puniſhment for Felony, which is an Offence of a leſs Nature, therefore Treaſon ſhould be puniſhed not only cum ultimo ſupplicio, ſed cum aggravatione pœnæ corporalis, vel cum pœna qua nulla aſperior, becauſe 'tis a Crime committed againſt the Body Politick in the Perſon of the King who is the Head of the Kingdom, and of whoſe Preſervation the Law takes ſo great Care that it puniſheth the very Intention to commit Treaſon againſt him; but no Man can be guilty of a Felony without an Act done. Smith de Rep. Ang. 245. Finch's Law, cap. 28. 12 H. 8. 13.

When the Law of England appoints a particular Judgment for an Offence, 'tis not in the Power of the Judges to alter it either by any Addition or Diminution.

'Tis true, there is no Act of Parliament (as has been obſerved) which appoints a formal Judgment in High Treaſon, then it muſt be conſidered what Judgment was directed by the Common Law in ſuch Caſes, and it will appear that the Precedents for above 200 Years have been uniform without the Omiſſion of thoſe Words, or ſome of the ſame Import.

Theſe were mentioned, viz. in 1 H. 4. 1. in the Earl of Huntingdon's Caſe, where it is, That he be cut down alive, and his Entrails taken out of his Body and burnt.

In Humphry Stafford's Caſe, 'tis in the Year-book of H. 7. quod ante mortem cor ſcindatur; and Brook in abridging of that Caſe mentions the Judgment more fully viz. he tells us it was, Quod ante mortem corda ſcindantur, which comprehends all the internal Parts.

The next Attainder was of Edmond Bohun Duke of Buckingham; it was Anno 13 H. 8. 'tis mentioned in Stow's Chronicle p. 513. and the Judgment is with theſe Words.

In

fol. 699. In Anno 3 E. 6. John Bury was attainted, 'tis mentioned in my Ld. Cok's Entries with these Words.

fol. 387. Anno 1 Mariæ Robert Dudley was attainted, 'tis pleaded in the Earl of Leicester's Case in the Commentaries with these Words in that Judgment.

fol. 182. Then Justice Staundford in his Book of the Pleas of the Crown, which he wrote Anno 2 Eliz. mentions a Judgment in High Treason, with Words which amount to the same Sense viz. That his Entrails be burnt in his View.

'Tis so likewise in the Case of John Littleton which happened Anno 43 Eliz. 'tis pleaded in my Ld. Cok's Entries, and so is the Judgment in his 3d. Institutes.

fol. 422,423.

And then in the Case of my Ld. Stafford which was 33 Car. II. it was debated what Judgment should be given against him, and a Motion being made that he should have Judgment to be beheaded, 10 of the Judges were consulted if any other Judgment should be given than what was usual in such Cases, Whether it would work an Attainder of Blood? They were all of Opinion that they could not take Notice of any Judgment in the King's Courts but what was appointed by Law; and thereupon the Lord High Steward pronounced the ordinary Judgment, viz. that his Bowels should be ripped up before his Face and thrown in the Fire.

As to the Objections and Precedents produced to maintain a contrary Opinion, they may receive this Answer.

Object. First, That this Judgment is not erroneous by Reason of this Omission, because the Words vivus ad terram prosternatur are of the same Sense and Signification.

Answ. Those Words are in all the Precedents cited before, but would not have been sufficient if the subsequent Words viz. ipsoq; vivente comburentur, had been left out.

Object. The Case of David Prince of Wales has been objected, which happened Anno 9 Ed. 1. 'tis mentioned by Fleta, that he detractus suspensus decollatus dismembratus & combustus fuit, but doth not say in conspectu suo.

Lib. 1. c. 16.

Answ. This was a Judgment in Parliament, which differs from the usual Judgment not only in this, but in many other Things, as may be seen in Cotton's Abaidgment, 401.

2 Inst. 195.

5 There

There are 20 other Judgments in Treason before the 25th of Ed. 3. in which these Words are omitted; but it doth not appear by the Books for what Species of Treason those Attainders were.

But those Judgments were not only defective in this, but in many other Parts thereof; for 'tis not mentioned in any of them where the Quarters shall be disposed, &c.

So in those Judgments in 21 R. 2. Rot. 22. and in Easter Term against Henry Roper there was the same Defect; and in Zouch and Manner's Case it was defective in more Particulars, viz. Quod Secreta membra amputentur & in igne ponantur, quod interiora extra ventrem capiantur & in igne ponantur & ibidem comburentur, is all left out.

So that these and all other Precedents which can or may be produced before the Reign of H. 4. signify but little to prove these Words may be omitted in Treason for conspiring the Death of the King, because in those Days they were very negligent in entring of Judgments, and therefore (as has been observed) the Statute of 29 Eliz. was made to confirm those irregular and mistaken Entries.

There may be some Judgments of a later Date produced, wherein these Words were left out, it may be in the later end of the Reign of King Charles II. but they were against Popish Recusants, who had neither Lands or Goods to forfeit, and so little Care was likewise taken in entring of those Judgments.

The giving of Judgment against Malefactors is part of the Constitution of the Government, and therefore it was something extraordinary to affirm at the Bar, that Judgments in High Treason were discretionary, which indeed is only a softer Word for arbitrary.

If that Doctrine should once pass for Law, then the Courts which give Judgments might make new Punishments as they should think more suitable to the Crimes; they might pronounce a Jewish Judgment, viz. that the Offender should be stoned to Death; or a Turkish-Judgment, that he should be strangled; or a Roman Judgment, that he should be murder'd; or a French Judgment, that he should be broken on the Wheel; all which are contrary to the known Laws of this Realm.

This being then an essential part of the Judgment settled and stated by the Common Law of England, the Omission of these Words makes it void.

Like the Common Case of a Judgment in an Assumpsit for 8 l. Damages, and 2 d. Costs: The Entry was thus,

Yelv. 107. ff. Ideo conſ. eſt &c. quod (the Plaintiff) recuperet damna ſua per jurat' &c. aſſeſſ. ad octo libras necnon 20 s. pro miſ. & cuſtagiis de incremento &c. omitting the 2 d. for Coſts aſſeſſed by the Jury, which is not helped or included by the Increaſe, that is, by the Act of the Court ex officio, for which Reaſon the Judgment is erroneous.

Laſtly, This Reaſon was added to the Authorities before recited, viz. if this Omiſſion in the moſt ſevere part of the Judgment ſhall not be Error, then thoſe Judgments which have theſe Words cannot be ſupported, becauſe a heavier Puniſhment is by that Means afflicted on the Subject than allowed by Law, and may for that Reaſon be reverſed.

Therefore it muſt of Neceſſity be, that thoſe Words make a neceſſary part of the Judgment in High Treaſon, and the Omiſſion of them makes it erroneous.

Neither is it impoſſible in Nature (as hath been objected) that ſuch a Judgment ſhould be executed; for Colonel Harriſon, one of the Regicides, was cut down alive, and after his Entrails were taken out of his Body, he roſe up, and had Strength enough left to ſtrike the Executioner.

The Judgment was reverſed; which Judgment of Reverſal was afterwards affirmed in the Houſe of Lords. Show. Par. Caſes 129.

Hunt *verſus* Braines.

Hill. 6. Rot. 411.

IN Replevin for taking bona catalla & averia, &c. The Defendant made Cognizance for the taking of averia only, for that a Rent-charge of 100 l. per Annum was granted out of the Lands, &c. payable half-yearly at Michaelmas and Lady-day, that 33 l. parcel of 50 l. for half a year's Rent being behind and unpaid, he diſtrained, and ſo juſtifies the taking; inde petit judicium & retorn' averiorum bonorum & catallorum prædict'.

Cro. Car. 102. Upon a Demurrer to this Avowry, it was held to be inſufficient, becauſe he did not ſhew when the other 17 l. was paid to make up the half Year's Rent.

Beſides, the Action was brought for taking bona catalla & averia, and the Defendant avowed the taking of averia only, which is an Anſwer only for the live Cattle, and not for the Whole; and for theſe Reaſons the Plaintiff had Judgment.

DE

DE
Termino Paſchæ.

Anno 7 W. III. Regis in B. R. 1695.

Williams, *Executor of* Melliſh, *verſus* Cary *Under-Sheriff of* Wilts.

THE Plaintiff as Executor to Melliſh, brought an Action on the Caſe againſt the Defendant for a falſe Return, ſetting forth, that his Teſtator 4 Jacobi had recovered a Judgment againſt one Smart for 140 l. and that he ſued out a Teſtatum Fieri fac. againſt him, which he delivered to the Defendant, who made Execution, and levied Goods, &c. to the Value of 101. l. and returned that he had levied only 19 l. 19 s. which he was ready to pay; and that he had more Goods in his Poſſeſſion, to the Value of 40 l. which remained with him pro defectu emptorum, whereas in truth he had levied more. 1 Salk. 12. 1 Vent. 30. 1 Sid. 48, 80.

That afterwards Melliſh the Teſtator died, and for this falſe Return the Plaintiff brought an Action, and had a Verdict.

And now it was moved in Arreſt of Judgment, that the Plaintiff, as Executor, could not maintain this Action, becauſe it was a perſonal Tort done to his Teſtator, for which the Executor could have no Remedy after his Death.

Cro. Car. 297. 1 part 913. In Hillary Term 8 Caroli, this was made a Doubt in the Caſe of Purſtow and Prince, but my Lord Rolle in abridging of that Caſe tells us, that the Action would not lie.

Econtra. It will not be denied, but that an Action of Debt will lie againſt a Sheriff for Money levied by Virtue of an Execution, and not anſwered to the Creditor; for tho' there Hob. 206. is no actual Contract between the Sheriff and the Creditor, yet Debt will lie upon a Contract in Law; becauſe when the Money is levied, the Action ceaſes againſt the Defendant, and is transferred to the Sheriff; and if it could not be recovered of him, there would be a manifeſt Injury done to the Party.

It cannot be properly ſaid in this Caſe, that there is any actual Wrong or Injury done to the Perſon of the Teſtator; for if ſo, then moritur cum perſona; but 'tis an Injury done to his perſonal Eſtate in which he is repreſented by his Exe- 4 Ed. 3. c. 13. cutor, and therefore he may maintain this Action within the Equity of the Statute de bonis aſportatis in vita Teſtatoris, which gives him an Action of Treſpaſs for a Wrong done to his Teſtator.

Noy. 87 Poph. 187 Latch. 167 Jones 173. An Executor may have a Replevin or Detinue for taking of Goods in the Life-time of his Teſtator, becauſe the Property ſtill continues, and ſo doth the Wrong to his Eſtate in this Caſe.

Therefore it hath been held, that he may have a Trover for any Converſion in the Life of the Teſtator, and likewiſe an Eſcape upon mean Procis, becauſe the Body of the Priſoner being a Pledge for the Debt, the Executor might be otherwiſe without any Remedy.

So he may have Debt againſt a Pariſhioner for not ſetting out of Tithes in the Time of his Teſtator, becauſe the Statute makes it a Duty.

Therefore tho' 'tis true, that a perſonal Action dies at Common Law with the Perſon, yet upon the Equity of this Statute a Wrong done to his Eſtate ſtill remains.

Judgment was given for the Plaintiff niſi cauſa.

Gibbons *verſus* Pepper.

2 Salk. 637. Style 72. 1 Vent. 295. 2 Lev. 172. 2 Jones 205. 3 Lev. 37. In Aſſault and Battery the Defendant pleaded, that he was riding on a Horſe in the High-way, and that on a ſudden Fright the Horſe ſtarted and run upon the Plaintiff, who continued in the Way after he was called to go out, which was the ſame Aſſault.

To this Plea the Plaintiff demurred, and it was moved in Behalf of the Defendant, that what he had pleaded, was a ſufficient Excuſe; for it was no Neglect in him, and the Miſchief done was inevitable.

'Tis like the Caſe of Weaver and Ward, where in Treſpaſs, Aſſault and Battery, the Defendant pleaded, that he was a trained Soldier, and that he and the Plaintiff were under one Captain, and in muſtering he diſcharged his Gun, which caſualiter, & per infortunium & contra voluntatem ſuam did hurt the Plaintiff; and it was there held, that if the Defendant had pleaded that he could not have avoided it, or that the Plaintiff had run croſs the Gun when it was diſcharging, or had ſet forth the Circumſtances ſo that it might appear to the Court to be inevitable, that ſuch a Plea had been a ſufficient Juſtification. Hob. 134. Roll. Abr. 548. Moor 864.

But it was anſwered, that Caſe was not parallel with this, becauſe the Fact was confeſſed there; but the Battery is not anſwered here; he ſhould have pleaded the General Iſſue, for if the Horſe run away againſt his Will, he would not have been found Guilty, becauſe in ſuch Caſe it cannot be ſaid with any Colour of Reaſon to be a Battery in the Rider. The Plaintiff had Judgment.

Derrier *verſus* Arnaud.

Hill. 6 Willielmi, *Rot.* 416.

INdebitatus aſſumpſit, the Defendant pleaded that the Plaintiff was alienigena in Regno Franciæ ſub Ligeantia adverſarii Domini Regis, &c. ORIUNDUS.

And upon a Demurrer Exception was taken to this Plea, becauſe 'tis not a direct Affirmative that the Plaintiff was alienigena; it ſhould have been Natus, and not oriundus.

Curia. In a Real Action the Word Alienigena had been well enough, but ſome Doubt being made whether it was ſo in this Caſe a farther Day was taken to conſider of it; and afterwards ſome Precedents being cited out of Raſtal, where the Word natus was ſupplied by oriundus, the Plea was held good. Entr. 252. b. 605. b.

St. Leger

St. Leger *verſus* Pope.

Dominus Rex & Domina Regina mandaverunt dilecto & fideli ſuo Georgio Treby militi capital. Juſtic. ſuo de Banco breve ſuum clauſum in hæc verba, viz.

GUlielmus & Maria, &c. Reponſ. Georgii Treby militis capital. Juſtic. infranominat. Recordum & proceſſum loquelæ unde infra fit mentio cum omnibus ea tangen. coram Domino Rege & Domina Regina ubicunque &c. ad diem infracontent. mitto in quodam Recordo huic brevi annex. prout interius mihi p̃cipitur Georg. Treby Plita. irrotulat. apud Weſtm coram Georgio Treby milite & ſociis ſuis juſticiariis Domini Regis & Dominæ Reginæ de Banco de Termino ſancti Michis. Anno Regni Domini & Dominæ Willielmi & Mariæ Dei gratia &c. quinto, Rot. 337.

Middleſex ſſ. Johes. St. Leger nuper de parochia ſancti Martini in Campis in Com. præd. Armiger. alias dictus John St. Leger of Donocale Eſq; ſummonitus fuit ad reſpondend. Rogero Pope Ar. de plito. quod reddat ei cencum & ſeptem libras & decem ſolidos quos ei debet & injuſte detinet &c. Et unde idem Rogerus per Johannem Oliver Attorn' ſuum dicit quod cum prædict. Johannes St. Leger & Rogerus Pope octavo Dei Julii Anno Dom' milleſimo ſexcenteſimo nonageſimo primo apud paroch. ſanct' Martini in campis in comitatu Middleſex Latrunculis luſer. ad ludum Anglice voc. Back-Gammon cumq; ad ludum illum præd. Rogerus adtunc & ibm. uno jactu jecit quatuor ſuper unam aleam & quatuor ſuper alteram aleam Anglice threw two Fours cumq; ſuperinde præd. Rogerus adtunc & ibidem tetigit & paulatim movebat duos latrunculorum ſuorum Angl' two of his Table-men ſed non amovebat illos a ſtatione ſua Anglice from the Point they ſtood on cumq; ſuperinde adtunc & ibidem pignore certat. fuit Anglice a Wager was laid inter prædict. Johannem St. Leger & præfat. Rogerum modo ſequenti videlt. qd. p̃d. Rogerus ſolveret p̃fat. Johanni St. Leger centum & quinquaginta nummos aureos Anglice vocat. Guineas ſi præfat. Rogerus tenebatur jure luſus illius amovere Anglice to Play duos Latrunculos illos quos ita movit quodq; præd' Johannes

St Leger ſolveret præfat. Rogero centum nummos aureos ſi præd. Rogerus non tenebatur jure luſus illius amovere Anglice **to play** duos latrunculos illos quos ita movit & præd. Johannes St. Leger & Rogerus adtunc & ibidem pro determinatione pignorationis illius Anglice **of that Wager** poſuer. ſe ſuper judicium Atrienſis Anglice **of the Groom-Porter** of England cumq; p̄d Johannes St. Leger eiſdem die & Anno ſuprad. apud paroch. præd. per ſcriptum ſuum ſigillo ſuo ſigillat. Curiæque dicti Domini Regis & Dominæ Reginæ nunc hic oſtenſ. cujus dat' eſt eiſdem die & Anno cognovit pignoratione præd. Anglice **the ſaid Wager** & p̄d. Johannes St. Leger per idem ſcriptum obligavit ſeipſum ſolvere præfat. Rogero Pope vel ordini ſuo Centum nummos aureos Angl. 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. Johannem St. Leger & idem Rogerus in fact. dicit quod poſtea poſt confectionem ſcripti præd. & ante impetrationem brevis originalis præd Rogeri in Curia hic ſcilt. 31 Die Juli Anno Domini 1691 ſupradicto quidam Thomas Neale Armiger. tempore confectionis ſcripti prædict' & diu antea & abinde adhuc exiſten. Atrienſis Anglice **the Groom-Porter of England** in caſu præd' adjudicavit contra præd. Johannem St. Leger ſcilt. qd. 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** quodq; centum nummi aurei Anglice vocat. **Guineas** tempore confectionis ſcripti præd. & diu antea fuer. & adhuc exiſtunt valoris prædictarum Centum & ſeptem librarum & decem ſolidorum ſcilt. apud parochiam præd. in Com. præd. unde præd. Johannes St. Leger adtunc & ibidem habuit notitiam præd. tamen Johannes St. Leger licet ſepius requiſit. præd. Centum & ſeptem libras & decem ſolidos eidem Rogero non reddidit ſed ill. ei hucuſq; reddere omnino contradixit & adhuc contradicit. unde dicit quod deteriorat. eſt & dampnum het. ad valentiam 40 l. & inde producit ſectam &c.

Et præd Johannes per Edmundum Hubberfeild Attorn. ſuum ven. & defend. vim & injuriam quando &c. Et petit auditum ſcripti præd. & ei legitur in hæc verba ſſ. **I John St Leger of Donocale Eſq; do own that I have betted with Lieutenant Colonel** Roger Pope **one hundred Guineas**

neas againſt an 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 Chantrel, and referred to the Deciſion of the Groom-Porter of England. And I do by theſe Preſents oblige my ſelf in the Word and Honour of a Gentleman, to pay unto the ſaid Roger Pope or his Order, or whom he appoints to receive it, one 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 of A. B. and C. John St. Leger is meant by A. and Roger Pope by B. Given under my Hand and Seal this 8th. Day of July 1691. Quibus lectis & auditis idem Johannes dicit quod ipſe de debito p̄d. virtute ſcripti p̄d. onerari non debet quia dicit qd. in ſtatuto in Parliamenti Domini Caroli ſecundi nuper Regis Angliæ inchoat. apud Weſtm. in Com. Middleſex octavo Die Maii Anno Regni dicti Domini nuper Regis decimo tertio & per diverſas Prorogationes & adjournament. ibid. continuat. uſq; decimum ſextum diem Martii Anno Regni ejuſdem nuper Regis decimo ſexto inter alia authoritate ejuſdem Parliamenti ordinat. & inactitat fuit qd. ſi aliqua perſona vel p̄ſonæ ad aliquod tempus vel tempora poſt viceſimum nonum diem Septembris in Anno Domini 1664. ludere ad & cum pictis chartis Anglice Cards aleis latruncu-lis &c. (reciting the Statute.) Prout p̄ eundē actum inter alia plenius apparet & idē Johanues in facto dicit quod poſt 29 diem Septembris Anno Domini 1664. ſupradict. & ante confectionem ſcripti præd ſcilt. præd. octavo die Julii Anno Domini 1691. ſuprad. apud paroch. præd. in Com. præd. ipſe idem Johannes & præd. Rogerus ludebant cum aleis ad quendam ludum vocat. Back-gammon quodq; p̄d. Centum nummi aurei vocat. Guineas in præd. ſcript mentionat. adtunc & ibm' ad unum tempus & unum congreſſum Anglice meeting fuerunt pignorat. Anglice betted per eundem Johannem cum præd. Rogero & perdit. in luſu illo & non cum vel pro pecuniis depoſit. Anglice ready Money quodq; p̄d. centum nummi aurei vocat. Guineas tempore pignorationis illius Anglice at the Time of the ſaid Bett necnon tempore adjudicationis in narratione præd. Rogeri per Thomam Neale in eadem narratione mentionat. fieri ſuppoſit. fuerunt valoris

ultra ſummam centum librarum viz. valoris centum & ſeptem librarum & decem ſolidorum ſuperius petit. viz. apud parochiam præd. in Com. prædict. quodque præd. centum nummi aurei tempore luſus illius non fuerunt pignorat. Anglice betted in pecuniis depoſit. Anglice ready Money neque tempore adjudication. p̃d. in narratione p̃d fieri ſuppoſit' ſolut. ſed pro ſecuritate ſolutionis præd. centum nummorum aureorum per ipſum Johannem cum præd. Rogero ut præfertur pignorat. Anglice betted idem Johannes poſtea ſcilt. prædicto octavo die Julii Anno Dom. milleſimo ſexcenteſimo nonageſimo primo ſupradicto aqud paroch. præd. in Com. præd. ſcriptum præd' in narratione præd. mentionat' præfat. Rogero dedit ſigillavit & ut factum ſuum deliberavit per quod ac vigore ſtatuti p̃d. in eo caſu inde edit & proviſ. ſcriptum præd. fuit & eſt vacuum & nullius vigoris in lege & hoc parat. eſt verificare unde petit judicium ſi ipſe de debito prædicto virtute ſcripti præd. onerari debeat &c.

To this Plea the Plaintiff demurred, and the Defendant joined in Demurrer; and Judgment was given for the Plaintiff in the Common Pleas; and now a Writ of Error was brought, and the general Error aſſigned, and in nullo eſt erratum was pleaded.

St. Leger *verſus* Pope.

The CASE.

THE Plaintiff and Defendant were playing at Back-gammon, and the Plaintiff in the Action touched the Tablemen, but did not remove them from the Points; a Diſpute ariſing between them ended in a Wager, which was reduced into Writing, by which the Plaintiff in Error was obliged to pay Mr. Pope an hundred Guineas if he was not bound by the Courſe of Play, to remove and play thoſe Tablemen he touched, and Mr. Pope was to pay him 150 Guineas if he was obliged. 5 Mod. 4; 1 Salk. 344.

This Wager was to be decided by the Grroom Porter, who gave Judgment, that Mr. Pope was not obliged to play the Men he touched; whereupon the hundred

Guineas were loſt; for which the Action was brought below, and upon the Statute pleaded, Judgment was given for the Plaintiff, and now it was argued for the Plaintiff in Error.

That the Demand was wrong, becauſe the Note on which the Action is brought is for Payment of Guineas; now Guineas quatenus ſuch cannot be demanded, becauſe they are of no certain or determinate Value, for they may be altered, added or diminiſhed by Prerogative; and therefore the Statute 5 & 6. Ed. 6. prohibits the buying of Coin, becauſe no Perſon can ſet a Value thereon but the King.

Beſides Guineas are by Proclamation at 20 s. Value and no more; and if ſo, the Plaintiff has a Judgment for more than the Law allows, and this being an Engliſh Coin, you cannot declare for it ad valentiam, &c. as 'tis uſual for foreign Coin, in which Caſe the Action is brought in the detinet only, becauſe the Value of ſuch Coin is not known to the Court, and therefore 'tis uncertain what Sum ſhall be recovered.

But for Engliſh Coin the Action is always brought in the Debet and Detinet, and without ad valentiam.

If therefore the legal Value of a Guinea is 20 s. the Plaintiff hath obtained an unlawful Judgment, viz. for more than the Value, if it is above 20 s. than the Sum will amount to more than 100 l. and ſo within the Statute of Gaming.

To this it was anſwered, That the Writing doth warrant the Declaration and the Demand, for if Guineas are not of the noted and common Coin of the Kingdom, and of no certain Value, then they are as foreign Coin to the Court, and they may be demanded as in that Caſe, ſo likewiſe in this by ſo many Pieces of Money valoris, &c. and in the Debet and Detinet, becauſe the Value of them is reduced to a Certainty.

But if the Demand here had been of Guineas only, without ſaying ſo many Pieces of Gold, then it had been like the Demand of Dollars in foreign Coin, and the Action muſt have been brought in the Detinet, becauſe the Thing in Specie is demanued.

Then as to the Statute of Gaming it doth not concern this Action, becauſe this is a Wager, and not within the Reach of that Law; 'tis not any playing, but a collateral Matter concerning the Right of a particular Game.

No Judgment was given concerning this Matter, but an Objection was made that there was a Variance between the Declaration and the Note therein ſet forth; for the Action was grounded on a Wager, and the Plaintiff declared

that the Defendant per ſcriptum ſuum &c. cognovit pignorationem, Anglice the Wager, and upon Oyer of the Writing there is nothing therein relating to ſuch an Acknowledgemt, ſo that he made that to be a part of the Deſcription of the Writing which ſhould have come in by Way of Averment out of it, viz. he ought to have averred that the Wager in the Writing, and for which the Action was brought was the ſame Wager, &c. and for this Reaſon the Judgment was reverſed.

Strode *verſus* Birt.

Trin. 6 Rot. 515.

DOminus Rex & Domina Regina Mandaver. dilicto & fideli ſuo Georgio Treby Mil. Capital Juſtic. de Banco breve ſuum clauſum in hæc verba viz. Gulielmus & Maria Dei Gratia, Angliæ Scotiæ Franc., & Hiberniæ Rex & Regina fidei defenſores &c. dilecto & fideli ſuo Georgio Treby Milit. Capital Juſticiario ſuo de Banco ſalutem Quia in recordo & proceſſu ac etiam in redditione judicii loquelæ que fuit in Curia noſtra coram vobis & Sociis veſtris Juſticiariis noſtris de Banco per Breve noſtrum inter Thomam Byrt & Edwardum Strode Armigerum & Richardum Thorn de quadam tranſgreſſione ſuper caſum eidem Thomæ per præfat Edwardum & Richardum illat. ut dicitur Error intervenit manifeſtus ad grave damnum ipſorum Edwardi & Richardi ſicut ex querela ſua accepimus nos errorem ſi quis fuerit modo debito corrigi & partibus p̃d. plenam & celerem juſtitiam fieri volentes in hac partes vobis mandamus quod ſi judic. inde reddit. ſit tunc recordum & proceſſum præd. cum omnibus ea tangen. nobis ſub ſigillo veſtro diſtincte & aperte mittatis & hoc breve ita quod ea habeamus in Octab. purificationis beatæ Mariæ ubicunq; tunc fuerimus in Anglia ut inſpect. record. & proceſſu præd' ulterius inde pro errore ill. corrigend. fieri faciamus quod de jure & ſecundum legem & conſuetudinem hujus Regni Angliæ fuerit faciend. Teſte nobis ipſis apud Weſtm. viceſimo nono die Januarii An. Reg. noſtri quinto.

Paget.

Reſponſ. Georgii Treby Mil. Capital. Juſticiar. infranominat. Record. & proceſſ. loquelæ unde infra fit mentio cum omnibus ea tangen. coram

Domino Rege & Domina Regina ubicunq; &c. ad diem infracontent. mitto in quodam recordo huic brevi annex. prout interius mihi præcipitur.

Geo. Treby.

Placita irrotulat. apud Weſtm. coram Georgio Treby Milit. & Sociis ſuis juſticiariis Domini Regis & Dominæ Reginæ de Banco de Termino Sanctæ Trinitatis Anno Regni Domini Gulielmi & Dominæ Mariæ Dei gratia Angl. Scotiæ Franciæ & Hiberniæ Regis & Reginæ fidei defenſor. &c. quinto Rot. 313.

Somerſet ſſ. Edwardus Strode nuper de Downſide in Com. præd. Armiger & Richardns Thorne nuper de eadem Yeoman Attach. fuerunt ad reſpondend. Thomæ Byrt de placito tranſgr. ſuper caſum &c. Et unde idem Thomas per Galfridum Pottinger Attorn. ſuum queritur quare cum ipſe idem Thomas Byrt primo die Maii Anno Regni Domini Regis & Dominæ Reginæ nunc Secundo & continue abinde poſtea hucuſq; legittime poſſeſſionat. fuit & adhuc poſſeſſionat. exiſtit de & in uno tenemento continen. in ſe unū molendinum fullonicū unum molendinum granaticum uuum clauſum paſturæ unā rodā terræ & unam peciam terræ vocat. Wythybed cum pertin. in Paroch. de Shepton Mallet in Com. præd. ac per totum idem tempus ipſe idem Thomas Byrt de jure habuiſſet & habere & gaudere debuiſſet communiam paſturæ in mille Acris terræ vocat. Mendip Foreſt in Com. præd pro omnibus averiis ſuis communicalibus in & ſuper tenementa prædicta cum pertin. levan & cuban' quolibet anno omni tempore anni tanquam ad tenementa ſua prædicta ſpectan. & pertinen. prædict. Edwardus & Richardus præmiſſorum non ignari ſed machinan'& malitioſe intenden. eundem Thomam Byrt in hac parte minus rite prægravare injurare & quam plurimum damnificare & ipſum Thomam Byrt de communia ſua præd. in præd. mille acris terræ vocat. Mendip Foreſt & de uſu proficuo & beneficio inde magnopere & minus juſte impedire & deprivare ac ipſum Thomam pejorare & deteriorare ipſi iidem Edwardus & Richardus eodem primo die Maii Anno ſecundo ſupradicto apud Shepton Mallet præd. ſolum & fundum præd. mille acrarum terræ vocat. Mendip Foreſt in diverſis locis ejuſdem Foreſtæ effoderunt & ſubverterunt & quam plurima antra p̄ cuniculis Angl. Cony-Boroughs, adtunc & ibidem fecerunt & erexerunt & cuniculos adtunc & ibidem in eiſdem mille Acris terræ vocat. Mendip Foreſt locaverunt

locaverunt & propagaverunt & antra & cuniculos ill. ibidem per totum tempus ill. cuſtodiverunt & continuaverunt qui quidem Cuniculi quam plurimam part' herbæ ibid. creſcen. diverſis diebus & vicibus infra tempus præd. depaſt. fuerunt ſpoliaverunt conculcaverunt & conſumpſerunt iidemq; Edwardus & Richardus eodem primo die Maii Anno ſecundo ſupradicto & diverſis diebus & vicibus infra tempus præd. in eiſdem mille acris terræ vocat. Wendip Foreſt quâ plurimos laqueos & tendiculos ibidem ſparſim fixerunt poſuerunt cuſtodiver. & fingi & poni procuraverunt per quod viginti oves ipſius Thomæ Byrt in & ſuper tenementa ſua prædicta cum pertin. levan. & cuban. per ipſum ad herbam in eiſdem mille acris terræ vocat. Wendip Foreſt tunc creſcen. depaſcen. impoſuit uten' communia ſua præd. in laqueos & tendiculos ill. ibidem incider. & ibidem capt. quamplurimum damnificat. detoriorat. & ſpoliat. fuerunt & nullius uſus ſive valoris eidem Thomæ adtunc & ibidem devenerunt ratione quorum quidem præmiſſorum idem Thomas communiam ſuam præd. pro ovibus & averiis ſuis præd. in & ſuper tenementa ſua præd. cum pertin. levan. & cuban' per totum tempus præd' habere uti ſeu gaudere in tam amplo & beneficiali modo prout debuit uti ſeu gaudere non potuit ſed idem Thomas uſum proficuum commoditat. eaſiment' & beneficium Communiæ paſturæ ſuæ præd. in præd. mille acris terræ vocat. Wendip Foreſt, p totum idem tempus perdidit & amiſit ad dampnum ipſius Thomæ Centum librarum & inde producit ſectam, &c.

Et prædict. Edwardus & Richardus per Henricum Godfrey Attorn' ſuum ven. & defend. vim & injuriam quando &c. Et dicunt quod narratio præd. materiaq; in eadem content. minus ſufficien. in lege exiſtunt ad ipſum Thomam actionem ſuam præd. inde verſus eoſdem Edwardum & Richardum habend. ſeu manutenend. ad quam quidem narrationem iidem Edwardus & Richardus neceſſe non habent nec per legem terræ tenentur reſpondere & hoc parat. ſunt verificare unde pro defectu ſufficien. narration. in hac parte iidē Ed'us & Rich'us petunt judicium & quod præd. Thomas ab actione ſua præd. inde verſus ipſos habend. præcludatur &c. Et pro cauſis moration. in lege iidem Edwardus & Richardus dicunt & oſtendunt Curiæ hic quod præd. Thomas in narratione ſua præd. non monſtrat aliquam præſciption' ſeu aliquem alium titulum ad communiam præd. habend. ac etiam dicta narratio

narratio valde incerta eſt & caret forma.

Et prædict. Thomas ex quo ipſe ſufficien. materiam in lege in narratione ſua præd. ad action. ſuam præd. verſus præd. Edwardum & Richardum habend' manutenend. ſuperius declaravit quam ipſe parat. eſt verificare quam quidem materiam præd. Edwardus & Richardus non dedicerunt nec ad eam aliqualiter reſpondent ſed verificationem ill'admittere omnino recuſant idem Thomas petit judicium & damna ſua occaſione præmiſſor. ſibi adjudicari &c. Et quia Juſtic. hic ſe adviſare volunt de & ſuper præmiſſis priuſquam judicio inde reddant dies inde dat. eſt partibus præd. hic uſq; a die ſancti Michaelis in tres ſeptimanas de audiend'inde judicio ſuo eo qd' iidem Juſtic. hic inde nondum &c ad quem diem hic venit tam præd' Thomas quam præd. Edwardus & Richardus per Attorn. ſuos præd. & ſuper hoc viſis p̃miſſis & per Juſticiar. hic plenius intellectis videtur eiſdem Juſticiar' quod narratio præd' in forma præd. fact. & declarat. ac materia in eadem content. ſufficien. in lege exiſtunt ad ipſum Thomam actionem ſuam præd. verſus præfat. Edwardum & Richardum habend. manutenend. prout præd. Thomas ſuperius allegavit ac quod idem Thomas dampna ſua occaſione præmiſſorum verſus præfat. Edwardum & Richardum recuperare debeat ſed quia neſcitur quæ dampna idem Thomas ſuſtinuit occaſione præmiſſorum præcept. eſt Vic. quod per ſac'rum proborum & legalium hominum de balliva ſua diligenter inquirat quæ dampna idem Thomas ſuſtinuit tam occaſione præmiſſorum quam pro miſis & cuſtagiis ſuis per ipſum circa ſectam ſuam in hac parte appoſit. & Inquiſitionem quam &c. Vic. conſtare fac. hic in Octab. Sancti Hillarii ſub ſigillo &c. & ſigillis &c.

Ad quem diem hic venit præd. Thomas per Attorn. ſuum præd. & Vic. videlicet Robertus Siderfin Armiger modo mand. hic quandam inquiſitionem coram eo apud Civitat. Wellen'in Comitatu præd. 12 die Januarii ult. præterit. per ſacrum duodecim &c. capt. per quam compertum exiſtit quod præd. Thomas ſuſtinuit dampna occaſione præmiſſorum ultra miſ. & cuſtag ſua per ipſum circa ſectam ſuam in hac parce appoſit. ad quinque ſolid. & pro miſ. & cuſtagiis ill. ad duos denarios Ideo conſ. eſt quod prædict. Thomas recuperet verſus præfat. Edwardum & Richardum dampna ſua præd. ad quinpue ſolidos & duos denar. per inquiſitionem præd. in forma præd. compert' nec-

necnon quindecim libras quatuordecim ſolidos & decem denar. eidem Thomæ ad requiſition ſuam p̄ miſis & cuſtagiis ſuis p̄ Curiam hic de incremento adjudicat. quæ quidem dampna in toto ſe attingunt ad 16 l. & p̄d. Edwardus & Richardus in mia. &c. ſign. 28 die Februarii Anno ſexto Willielmi & Martæ.

Poſtea ſcilicet die Veneris p̄x. poſt Craſtinum Sanctæ Trinitatis Anno Regni Domini Willielmi & Dominæ Mariæ nunc Regis & Reginæ Angliæ, &c. ſexto coram Domino Rege & Domina Regina apud Weſtm̄ venerunt prædict. Edwardus Srrode & Richardus Thorne p̄ Petrum Courtney Attorn. ſuū & dicunt quod in rrecordo & p̄ceſſu prædict. ac etiam in redditione judicii præd. manifrſte eſt erratum in hoc videlt. quod per recordum præd. apparet quod judicium ill. in forma præd. reddit' reddit. fuit p̄ præd. Thoma Byrt verſus præd. Edwardum Strode & Richardum Thorne ubi per legem terræ hujus Regni noſtri Angliæ judicium illud reddi debuiſſet pro prædict. Edwardo Strode & Richardo Thorne verſus eundem Thomam Byrt Ideo in eo manifeſte eſt erratum, erratum eſt etiam in hoc quod non habetur aliquod Breve original. inter præd. partes de placito præd. ad warrantizand. narrationem præd. Thomæ Byrt præd. de recordo affilat. nec de recordo reman. in cuſtodia cuſtodis Breviū dict. Domini Regis & Dominæ Reginæ de Banco præd. Ideo in eo ſimiliter eſt erratum & iidē Edwardus Strode & Richardus Thorne petunt Breve dicti Domini Regis & Dominæ Reginæ præfat. cuſtod. brevium ipſorum Domini Regis & Dominæ Reginæ de Banco præd. dirigend. ad certificand. dict. Domino Regi & Dominæ Reginæ plenius inde veritatē & eis conceditur &c. p̄ quod præcept. eſt Willielmo Thursby Armigero Cuſtod. breviū dict. Domini Regis & Dnæ. Reginæ de Banco prædict. quod ſcrutatis Brevibus originalibus de Com̄ Somerſet. de Termino ſanctæ Trinitatis Anno Regni dict. Domini Regis & Dominæ Reginæ nunc quinto in cuſtodia ſua de recordo exiſten. & quid de eodem brevi invenerit una cum retorn ejuſdē adeo plane & integre p̄ut coram ſe remanet dict. Domino Regi & Dominæ Reginæ indilate ubicunque &c. certificet una cum brevi Dom. Regis & Dominæ Reginæ ſibi inde direct. &c. qui quidem Willielmus Thurſby cuſtos brev. de Banco præd dict. Domino Regi & Dominæ Reginæ retornavit & certificavit quod virtute brevis p̄d ſibi direct. ſcrutat. brevibus originalibus comitatus Somerſet.

præd.

præd. de præd. Termino ſanctæ Trinitatis Anno quinto ſupradicto in cuſtodia ſua exiſten. in eiſdem invenit quoddam Breve original. inter partes p̃dict. de plito præd. de recordo affilat. cujus quidem brevis tenor ſequitur in hæc verba ſſ. Gulielmus & Maria Dei gratia Angliæ Scot. Franciæ & Hiberniæ Rex & Regina fidei deſenſores &c. Vicecomiti Somerſet. ſalutē ſi Thomas Byrt fecerit te ſecurum de clamore ſuo proſequend. tunc pone p̄ vadios & ſalv. pleg. Edwardū Strode nuper de Downſide in Com̃ tuo Ar. & Richardum Thorn nuper de Downſide in Com̃ tuo Yeoman quod ſint coram Juſticiariis noſtris apud Weſtm̃ in craſtino ſanctæ Trinitatis oſtenſ. quare cum ipſe idem Thomas Byrt primo die Maii Anno Regni noſtri ſecundo & continue abinde poſtea hucuſque legitime poſſeſſionat. fuit (as in the Declaration) ad dampnum ipſius Thomæ Centum librarum ut dicit &c. & habeas nomina pleg. & hoc breve Teſte nobis apud Weſtm. 26 Die Maii Anno Regni noſtri quinto (Paget p̄ Dominum Cuſtodem magni ſigilli Angl. ad inſtantiam peten. pleg. de pros. Johannes Doe & Richardus Roe. infranominat. Edw. & Ricus. Nichil' hent. in balliva mea per quod attach. poſſunt Warwick Bampfeild Ar. Vic. Ret. p̄ Fin. H. Hetherington quod quidem breve de Certiorari una cum retorn. inde inter recorda ſine die iſtius Termini affilat. Et ſup̄ hoc idem Thomas Byrt p̄ Joſephum Sherwood Attorn' ſuum gratis ven. ſup̄ quo præd. Edwardus Strode & Richardus Thorne ut prius dicunt quod in recordo & p̄ceſſu præd. acetiam in redditione Judicii p̃d. manifeſt. eſt erratū allegand. errores præd. p̄ ipſos in forma præd. allegat. & pet. quod judiciū præd. ob errores ill. & al. in recordo & proceſſu præd. exiſten. revocetur adnulletur & penitus pro nullo habeatur & quod ipſi ad omnia quæ occaſione judicii præd. amiſerunt reſtituantur & quod præd. Thomas Byrt ad errores præd. rejungat & quod Curia dicti Domini Regis & Dominæ Reginæ nunc hic p̄cedat. ad examination. tam record. & p̄ceſſ. præd. quam mater. prædict ſuperius p̄ errore aſſign. ſup̄ quo præd. Thomas Byrt dicit quod nec in recordo & p̄ceſſu p̃d nec in redditione judicii præd. in ullo eſt erratū & petit ſimiliter quod curia dicti Domini Regis & Dominæ Reginæ nunc hic procedat ad examinationem tam record' & proceſſ. præd' quam mater prædict' ſuperius pro erroribus aſſign' & quod judicium præd. in omnibus affirmetur &c. Et quia Curia dicti Domini Regis & Domi-

The Continuances begin in Mich. Anno 6 Will. & Mariæ *and end in* Trinity *Term* Anno 8 Will. 3.

Dominæ Reginæ nunc hic de judicio ſuo de & ſuper præmiſſis reddend. nondum adviſatur dies inde dat. eſt partibus coram dict. Domino Rege & Domina Regina a die ſancti Michaelis in tres ſeptimanas ubicunq; &c. de judicio ſuo inde audiend. eo quod Curia dict. Domini Regis & Dominæ Reginæ nunc hic inde nondū &c. ad quē diē corā Domino Rege & Domina Regina apud Weſtm̄ ven. partes præd. per Attorn. ſuos præd. ſed quia Cur. dict. Dom. Regis & Dominæ Reginæ nunc hic de judicio ſuo de & ſuper præmiſſ. præd. reddend. nondū adviſatur dies inde datus eſt partibus prædict. corā Domino Rege & Domina Regina uſque in Octab. Sancti Hillarii ubicunque &c. de judicio ſuo inde audiend. eo quod Cur. dict. Domini Regis nunc hic inde nondū &c. ante quē diē Domina Maria Regina diē ſuū clauſit extremū ad quē diē coram Domino Will. tertio nunc Rege Angliæ &c. apud Weſtm' ven. partes præd p Attorn. ſuos præd. & ſic continuatur uſque in craſtino ſanct. Trinitatis ubicunque &c.

Ad quem diem coram Dom. Rege apud Weſtm̄ ven. partes præd. per Attorn. ſuos præd. ſuper quo viſis & per Cur. dict. Domini Regis nunc hic plenius intellectis omnibus & ſingulis p̄miſſis diligenterq; examinatis & inſpectis tam record. & p̄ceſſ. p̄d. quam præd. cauſis & materiis ſuperius pro Error. aſſign. videtur Cur. dicti Dom̄ Regis nunc hic qd. nec in Record. & proceſſ. p̄d. nec in reddition' Judicii p̄d. in ullo eſt erratum ac quod record. ill. in nullo vitioſum aut defectivum exiſtit Ideo conſ. eſt quod Judicium præd. in omnibus affirmetur ac in omni ſuo robore ſtet & effectu dictis cauſis & materiis ſuperius pro Error' aſſign' in aliquo non obſtan. Et ulterius per Cur. Dom. Regis nunc hic conſ. eſt qd' præd. Thomas recuperet verſus præd. Edwardum & Richardum triginta & unam libras eidem Thomæ p̄ Cur. Dom. Regis nunc hic ſecundū formā ſtatuti in hujuſmodi caſu nuper edit. & p̄viſ. adjudicat' pro cuſtagiis & damnis ſuis quæ ſuſtinuit occ'one dilacon' execution. judicii p̄d. pretextu proſecution. prædict. brevis de Error' Et quod præd' Thomas habeat inde execution. ſuam &c.

Strode *verſus* Byrt.

The *CASE*.

3 Lev. 175, 266. THE Plaintiff brought an Action on the Caſe againſt the Defendant, ſetting forth that he was poſſeſſed of a Tenement, and of a Cloſe of Paſture, and Rood of Land, &c. in Shipton Mallet, and that he had Right of Common in Mendip Foreſt for his Cattle, &c. tanquam thereunto belonging, that the Defendant did dig and make Cony-boroughs in the ſaid Foreſt, and ſet Nets and Gins there by which his Sheep were damnified, and he deprived of his Right of Common, &c.

The Defendants demur to the Declaration, and Judgment was given againſt them in the Common Pleas; and upon a Writ of Error brought in this Court, the Queſtion was, Whether the Declaration was good or not? becauſe it ſets forth that the Plaintiff legitime poſſeſſion. fuit de tenemento, &c. which was not ſufficient to entitle him to this Action, but that he ought to ſhew a Title by Cuſtom or Preſcription, or otherwiſe, and not to declare upon the bare Poſſeſſion, without any other Right; for he claiming a Profit ariſing out of another Man's Soil, ought to have ſet forth a particular Eſtate to himſelf, either by Grant, Preſcription or ſome Conveyance, and not to ſay, that he was poſſeſſed, &c. and ought to have Common, &c. tanquam ad tenementa ſua ſpectan', without ſhewing how, or in what Manner, which is ſo incertain, that no Iſſue can be taken upon it.

Therefore he ought to have ſhewn the Commencement of
1 Inſt. 303. b. his Eſtate, and how he came to be intitled to the Common, which in this Caſe muſt be either appendant, or nothing; and if ſo, he muſt ſet forth the Beginning of it, that the Defendant might give him an Anſwer.

(2.) 'Tis impoſſible that the Defendant could take Iſſue upon this Declaration; for 'tis ſaid, that the Plaintiff de jure debuiſſet habere communiam; now if the Defendant had pleaded non de jure habere debuiſſet, then the Law, and not the Fact, had been put in Iſſue.

'Tis

'Tis true, when an Action is brought upon a Poſſeſſion for a Wrong done, then ſuch a general Way of declaring may be well enough; but where the Right is in Queſtion, 'tis never ſo.

Now this Action is brought upon the Right, &c. for the Words de jure debuiſſet habere, &c. and gaudere debuiſſet import a Right and nothing elſe. Ante, 346.

In Treſpaſs for the taking of a Gelding and impounding of it; the Defendant pleaded, that tempore quo &c. he was poſſeſſed, &c. of a Cloſe, &c. in which he took the Gelding Damage feaſant; and upon a Demurrer it was ſhewn for Cauſe, that he had not ſet forth by what Title or in what Manner he was poſſeſſed; and Judgment was given for the Defendant, Hill. 2 & 3 Jacobi B. R. Rot. 695. inter Langford and Webber. 3 Mod. 132.

So in Treſpaſs for chaſing of his Sheep, the Defendant made Conuſance as Bailiff to Serjeant Trindar for Damage-feaſant in an Acre of Ground, of which the Serjeant was poſſeſſed; and there was a Demurrer to the Plea, becauſe he did not ſhew what Title or Eſtate he had, nor any Seiſin or Freehold, and therefore Judgment was given for the Plaintiff: This was in the Common Pleas, Trin 4 Willielmi between Godfrey and Rock.

This Way of pleading is not only contrary to all the Authorities of the like Nature in the old Books, but thoſe alſo of later Times.

Antiently when a Tenancy at Will was pleaded, it was always ſhewn how, viz. either by Demiſe, or as a Copyholder, or as Tenant at Sufferance. Br. tit. pleading 85.

So where a Seiſin in Tail was pleaded, it was conſtantly ſet forth of whoſe Gift, becauſe it is a particular Eſtate; 'tis true, where a Seiſin in Fee is alledged, 'tis otherwiſe.

My Ld. Brook in abridging of that Caſe above-mentioned, ſays, 'tis good pleading, and has mark'd it with theſe Words, viz. Quod nota. Br. tit. pleadings 160, 170.

It cannot be properly objected, that in a Bar 'tis neceſſary to ſet forth a Title, but not in a Writ or Count, becauſe this Objection is contrary to the old Law; for 'tis as eſſential to ſet forth a Title as well in the one as the other.

Therefore in 24 Ed. 3. the Pleadings in a Scire fac. were, that his Father died ſeiſed, and that the Lands deſcended to him as Son and Heir, &c. and it was adjudged, that he ought to have ſhewn of what Eſtate his Father died ſeiſed.

So in this Caſe an Action will not lie for depriving a a Man of ſuch a Common, becauſe 'tis claimed as belonging to the bare Poſſeſſion of a Tenant; ſo that his being a

Reſiant in the Houſe, is an Excuſe to him for a Treſpaſs done in another Man's Soil; but certainly no Action will lie for Damage done to ſuch a Commoner, becauſe there is no durable Eſtate or Intereſt laid to which any Common may belong.

Co. Ent. 9, 10, 14. Brownl. 250. But if he had ſet forth any Intereſt, he ought to have made it more certain than to ſay tanquam ad Tenementa ſpectan. for if this pleading ſhould be allowed, then a Poſſeſſion under any Title would be ſufficient, which is ſo incertain that no Man can be provided to make his Defence againſt it.

There cannot be a Caſe cited to maintain this Declaration, but ſuch where the Poſſeſſion is laid by way of Inducement to the Action, or ſuch which have been brought againſt Tort Feſors, or where there hath been a Seiſin in Fee alledged, and even moſt of thoſe Caſes after Verdict.

Cro. Car. 138. The Caſes are, viz. between Skevil and Averie, it was an Action of Treſpaſs, Aſſault and Battery.

The Defendant pleaded that he was poſſeſſed of a Houſe for a Term of Years, and that the Plaintiff would have thruſt him out, and thereupon molliter manus impoſuit, and ſo juſtifies in Defence of his Poſſeſſion, and upon a Demurrer he had Judgment; for tho' the Defendant did not ſhew who made the Leaſe, or how many Years he had in it, or any particular Eſtate, yet his Plea was held good, becauſe his ſetting forth a Poſſeſſion for Years, was but an Inducement to his Juſtification, and the Poſſeſſion and not the Title was the principal Matter in that Caſe.

2 Cro 52. Yelv. 74. But where an Intereſt is pleaded by the Defendant, and he claimeth a Title, it muſt certainly be ſet forth; and this is the very Diſtinction made in Babington's Caſe, 1 Roll. Rep. 13.

Now in the Caſe at Bar, 'tis not the Poſſeſſion which entitles the Plaintiff to the Common; for if ſo, then de injuria ſua propria had been a good Plea, which no Man will affirm.

Paſch. 33. Car. 2. B. R. Rot. 109. The Caſe of Brooking and Bond is the ſame with this, but only 'tis ſaid there, that ſeiſitus fuit of a Houſe and twenty Acres of Land; which Words muſt be intended of a Fee-ſimple Eſtate: And afterwards when he ſays, de jure habere debuiſſet Common, thoſe Words amount to a Preſcription.

Cro. Car. 575. In Sands and Trefuſis Caſe, the Action was for diverting of a Water-courſe, but there was a Seiſin in Fee alledged in the Mill, and ſo de jure habere debuiſſet, &c. was well enough; but no Judgment was given,

In

In Scavage and Hawkins's Caſe, which was Debt for Rent on a Leaſe for Years made by the Father, who was Tenant in Tail, and died ſeiſed of the Reverſion which deſcended to the Plaintiff; Exception was taken that he did not ſet forth the Commencement of the Eſtate, but it was not allowed becauſe it was an Action founded upon the Contract, and he had ſhewn enough to entitle himſelf to it, the Land being not in Diſpute; but this was after a Verdict wherein the Right had been tried; ſo were the Caſes mentioned in the * Margin. Cro. Car. 571.

In Dent and Oliver's Caſe, which was for diſturbing of the Plaintiff from Taking of Toll in a Fair: An Exception was taken that he did not ſet forth a Grant or Preſcription, &c. but it was held Good, becauſe he ſaid that he was ſeiſed in Fee of the Manor, &c. and of a Fair to be held there every Aſcenſion-Day.

So that thoſe Caſes are not applicable to that now in Queſtion, becauſe in moſt or all of them a Title is ſet forth by Way of Seiſin in Fee, but here the Right of Common is claimed without any Title but only on a bare Poſſeſſion.

* Franklin *verſus* Webb. B. R. Paſch. 33 Car. 2. Rot. 538. St. John *verſus* Moody. 1 Vent. 274, 319, 356. 2 Cro. 43.

Econtra. It was argued that it was not material to ſet forth any Right or Title to which the Defendant might give a particular Anſwer, it being ſufficient to ground this Action upon the Right of Poſſeſſion alone againſt a Wrong-doer; eſpecially ſince upon the general Iſſue the Plaintiff muſt prove his Title, or be Nonſuit; ſo that this is only a ſummary Way to try the Matter; and all Declarations for ſtopping of Ways, diverting Water-courſes and Diſturbances in Commons, are drawn and founded upon the Poſſeſſion without ſhewing of a Title.

'Tis true, in Actions for Treſpaſſes, if the Plaintiff will lay any Charge upon the Land, then he muſt ſet forth his Title, as if the Action is brought againſt the Owner thereof; but when againſt a Wrong-doer, there the Ownerſhip of the Land is not in Queſtion, ſo that a Poſſeſſion alone is ſufficient Ground for that Action.

This was the Difference taken by my Lord Coke in Buckmer's Caſe, viz. That in Real Actions founded upon a Wrong, the Plaintiff need not ſet forth a Title, but 'tis ſufficient to ſhew a Poſſeſſion againſt a Wrong-doer; and if upon the Evidence at the Trial the Plaintiff cannot prove a Title, he will never recover. 9 Rep. 87. b.

He

He was of the ſame Opinion in Babington's Caſe, and there he took another Difference between an Inducement to an Action, and to a Matter of Title; for he held, That if an Action on the Caſe was brought for a Nuſance done to a Freeholder or in a Way, 'tis ſufficient to declare, that he was poſſeſſed, &c. for a Term of Years, which however uncertain, is only a Conveyance to the Action.

Beſides this Way of declaring gives the Defendant an Opportunity to ſet forth his Title, and to demand Judgment againſt the Plaintiff for that he had ſhewed only a Poſſeſſion without a Title.

Fitz. tit. Brief. pl. 674. In Mich 13 Ed. 3. The Abbot of Glouceſter declared, That he was ſeiſed in the Manor of M. &c. by Reaſon whereof he was intitled to have Eſtrays, and that the Defendant had taken two Horſes in the ſaid Manor, which the Abbot claimed, &c.

An Exception was then taken, becauſe he had not claimed this Franchiſe as appendant to the Manor, nor by Grant; but that was not the Queſtion, the Defendant muſt anſwer the Wrong alledged to be done by him in taking of the Horſes.

And for later Authorities it has been held to be the uſual Courſe thus to declare even in Actions of different Natures.

Owen 109. As in the Caſe of Eſcat and Lawney, which was brought upon a Leaſe for Years of the Toll and Profit of a Market and Fair in Thetbury, and the Defendant diſturbing of him, &c.

Exception was taken to that Declaration, becauſe the Plaintiff did not ſhew that the Leſſor was ſeiſed in Fee at the Time of the Demiſe made to the Plaintiff; but it was not allowed, becauſe the Title of the Land was not in Queſtion, but Damages were to be recovered for an Injury done.

Cro. Eliz. 335, 419. So for a Diſturbance in an Office the Plaintiff had miſtaken his Title, and in a ſpecial Verdict, another Title was found for him different from that on which he declared, yet he had Judgment, notwithſtanding this Variance, becauſe the finding the Title was held to be ſuperfluous; it was the Diſturbance, &c. which was the Occaſion of the Action.

So likewiſe upon the Statute of Ed. 6. for not ſetting out of Tithes the Plaintiff ſeldom or never ſhews any Title, but generally that he is proprietarius of ſuch a Place, and this is held well enough, for he cannot recover without ſhewing a Title upon the Evidence at the Trial.

1 Roll. Rep. 393. And laſtly in Treſpaſs for a Battery, per quod ſervitium amiſit, the Defendant pleaded in Bar, that he was poſſeſſed

of a Houſe in which he had Lights, and that the Servant of the Plaintiff was building another Houſe on the Waſte to obſtruct the ſaid Lights, and that he cum baculo thruſt him away; and upon a Demurrer an Exception was taken to this Plea, that the Defendant had not ſet forth of what Eſtate he was poſſeſſed,

'Tis true, in this laſt Caſe it was held to be ill, becauſe it was in a Plea in Bar, and that no Iſſue could be taken upon it as pleaded; but had it been in a Declaration, or in an Action on the Caſe for a Nuſance, it had been well enough; becauſe it would then have been only an Inducement to the Action.

But the Caſe of St. John and Moody was the very ſame with this; 'tis true, it was after a Verdict, but the Court did not rely upon that; ſo was the Caſe of Bound and Brooken, and that of Heblethwaite and Palmes, in both which the Declarations were upon a Poſſeſſion generally without a Title; and held good. 2 Jones 148. 3 Mod. 48.

Tamen quære, for in the laſt Caſe 'tis, that he was poſſeſſed de antiquo aquæ curſu, which implies a Preſcription.

So in Trinity-Term, 2 Jac. Rot. 28. between Cary and Brockhurſt, the Bailiff of Weſtminſter ſhewed that he had a Franchiſe, but did not ſay how he came to have a Return of Writs, or that he was ſeiſed of the Bailiwick; and yet had Judgment, which was affirmed in the Exchequer-Chamber. 1 Show. 17. 377.

Curia. This Declaration might have been better, for 'tis ſomething difficult to underſtand what is here intended by the Word Tenemento of which the Plaintiff ſaith he was poſſeſſed; for he ſets forth that it contained a Fulling-Mill and Corn-Mill, &c. and a Piece of Land called Wythybed, &c. and then preſcribes to have Common in Mendip, as belonging to the ſaid Tenement, for Cattle Levant and Couchant thereon, which is impoſſible; for Cattle cannot be Levant and Couchant on a Hill.

In the next Place he hath not ſet forth what Quantity of Land is contained by the Name of Wythybed, which he ought to have done, eſpecially where the Preſcription is for a Right of Common belonging to it.

But upon the whole Matter the Declaration was adjudged to be good, and that the Plaintiff need not to ſet forth his Title either by Preſcription or Grant, becauſe 'tis an Action grounded upon the Poſſeſſion againſt a Wrong-doer, to which Action, a Title would be only an Inducement.

2. That

2. That he need not ſet out any Title whatſoever becauſe (as to the Defendant who did the Injury) it ſtands indifferent whether the Plaintiff is Owner of the Soil or not; his Buſineſs is to anſwer the Wrong alledged to be done by him.

'Tis true, if it had been upon a ſpecial Pleading, as in Treſpaſs for diſtraining of his Cattle, and the Defendant had pleaded that he was Owner of the Soil, and ſo juſtified the Taking, the Plaintiff in ſuch Caſe muſt have replied and ſhewed a Title either by Grant or Preſcription, or ſome other Conveyance.

1 Vent. 274. 2 Lev. 248. And laſtly, this Matter is not traverſable, for upon the general Iſſue, a right of Common muſt be proved and given in Evidence, otherwiſe the Plaintiff cannot maintain his Action, but what Right is not material; and the Caſe of St. John and Moody was relied on as full in Point; the like between Blockley and Slaughter, Hill. 4. & 5 Willielmi, in the Common Pleas, Rot. 1771. and ſo the Judgment in this Caſe was affirmed, and the Law ſettled in this Point.

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