# The SECOND PART
OF
# Modern Reports,
BEING A
# COLLECTION
OF SEVERAL
## *SPECIAL CASES,*
Moſt of them ADJUDGED in the
# COURT
OF
## Common-Pleas,
In the 26th, 27th, 28th, 29th, and 30th Years
Of the REIGN of
# King Charles II.
When Sir *Fr. North* was Chief Juſtice of the ſaid Court.
To which are added,
Several Select CASES in the Courts of *Chancery*, *Kings-Bench*, and *Exchequer*, in the ſaid Years.

*Carefully Collected by a Learned Hand.*

**The Third Edition.**
With the Addition of a great Number of new References never before printed.

In the *SAVOY:*
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MDCCXXV.

TO THE

# *RIGHT HONOURABLE*

# JOHN

# Lord SOMERS,

## Baron of *Eveſham*, Lord High Chancellor

OF

# ENGLAND.

My Lord,

*WHEN both the Favour and Severity of the Laws were by partial and unuſual Methods applied to the Perſons, and not to the Caſes of the Accuſed; when the Life and Honour of an unfortunate Man depended on the Arbitrary Dictates of ſome Men in Authority; and when the Sentence pronouced was more Criminal than the Offence of which the Party was too eaſily convicted; then was your Lordſhip as far from any Advancement to a judicial Office, as your Judgment and Inclinations were from the Approbation of ſuch Proceedings: But no ſooner were Places of Honour and Profit in the Law made the unſought Rewards of good and learned Men, but your Lordſhip's Merits entituled you to both; whoſe Moderation and Temper will make your Adminiſtration juſt and eaſy in that honour-*

*able Court, to which Fortune had no Share in your Promotion; and whoſe natural Abilities are ſo improved by a continued and inflexible Study, that your Knowledge is not alone confined to the municipal Laws of this Nation, but is generally extenſive to all humane Learning.*

*What Services may not a Prince expect from the Wiſdom and Vigilancy of ſuch a Counſellor? And what Benefit may not a divided People find by your equal Diſpenſation of Juſtice, who, if they can be united in any Thing, it muſt be in the general Satisfaction which all have in your Promotion, becauſe they know thoſe Cauſes which come before your Lordſhip will receive a due Hearing and Attention without Paſſion or Prejudice to Perſons; ſuch Emotions being as much beneath the Greatneſs of your Lordſhip's Mind, as they are beyond the Duty of Juſtice, and fit only for ſuch who will neither be guided by the Rules of Equity or Reaſon; ſo true is that Saying,* Utitur animi motu qui uti ratione non poteſt.

*The Reſpect which is due to the Office of Magiſtrates, challengeth an univerſal Obedience; but that particular Affection and Eſteem which we have for their Perſons, is due only to their Vertues and Merits: And ſuch is that which I have, and all Men, eſpecially thoſe of my Profeſſion, ought to have for your Lordſhip and the preſent Judges in* Weſtminſter-Hall, *whoſe Learning and Integrity in judicial Determinatsons may bring the Laws nearer to Perfection; and whoſe Examples are the juſt Commendation of the preſent, and I hope will be the Imitation of ſucceeding Ages.*

*I could never underſtand the right Meaning of that Sentence,* Boni Judicis eſt ampliare Juriſdictionem; *for if that be true, then to what Purpoſe were thoſe Arguments at the Bar of the Houſe of Peers againſt ſome late Judges for retaining Bills in Equity, the ſubject Matter whereof was only tryable at the*

*Common Law? Such Complaints are now no more, becauſe your Lordſhip will not only ſupport the Honour and Dignity of that Court wherein you preſide in the Beauty of Order, but will not enjoyn any other from exerciſing its proper Juriſdiction.*

*Thus will the Credit of the Laws of* England *be revived, and Men will acquieſce under the legal Determinations of each Court; very few Writs of Error will be brought for Error in Law, becauſe of the Juſtice and Stability of the Judgment in that Court wherein it was given; and very few Appeals, becauſe your Lordſhip knows ſo well how to temper Equity with Juſtice, that he muſt be a very angry Man, who goes away diſſatisfied with your Lordſhip's Decree.*

*But ſince the Actions of Men in great Places are ſubject to the various Cenſures of Mankind, if any prejudiced Perſon ſhould revive thoſe Diſputes, or quarrel at your Lordſhip's Adminiſtration, ſuch Complaints would leave no other Impreſſion upon the Minds of impartial Men, than to convince them of the Wrong done to your Lordſhip, and the Folly of ſuch Miſapprehenſions.*

My Lord, *I have prefixed your Lordſhip's Name to this mean Performance, taking this Occaſion to ſhew that great Honour and Reſpect which I have for your Lordſhip; not that I am ſo vain to think any Thing herein to be worthy of your Lordſhip's Leiſure, neither do I think it Manners to beg your Lordſhip's Patronage, becauſe a good Book will protect it ſelf at all Times, and a bad one deſerves no Protection.*

*I know few Books are either praiſed or peruſed, but what are warranted by the common Repute and Eſteem of the Writer, which muſt be imputed to the Prejudice and Partiality of Men, and which argues a Diffidence*

*of our natural Parts, as if we did not dare to make a right Uſe of our own Judgments: For this Reaſon I have concealed my Name, that a Judgment may not be made of the Book by the Repute of the Writer. But I hope your Lordſhip will not condemn my Ambition, when I ſay, I am not altogether unknown to your Lordſhip, who am*

Your Lordſhip's

Middle-Temple,
June 22. 1693.

Moſt humble Servant,

*J. W.*

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DE

# DE

# Termino Sancti Hill.

## Annis 26 & 27 Car. II. in Communi Banco.

Coram *Franciſco North* Milite, *Capital' Juſtic'.*
*Hugone Wyndham* Milite,
*Roberto Atkins* Milite, & } *Juſtic'.*
*Willielmo Ellis* Milite,

The King *verſus* the Biſhop of *Rocheſter* and Sir *Francis Clark.*

Quare Impedit.

Mod. Rep. 195. Grant of the King where the firſt Clauſe is certain, and a Miſtake in another, yet the Grant is good.

* 31 H. 8. c. 13.

IN a Quare impedit **a ſpecial Verdict was found, wherein the Caſe was thus:**

**The Manor of** Laburn, **to which the Advowſon of the Church of** Laburn **was appendant, did by the Diſſolution of Monaſteries,** Anno 31 H. 8. **come to the King, who granted the ſaid Manor to the Archbiſhop of** Canterbury (**excepting the Advowſon**) **and afterwards the ſaid Archbiſhop regrants the ſame to King** H. 8. **and the Advowſon of the Church of** Laburn **aforeſaid; and then King** H. 8. **grants the ſaid Manor of** Laburn & Advocation' Eccleſiæ de Laburn dicto Archiepiſcopo, (**having named him before**) dudum ſpectan', **and which was regranted to the ſaid King by the ſaid Archbiſhop, and lately belonging to the Abbot of** G. &c. adeo plene **as the ſaid Archbiſhop or Abbot had it, or as it was in our Hands by any Ways or Means howſoever.**

**And whether the Advowſon paſſed by this laſt Grant, was the Queſtion.**

**Three Juſtices** (abſente North) **gave Judgment for the Defendant, that the Advowſon did paſs by this Grant.**

Juſtice Ellis in his Argument ſaid, That it was plain that when the Manor came to H. 8. the Advowſon was appendant; but when it was granted to the Archbiſhop, and the Advowſon excepted, it then became in groſs, and therefore could never afterward be appendant: As an Acre once diſunited from the Manor can never after be Part of that Manor. Liford's Caſe, 7 Co.

James *and* Johnſon's *Caſe* Poſtea.

And 'tis as plain, that before the Statute de Prerogativa Regis, cap. 15. That in the Caſe of the King, by the Grant of a Manor, the Advowſon though not named paſſed, much more if it be named in any Part of the Deed, as if it be in the Habendum though not in the Premiſſes; but that must be intended of an Advowſon appendant.

10 Co. 63.

And though Advowſons are excepted by that Statute, yet in caſe of Reſtitution, an Advowſon will paſs by the Words Adeo plene & integre, though not named.

In this Caſe there are general Words, and the ſame as in * Whiſtler's Caſe; yet this differs from that, for here 'tis granted Adeo plene, as the Abbot had it; by thoſe Words it doth not paſs, for then it was appendant, but now it is in groſs; and if the King intended to paſs an Advowſon as appendant when 'tis in groſs, the Grant is void. Hob. 303.

* 10 Co. 63. Poſtea. Attorney General *againſt* Turner.

In Whiſtler's Caſe there are the Words Adeo plene, as in this, and the Advowſon was appendant ſtill; but yet there are general Words here that will paſs it: *Adeo plene* as the Archbiſhop had it, will not ſerve, becauſe he never had it; neither will *Adeo plene* as the Abbot had it paſs this Advowſon, becauſe he had it in groſs; but *Adeo plene* as the King had it by any Ways or Means whatſoever, thoſe general Words are ſufficient to paſs it.

The King grants the Manor and the Advowſon of the Church of Laburn, which is certain, and by particular Name, Part of what follows (as *ſpectan'* to the Archbiſhop) is falſe, for it never belonged to him, becauſe it was excepted in the Grant of the Manor to him, but the firſt Deſcription being full and certain, the Falſity of the other ſhall not avoid the Grant, eſpecially when the King is not deceived in his Title nor in the Value, and when there is a Certainty of the Thing granted.

Some falſe Suggeſtions may make his Grant void, as if he grant the Manor of D. reciting that it came to him by Attainder, when it came by Purchaſe. Hob. 229.

But if the Mis-recital concerns not the King's Title or Profit, it doth not vitiate the Grant, 10 H. 2. 4. Sir John Leſtrange's Caſe, where the King by Office found had the Wardſhip of a Manor, and makes a Grant thereof, reciting

Lane 11.

Quod

Quod quidem Manerium in manus noſtras ſeiſit' &c. which was not true, yet the Grant was held good, becauſe it was only to make that certain which was certain enough before by a particular Deſcription. So in Legate's Caſe, 10 Co. 113. wherein is cited the Caſe of the Earl of Rutland and Markham, to whom the Queen had granted the Office of Parkerſhip, &c. Quod quidem Officium the late Earl of *Rutland* habuit, when in truth the Earl never had it before, yet the Grant was held good.

So alſo if he grants for and in Conſideration of Service done, or Money paid; if falſe, it avoids not the Grant, becauſe ſuch Conſiderations (when paſt) are not material whether they are true or falſe. Cro. Jac. 34.

If the King let the Manor of D. of the Value of 4 l. per Annum, if it be more it is ill; but if he let it by a particular Name, and then adds, Quod quidem Manerium is of ſuch a Value, 'tis good, becauſe the * Quod quidem is but the Addition of another Certainty: So here the Advowſon is granted by ſpecial and expreſs Name, but the Clauſe that follows, Dudum ſpectan' to the Archbiſhop, implies a Miſtake; and had there been no more in the Caſe, this Falſity would never have avoided the Grant. * 2 Cro. 34.

But when the King had enumerated ſeveral Ways by which he thought he might be intitled, at laſt as a Proof that he was reſolved to paſs it, he adds theſe Words, viz. as it is in our Hands by any Way or Means whatſoever.

Atkins Juſtice of the ſame Opinion: Where the Thing is not granted by an expreſs Name, there, if a Falſity is in the Deſcription of that Thing, the Grant is void even in the Caſe of a common Perſon, as if he grant Lands lately let to D. in ſuch a Pariſh, and the Lands were not let to D. and were alſo in another Pariſh, the Grant is void, becauſe the Lands are not particularly named. Anderſ. 148. Heywood's Caſe.

A fortiori in the Caſe of the King, as if he grant omnia illa Tenementa ſituata in Wells, when in truth the Lands did not lie there; for this Reaſon the Grant was void, becauſe it was general, and yet reſtrained to a particular Town, and the Pronoun (illa) goes through the whole Sentence.

But if a Thing is granted by an expreſs Name, tho' there is a Falſity in the Deſcription, yet in the Caſe of a common Perſon 'tis good.

As when the Subchantor and Vicars Choral of Lichfield made a Grant to Humfrey Peto of 78 Acres of Glebe, and of their Tythes Predial and Perſonal, and alſo of the Tythe of the Glebe, All which late were in the Occupation of Mar-

garet Peto, which was not true, yet the Grant was adjudged good, for the Words All, which are not Words of Restriction, unless when the Clause is general and the Sentence entire, but not when it is distinct. Cro. Car. 548.

But in the Case of the King, if there is a Falsity by which the King hath a Prejudice, and a Falsity upon the Suggestion of the Party, it will make the Grant void, but every Falsity will not avoid his Grant, if it be not to his Prejudice.

But let the Falsity in this Case be what it will, the *Adeo plene* as it is in our Hands helps it; and though it hath been objected, That these Words will not help the Grant, because nothing new is granted, that being done before; 'tis true, there is nothing new granted, but that which was before was not well granted till this Clause came, which supplies and amends the Falsity; for now 'tis apparent that the King intended to pass the Advowson as well as the Manor, and therefore at last grants it, be his Title what it will.

In all Cases where the King's Grant is void because of any Mistake in his Title, 'tis to be intended the King would not make the Grant unless the Title were so as 'tis recited, but here 'tis apparent the King resolved to grant it.

Judgment. Wyndham Justice agreed, and Judgment was given accordingly.

## Wilcox *versus the Servant of Sir* Fuller Skipwith.

Replevin. Justification for an Herriot. IN Replevin, the Defendant justifies the Taking of the Cattle for a Herriot, which he alledges to be due upon every Alienation without Notice.

The Plaintiff denies the Herriot to be due upon Alienation. And thereupon Issue is joined.

The Special Verdict finds the Tenure to be by Fealty and the Rent of 3 s. 1 d. (tho' the Defendant in his Avowry had alledged the Rent to be 12 s. 4 d. and the Plaintiff in his Bar to the Avowry had confessed it to be so) Suit of Court, and an Herriot, which was payable upon every Alienation with or without Notice.

And whether upon this Special Verdict, Judgment should be given for the Plaintiff or the Avowant, was the Doubt.

Ex parte Def. Upon the Point of Pleading, Serjeant Jones for the Defendant said, it had been objected that the said Avowry was ill, for ut Ballivus, &c. bene cogn' captionem in prædicto loco, &c. but doth not say tempore quo, &c. for a Herriot (tempore

quo, &c. being left out) and ſo doth not ſay a Herriot was due at the Time of the taking of the Goods.

But he anſwered, That that was uſual and Common, and of that Opinion were all the Juſtices, and ſo it was held good.

It was farther objected, That here is a Variance between the Avowry and the Finding in the Special Verdict; The Avowant ſays that the Rent was 12 s. and 4 d. and the Jury find that it was but 3 s. 1 d. He alſo ſaith, that the Heriot was due upon every Alienation without Notice, and they find it due with or without Notice.

But to that he ſaid, the Jury have doubted only of the laſt Point, for the Avowry was not for Rent, but for the Herriot; ſo the Subſtance is, whether he had good Cauſe to diſtrein for the Herriot or not. Poſtea,

And as to that, the Subſtance is ſufficiently found, like the Caſe in Dyer 115. Debt upon Bond for Performance of Covenants, and not to do Waſte, the Breach aſſigned was that the Defendant fell'd twenty Oaks, who pleads Non ſuccidit viginti Quercus præd' nec earum aliquam, the Jury find he cut down ten, yet the Plaintiff recovered; for though the intire Allegation of the Breach was not found, becauſe ten did not prove the Iſſue of twenty literally, yet the Subſtance is found, which is ſufficient to make the Bond forfeited.

So in Treſpaſs, where the Plaintiff makes a Title under a Leaſe which commenced on Lady-day, Habendum a Feſto, &c. and the Iſſue was non demiſit modo & Forma, the Jury found the Leaſe to be made upon Lady-day, Habendum a confectione, and ſo it commenced upon Lady-day, and not a Feſto, &c. which muſt be the Day after the Feaſt, yet 'twas adjudged for the Plaintiff, becauſe the *Subſtance was, whether or no the Plaintiff had a Leaſe to intitle himſelf to commence an Action. Hob. 73. * Moor 868 Ylew, 148,

But in Ejectment or Replevin ſuch a Declaration had been naught, becauſe therein you are to recover the Term, and therefore the Title muſt be truly ſet out, and in Replevin you are to have a Retorn' Habend', but in Treſpaſs 'tis only by Way of Excuſe. Sed Quære.

A ſecond Reaſon is, becauſe both Plaintiff and Defendant in Pleading have agreed the Matter in this Particular, for both ſay the Rent was 12 s. and 4d.

'Tis a Rule in Law, that what the Parties have agreed in Pleading ſhall be admitted though the Jury find otherwiſe. 2 Aſſ. pl. 17. 18 E. 3. 13 b. 2 Co. 4. Goddard's Caſe. Jurors are not bound by Eſtopple ad dicend' veritatem, for they are ſworn ſo to do, unleſs the Eſtopple be within the ſame

ſame Record, but here that which is confeſſed cannot be Matter of Iſſue, not being Lis conteſtata.

It has been objected, That in 33 H. 6. 4. b. the Plaintiff brought Debt for 20 l. the Jury found the Defendant only owed 10 l. and the Plaintiff could never recover.

But that muſt be intended of a Debt due upon Contract and there the leaſt Variance will be fatal. 38 H. 6 1.

As to the ſecond Variance, 'tis not material, for 'tis not true as the Avowant hath ſaid, for if the Matter in Iſſue be found, the finding over is but Surpluſage; both the Verdict and the Avowry agree, that the Defendant may take a Diſtreſs in Caſe of Alienation without Notice: And ſo he prayed Judgment for the Defendant.

Judgment for the Defendant.

The Court were all of Opinion, that Judgment ſhould be given for the Defendant; for what is agreed in Pleading, though the Jury find contrary, the Court is not to regard; and here the Subſtance of the Iſſue, as to the Second Point, is well found for the Defendant.

Judge Atkins told Serjeant Wilmot, who argued for the Plaintiff, that he had cited many Caſes which came not up to the Matter, and ſo did magno conatu Nugas agere, for which Reaſon I have not reported his Argument.

## Smith *verſus* Feverel.

Caſe for ſurcharging a Common.

THE Plaintiff brought an Action on the Caſe againſt the Defendant, ſetting forth, That he had Right of Common in A. and that the Defendant put in his Cattle viz. Horſes, Cows, Hogs, &c. ita quod Communiam in tam amplo modo habere non potuit.

The Defendant pleads a Licence from the Lord of the Soil to put in Averia ſua, which was agreed to comprehend Hogs as well as other Cattle in the moſt general Senſe.

The Plaintiff demurs, and after Argument the Court were all of Opinion, that Judgment ſhould be given for the Plaintiff, becauſe the Defendant in his Plea hath not alledged that there was ſufficient Common left for the Commoners, for the Lord cannot let out to Paſture ſo much as not to leave ſufficient for the Commoners.

And tho' it was objected, That the Plaintiff might have replyed ſpecially, and ſhewn there was not enough; yet it was agreed by the Court that in this Caſe he need not, be-

cause his Declaration to that Purpose was full enough, and that being the very Gist of the Action, the Defendant should have pleaded it.

It was held indeed, that in an Action upon the Case by the Commoner against the Lord, he must particularly shew the Surcharge; but if the Action be brought against a Stranger, such a Shewing as is here is sufficient.

North Chief Justice said, and it was admitted, that the Licence being general, ad ponend' averia, it should be intended only of Commonable Cattle, and not of Hogs; Sed contra, if the Licence had been for a particular Time.

## Anonymus.

A Man devises Land to A. his Heir at Law, and devises other Lands to B. in Fee, and saith, If A. molest B. by Suit or otherwise he shall lose what is devised to him, and it shall go to B. The Devisor dies, A. enters into the Lands devised to B. and claims it; the Court were of Opinion, that this Entry and Claim is a sufficient Breach to entitle B. to the Land of A. Devise.

It was also agreed, that these Words, If A. molest B. by Suit, &c. make a Limitation and not a Condition, Pl. Com. 420. the Devise being to the Heir at Law; for if it were a Condition, it descends to him and so 'tis void, because he cannot enter for the Breach, 3 Co. 22. Cro. Eliz. 204. Wellock and Hamond's Case. Paying in the Case of the eldest Son makes a Limitation. Owen 112.

So in the Case of Williams and Fry in an Ejectione firmæ in B. R. lately for Newport-House. A. deviseth to his Grand-daughter, Provided and upon Condition that she marry with the Consent of the Earl of *Manchester* and her Grand-mother, 'tis a Limitation.

2dly, It was agreed, That an Entry and Claim in this Case was a sufficient Molestation; for when the Heir enters and claims generally, it shall be intended as Heir, and the Words, that he shall not molest by Suit or otherwise, are to be intended occasione Præmissorum.

3dly, There is no need of Entry to avoid an Estate in case of a Limitation, because thereby the Estate is determined without Entry or Claim, and the Law casts it upon the Party to whom it is limited, and in whom it vests till he disagrees to it.

A. devises Land to B. and his Heirs, and dies, 'tis in the Devisee immediately, but indeed til Entry he cannot bring a possessory Action, as Trespass, &c. Pl. Com. 412, 413. 10 Co. 40 b.

Nota. 40 b. where a Poſſeſſion veſts without Entry, a Reverſion will veſt without Claim.

## Curtis *verſus* Davenant.

Prohibition. A Biſhop cannot appoint Commiſſioners to tax the Pariſh for Building or Repairing a Church.

IN a Prohibition, the Queſtion was, Whether if a Church be out of Repair, or being ſo much out of Order that it muſt be re-edified, whether the Biſhop of the Dioceſe may direct a Commiſſion to impower Commiſſioners to tax and rate every Parithioner for the Re-edifying thereof? The Court did unanimouſly agree ſuch Commiſſions were againſt Law, and therefore granted a Prohibition to the Spiritual Court, to ſtop a Suit there commenced againſt ſome of the Pariſhioners of White-Chapel, for not paying the Tax according to their Proportions.

It was agreed, That the Spiritual Court hath Power to compel the Pariſh to repair the Church by their Eccleſiaſtical Cenſures; but they cannot appoint what Sums are to be paid for that Purpoſe, becauſe the Church-wardens by the Conſent of the Pariſh are to ſettle that.

As if a Bridge be out of Repair, the Juſtices of Peace cannot ſet Rates upon the Perſons that are to repair it, but they muſt conſent to it themſelves.

Theſe Pariſhioners here who contribute to the Charge of repairing the Church may be ſpared, but as for thoſe who are obſtinate and refuſe to do it, the Spiritual Court may proceed to Excommunication againſt them; but there may be a Libel to pay the Rates ſet by the Church-wardens.

## Nurſe *verſus* Yearworth *in Cancellaria.*

Bill *in Cancellaria* for the Aſſignment of a Term.

RIchard Yearworth being ſeiſed of Lands in Fee, makes a Leaſe to the Defendant Chriſtopher Yearworth for 99 Years to ſuch Uſe as by his laſt Will he ſhould direct.

Afterward he makes his Will in Writing (having then no Iſſue but his Wife groſſement enſeint) and thereby deviſes the ſame Land to the Heirs of his Body on the Body of his Wife begotten, and for Want of ſuch Iſſue, to the ſaid Chriſtopher the Defendant and his Heirs.

Richard dies, and about a Month after a Son is born, the Son by Vertue of this Deviſe enjoys the Land, but when he attains his full Age of One and twenty Years, he ſuffers a Common Recovery, and afterwards deviſes the Land to the Complainant Nurſe, and dies.

The Complainant exhibits a Bill against the Defendant to have the Lease for 99 Years assigned to him, and whether he should have it assigned or not, was the Question.

1. It was pretended, That an Estate in Fee being limited by the Will to Christopher, who was Lessee for 99 Years, the Term is thereby drowned.

2. It was objected, That the Devise by Richard to the Infant in ventre sa mere was void, and then the Complainant, who claimed by a Devise from the Posthumus, could have no Title, but that the Defendant to whom an Estate was limited by the Will of Richard in Remainder should take presently.

But notwithstanding what was objected, the Lord Keeper Finch decreed, That the Leale which was in Trust, should be assigned to the Complainant Nurse.

He said, That at the Common Law without all Question a Devise to an Infant in ventre sa mere of Lands devisable by Custom was good, so that the Doubt arises upon the Statute of H. 8. which enacts, That it shall be lawful for a Man by his Will in Writing to devise his Lands to any Person or Persons, for in this Case the Devisee not being in rerum naturâ, in Strictness of Speech is no Person, and therefore it hath been taken that such a Devise is void, Moor's Rep. and 'tis left as a Quære in the Lord Dyer 304. Roll. Abr. Tit. Devise 609. lit. H. pl. 2. Godb. 385. 11 H. 6. 13. 7 Co. 37. a. dubitatur.

But in Two Cases in the Common-Pleas, one in the Time when the Lord Chief Justice Hale was Judge there, the other in the Lord Chief Justice Bridgman's Time, it hath been resolved, That if there were sufficient and apt Words to describe the Infant, though in ventre sa mere, the Devise might be good.

But in the King's-Bench the Judges since have been divided upon this Point, that as the Law stands now adjudged, this Devise in our Case seems not to be good: But should the Case come now in question, he said he was not sure that the Law would be so adjudged; for 'tis hard to disinherit an Heir for want of apt Words to describe him, and 'tis all the Reason in the World, that a Man's Intent, lying in extremis, when most commonly he is destitute of Counsel, should be favoured.

## Whitrong *verſus* Blaney.

Proceſs into *Wales.*

THIS Term the Court delivered their Opinions in this Caſe, North Chief Juſtice, who had heard no Arguments herein, being abſent.

The Caſe was this: The Plaintiff upon a Judgment in this Court ſues out a Scire Facias againſt the Heir and the Tertenants, which was directed to a Sheriff of Wales; the Defendant is returned Tertenant, but he comes in and pleads Non tenure generally, and traverſes the Return; the Plaintiff demurs.

Two Points were ſpoken to in the Caſe.

1. Whether the Defendant can traverſe the Sheriff's Return? And all the Three Juſtices agreed that he cannot.

2. Whether a Scir' Fa', Ca' Sa', Fi' Fa', &c. would lie into Wales on a Judgment here at Weſtminſter; And they agreed it would well lie.

An Indictment may be removed. 2 Cro. 454.

Ellis Juſtice agreed, If Judgment be given in Wales it could not be removed into the Chancery by Certiorari, and ſent hither by Mittimus, and then Execution taken out upon that Judgment here, becauſe ſuch Judgments are to be executed in their proper Jurisdictions, and ſuch was the Reſolution of the Juſtices and Barons. Cro. Car. 34.

But on a Judgment obtained here, Execution may go into Wales. No Execution can go into the Iſle of Man, becauſe 'tis no Part of England, but Wales is united to England by the Statute of 27 H. 8. c. 26. And therefore in Bedo and Piper's Caſe, 2 Bulſtr. 156. it was held, that ſuch a * Writ of Execution goes legally into Wales.

* Het. 20. 2 Cro. 484. The Opinion of *Doddridge.* Roll. 395. 2 Sand. 194. *Twiſden* denied it.

He ſaid, he had a Report of a Caſe in 11 Car. 2. where a Motion was made to quaſh an Elegit into Wales; but it was denied, for the Court agreed the Writ well iſſued.

Some have made a Difference between the King's-Bench and the Common Pleas, as if an Execution might go into Wales upon a Judgment obtained in the King's-Bench, but aliter if in the Common Pleas.

But the Law is the ſame in both Courts, Mich. 1653. between Wyn and Griffith, this very Caſe came in queſtion, and there it was held, that Execution goes into Wales as well as into any Part of England upon a Judgment in the Courts of Weſtminſter.

In 2 Bulſtr. 54. Hall *verſus* Rotheram, it was held that a Ca' Sa' ſhall go into Wales againſt the Bail upon a Judgment recovered in the King's-Bench here againſt the Principal.

Of the ſame Opinion was Juſtice Atkins, and that the Defendant cannot aver againſt the Sheriff's Return, nor a Biſhop's Certificate; and the true Reaſon is given by my Lord Coke in 2 Inſt. 452. for the Sheriff is but an Officer, and hath no Day in Court to juſtify his Return.

In ſpecial Caſes, Exception may be made to the Sheriff's Return; but this is by Reaſon of the ſpecial Proviſion that is made for the Doing of it by the Statute of W. 2. cap. 39. as in caſe Two ſmall Iſſues be returned, or that the Sheriff return a Reſcous, the Party in his Averment muſt alledge of what Value the Iſſues are.

2dly. That notwithſtanding the common Saying, Breve Domini Regis non currit in Walliam, yet a Fi' Fa', Ca' Sa', or any Execution whatſoever, may iſſue into Wales upon a Judgment obtained here: And to prove this, he conſidered,

1. How Wales formerly ſtood in relation to England.
2. How it ſtood before it was united by the Statute of H. 8.
3. How it now ſtands ſince the Union.

1. And as to the firſt of theſe, England and Wales were once but one Nation, they uſed the ſame Language, Laws and Religion, and ſo continued 'till the Time of the Roman Conqueſt, before which they were both comprehended under one Name, viz. The Iſle of Great Britain.

But when the Romans came, thoſe Britains, who would not ſubmit to their Yoke, betook themſelves to ſuch Places where they thought themſelves moſt ſecure, which were the Mountains in Wales, and from whence they came again, ſoon after the Romans were drove away by their Diſſentions here, and then theſe Britains enjoyed their ancient Rights, as before.

After this came the Saxons and gave them another Diſturbance, and then the Kingdom was divided into an Heptarchy; and then alſo, and not 'till then, began the Welſh to be diſtinguiſhed from the Engliſh; but yet at that Time they had great Poſſeſſions in England, *viz.* Glouceſter, Part of Worceſter, Hereford, Shrewsbury, which they kept 'till King Offa drove them out of the plain Countries, and made them fly for Shelter into thoſe Mountainous Parts in Wales, where they now continue. Cambden 15. And 'tis obſervable, that though Wales had Kings and Princes, yet the King of England had Superiority over them, for to

him they were Homagers, Cambden 67. The Word Princeps implying a Subordinate Dignity, Selden's Titles of Honor 593.

2dly. During the Time of the Separation, Wales had distinct Laws and Customs from those in England, whence that Saying took its Effect, viz. Breve Domini Regis non currit in Walliam: yet the Parliament of England before that Time made Laws to bind Wales; as the Act of 25 Edw. 1. for Confirmation of the old great Charter of the Liberties of England and of the Forrests, which enacts, That certain Duties shall be paid for every Sack of Wool, &c. exported out of Wales. 2 Inst. 531.

So the Statute 3 Edw. 1. cap. 17. which gives Remedy if a Distress be taken and detained in a Castle, and upon Deliverance demanded by the Sheriff, if the Lord of the Castle should refuse, he might raise the Posse Comitatus, and beat down the Castle; and if such Detainer or Refusal be in the Marches of Wales, the King, as the Statute saith, is Sovereign Lord of all, and shall do Right upon Complaint; and the Conquest was not made till 9 E. 1. so that at that Time likewise, though Wales had
Vaugh. 400. Princes of its own, yet the Kings of England were Sovereigns to those Princes; and though they had Laws of their own, yet were they bound by those that were made here; and though their Princes had ordinary Remedial Writs, yet in Cases extraordinary the King's Writs here run into Wales; and it was not for Want of Power, but because there was no Need, for that it went so seldom; and when the King's Writ did issue, it was necessary to direct it to the Sheriff of an English County, for Wales was not then divided into Shires; but after-
* 2 Inst. 195. wards by the Act called Statutum Walliæ, 12 Edw. 1. * it was
4 Inst. 239. divided into Six Counties, and then again by the Act of 27 H. 8. cap. 26. it was divided into the other Six Counties.

But during this Time there were frequent Hostilities between England and Wales, until by the Conquest in Edw. 1's Time they were united.

'Tis pretended, that H. 3. father to Edw. 1. was the Conqueror, and 'tis probable something considerable might be done in his Time; yet the absolute Conquest of the whole Dominion was made by Edw. 1. in whose Time the aforesaid Statutum Walliæ was made, and after that the Statute
Vaugh. 414, of 27 H. 8. to compleat the Union, the End of which is de-
415. clared to bring the Subjects of both to an entire Unity; and that it may be done with Effect, 'tis enacted, That the Laws of England be executed there; for which Reason
2 Bulst. 54. it is held in 5 Co. Rep. Vaughan's Case, fol. 49. that the Sta-

tutes of Jeofails do extend to Wales; and in the Sheriff of Radnor upon a Scire Fac' directed to him, returned Breve Domini Regis non currit, &c. and was amerced 10 l. for his falſe Return. Vide 19 H. 6. 20. Fitzherb. Trial pl. 40. Tit. Juriſdiction. 13 Ed. 3. 23, 24, 34. Idem Brief 621. & Aſſize 382. 2 Bulſtr. 156.* * This was a Reſolution upon no Debate.

It was objected, That by expreſs Proviſion in 1 E. 6. cap. 10. Exigent and Proclamations ſhall be awarded out of the Courts of Weſtminſter into Wales, which if they might before, this Law was then needleſs.

'Tis true, the Opinion of the Parliament ſeems to be, that had it not been for this particular Proviſion, ſuch Proclamations might not have iſſued; for by 6 H. 8. c. 4. ſuch Proclamations went but to the next County, but they do not declare ſo, and perhaps they might ground themſelves upon that vulgar Error, Breve Domini Regis non currit in Walliam, which is not true, unleſs the Clauſe be limited to original Writs only. Vaugh. 414.

Objection. That the Statute of 5 El. cap. 23. which enacts, That the Excommunicato Capiendo ſhall be returned in the King's-Bench, and takes Notice that this Writ is not returnable into that Court from Wales, and therefore orders that the Significavit ſhall be ſent by Mittimus out of the Chancery to the Chief Juſtice there, and gives them Power to make Proceſs to inferior Officers returnable before them at their Seſſions for the due Execution of this Writ; all which had been in vain, if the Capias might go into Wales before the Making this Act.

Anſw. But that is an original Writ, and ſo comes not up to this Caſe.

Wyndham Juſtice agreed in omnibus, and ſaid, that the Statute of 1 Ed. 6. was very needful; for if a Man ſhould be outlawed, if the Proceſs ſhould be ſent to the Sheriff of the next adjoining County in England, he could not have any Notice that he was outlawed, and ſo could not tell when outlawed, or at whoſe Suit.

Vaughan late Lord Chief Juſtice, held ſtrongly, That no Execution would go into Wales when this Caſe was argued before him; and of the ſame Opinion was Juſtice Twiſden. Vaugh. 395. 2 Saund. 194.

Williamſon

## Williamſon *verſus* Hancock.

Collateral Warranty.

A Special Verdict was found in an Ejectment, where the Caſe was:

Richard Lock the Father was Tenant for Life, with Remainder in Tail to Richard his Son, Remainder to the right Heirs of the Father, who levies a Fine with Warranty to the Uſe of Suſan and Hannah Prinn in Fee; they by Bargain and Sale convey their Eſtate to the Defendant: The Son in his Father's Life-time, before the Warranty attached, comes of full Age; the Father dies; the Queſtion was, Whether the Son's Entry was barred by this collateral Warranty thus deſcended?

Mod. Rep. 192.

And the Three Juſtices, abſente North Chief Juſtice, were clear of Opinion, that the collateral Warranty was a Bar to the Son, and ſo Judgment was given for the Defendant.

Ellis Juſtice held, that his Entry is taken away: for in every Warranty two Things are implied, a Voucher and Rebutter; he that comes in by Voucher calleth the Perſon into Court, who is bound in the Warranty to defend his Right, or yield him other Land in Recompence, and muſt come in by Privity; but if the Man have the Eſtate, though he comes in the Poſt, he may rebut, that is, he may repel the Action of the Heir by the Warranty of his Anceſtor, without ſhewing how the Eſtate came to him. Fitz. Nat. Br. 135.

In a Formedon in the Diſcender to ſay the Anceſtor enfeoffed J. S. with Warranty, without ſhewing how J. S. came by the Eſtate, is good.

Object. It was objected by Serjeant Maynard, That no Perſon can take Advantage of a Warranty, who comes in by Way of Uſe, as in this Caſe.

Anſw. But 'tis expreſly reſolved otherwiſe in Lincoln College's Caſe, 3 Co. 62. b. and the Prinns in this Caſe came in by Limitation and Act of the Party, and the Defendant who hath the Reverſion likewiſe by Limitation of Uſe, though he be in the Poſt, ſhall take Benefit of the Warranty as Aſſignee within the Statute of 32 H. 8. c. 34. and ſo it was reſolved in Fowl and Doble's Caſe in this Court, that he who comes in by way of Uſe may rebut; and Juſtice Jones in his Report, fol. 199. affirms the fourth Reſolution in Lincoln College's Caſe to be Law.

Mod. Rep. 181.

It was formerly objected by the Lord Chief Justice Vaughan that this Warranty goes only to the Heirs, not to the Assigns, and here the Estate was conveyed by the Two Prinns before the Warranty attached.

Answ. But when the Estate passeth, the Warranty and Covenant followeth, and the Assignee shall have the Benefit thereof though not named, and so is the Authority of 38 E. 3. 26. if a Warranty be made to a Man and his Heirs, the Assignee, though not named, shall rebut, but he cannot vouch.

So if A. enfeoff B. with Warranty, and B. enfeoff C. without Deed, C. shall vouch A. as Assignee of the Land of B. for the Warranty cannot be assigned.

In this Case, though the Warranty did not attach before the Estate in the Land was transferred, yet if it attach afterwards 'tis well enough, and he who hath the Possession shall rebut the Demandant without shewing how he came by the Possession.

If a Warranty be to one and his Heirs without the Word Assigns, the Assignee indeed cannot vouch, but he may * rebut; for Rebutter is so incident to a Warranty, that a Condition not to rebut is void in Law: But 'tis otherwise of a Condition not to vouch, for in such Case you may rebut. * 1 Inst. 265. a. 354.

'Tis true, it hath been an Opinion, that he who claimeth above the Warranty, if it be not attached, cannot take Benefit of it by way of Voucher or Rebutter; as if Tenant in Dower maketh a Feoffment to a Villain with Warranty, and the Lord entreth upon him before the Descent of the Warranty, the Villain can never take Advantage of this Warranty by way of Rebutter, because the Lord's Title is paramount the Warranty, and he cometh not under his Estate to whom the Warranty was made.

If Land be given to two Brothers in Fee, with Warranty to the Eldest and his Heirs, the Eldest dies without Issue, the Survivor shall not take Benefit by this Warranty, for the Reason aforesaid.

But in the Case at Bar the Warranty being collateral and annexed to the Land, goes with the Estate, and whilst that continues, the Party may vouch or rebut; so here the Defendant, though he be only Tenant at Will, for the Estate is in the Bargainors and their Heirs (there being no Execution of it either by Livery or Enrolment) yet he may rebut.

Justice

Juſtice Atkins was of the ſame Opinion, that by this collateral Warranty the Entry of the Leſſor of the Plaintiff was taken away, for 'tis the Nature of a collateral Warranty to be a Bar; a* Right is bound by it; it extinguiſhes a Right, 'tis annexed to the Land, and runs with it.

* Jones Rep. 199, 200. 1 Inſt. 366, 385. 25 H. 6. 63. Bro. Car. 4.

If then a collateral Warranty be of this Nature, 'tis againſt all Reaſon, that he who is thus bound ſhould make any Title to the Land; but 'tis very reaſonable that he who comes in quaſi by that Eſtate ſhould defend his Title.

The Opinions of Juſtice Jones and Juſtice Crook in the Caſe of * Spirt and Bence has occaſioned this Doubt: The Caſe was ſhortly thus: Cann being ſeiſed in Fee had Three Sons, Thomas, Francis and Henry, and deviſed Lands to the Two eldeſt in Tail, and to Henry the Meadow called Warhay (which was the Land in queſtion) but doth not limit what Eſtate he ſhould have in it; then he adds theſe Words, viz. Alſo I will that he ſhall enjoy all Bargains I had of *Webb* to him and his Heirs, and for Want of Heirs of his * Body, to his Son *Francis*, and that *Margaret* ſhould have it for Life. Cann dies, the Meadow was not one of Webb's Bargains, Thomas had Iſſue Thomas the Leſſor of the Plaintiff, Henry made a Feoffment in Fee to A. and B. to the Uſe of himſelf and his Wife, and to the Heirs of their Two Bodies, Remainder to his own right Heirs, with Warranty againſt all Perſons, and died without Iſſue; the Leſſor of the Plaintiff enters, being his Couſin and Heir, and of full Age when Henry died. In this Caſe it was held, that if it had been found that Margaret had an Eſtate for Life, and that Henry entred in her Lifetime, that it had been then a Warranty commenced by Diſſeiſin, and would not have bound Thomas the Reverſioner. But as it was, thoſe Two Judges held it no Bar, becauſe the Warranty began with the Feoffment to Uſes, and Henry being himſelf the Feoffee, it returned inſtantly to him, and was extinct as to the Reverſion, becauſe that was veſted in him in Fee, and therefore they held he could have no Benefit either by Voucher or Rebutter, it being deſtroyed at the ſame Time it was created: But Berkly and Richardſon Juſtices held, that quoad the Eſtate of Henry's Wife the Warranty had a Continuance, and the Ground of the contrary Opinion might be, becauſe Juſtice Jones ſaid, there was no ſuch Reſolution, as is mentioned to be the Fourth in Lincoln College's Caſe; yet he affirmeth that very Reſolution in his own Reports, fol. 199.

* Cro. Car. 368.

* Notwithſtanding the Word *Body*, he had but an Eſtate for Life in *Warhay*, for that Word extends to no other than *Webb*'s Bargains.

There is a Clauſe in the * Statute of Uſes, difficult to be underſtood, by which 'tis enacted, That every *Ceſtuy que Uſe* may take ſuch Advantage of Vouching, *&c.* as the Feoffees themſelves might, ſo that *Ceſtuy que Uſe* have the Eſtate executed in him before the Firſt Day of *May*, 1536. which was a Year after the making that Statute; ſo that the Clauſe ſeems to be excluſive of all others who ſhall come in afterwards. * 27 H. 8. c. 10.

Anſw. But he ſuppoſed the Intention of the Law-makers to be, That there ſhould be no more Conveyances to Uſes: But becauſe they preſumed, that at firſt Men might not know of it, therefore, leſt the Parties ſhould be any ways prejudiced, they gave Liberty 'till ſuch a Time to vouch or rebut, within which Time they might have ſome Knowledge of the Statute, and then it was ſuppoſed they would make no more Limitations to Uſes.

But though they imagined them to be left expiring, yet they revived. Since then the Parliament gave Leave to vouch or rebut, whilſt they could in Reaſon think there would be any Conveyance to Uſes, 'tis but reaſonable, whilſt they do continue, that the Parties ſhould rebut, eſpecially ſince moſt Conveyances at this Day are made to Uſes.

Windham Juſtice accord in omnibus, and ſo Judgment was given as aforeſaid.

## Anonymus.

DOwer. The Tenant pleads, That a Leaſe was made by the Husband for 99 Years, before any Title of Dower did accrue, which Leaſe was yet in Being, and ſhews, that the Leſſor afterwards granted the Reverſion to J. S. and died, and that J. S. deviſed to the Tenant for Life.

The Demandant replies, That the Leſſor made a Feoffment in Fee, abſque hoc, that the Reverſion was granted prout, &c.

The Tenant Demurs.

Newdigate Serjeant, for the Demandant, argued, That the Plea was not good, to which he took ſeveral Exceptions.

1. Except. The Tenant by his Plea confeſſeth, That the Demandant ought to have Judgment of the Reverſion expectant upon the Leaſe for 99 Years, de tertia, but doth not ſay, parte.

2. Except. Here is the Grant of a Reverſion pleaded, and 'tis not hic in Curia prolat'.

Then for the Matter, as 'tis pleaded, 'tis not good: He agreed, if Dower be brought againſt Leſſee for Years, he may diſcharge himſelf, by pleading the Continuance of his Leaſe, during which Time the Demandant can have no Execution; but here the Tenant is no ways concerned in the Caſe; 'tis Littleton's Caſe, None ſhall take Advantage of a Releaſe, but he who is Party or Privy, and therefore the Leſſee in this Caſe being Party, might have pleaded this, but the Tenant is altogether a Stranger.

Before the Statute of Glouceſter, cap. 11. If the Demandant had recovered in a real Action againſt the Tenant, the Termor had been bound, becauſe, at the Common Law, no Body could falſify the Recovery of a Freehold, but he who had a Freehold himſelf: this Statute prevents that Miſchief, and enacts, That the Termor ſhall be received before Judgment, to defend the Right of his Term upon the Default of the Tenant; and though the Judgment cannot be hindred thereby, yet Execution ſhall be ſuſpended during the Term; and therefore in Dyer 263 b. the Lady Arundel brought Dower againſt the Earl of Pembroke, who made Default, and before Judgment the Termor prays to be received upon this Statute, and pleads a Leaſe made by the Husband after Coverture, which was aſſigned to him, and that Dower de tertia parte of the Rent of this Leaſe, was aſſigned to the Demandant by the Court of Augmentations, which was afterwards confirmed by Letters Patents; that ſhe accepted it, and concludes, That the Plea of the Tenant was by Colluſion, between him and her, to make him loſe his Term: And this was held ill, for the Reaſon given by my Lord * Hobart, That it is abſurd to admit Two Perſons to diſpute the Intereſt of a Third Man.

* Hob. 316. Not for that Reaſon, but becauſe that Court could not aſſign Dower, and ſo the Letters Patents of Confirmation could not make that good which was void before.

But whether the Traverſe is good or not, if the Plea is naught, Judgment ought to be given for the Demandant.

Jones Serjeant contra: The Pleading is well enough.

1. The Tenant confeſſeth, That the Demandant ought to have Judgment of the Reverſion de tertia, which is well enough, omitting the Word [parte] becauſe he claims a Third Part of ſuch Tenements; and the Tenant confeſſes ſhe ought to have Judgment, which is full enough, if the Words de tertia parte were wholly omitted.

2. He agreed, That whoever claims under a Deed, muſt ſhew it; but the Tenant, in this Caſe, did not defend himſelf

ſelf by any Title from the Deed, for the Subſtance of the Plea, which ſecured him, was, That a Leaſe of 99 Years was in Being, and by his alledging the Deviſe of an Eſtate to him for Life, made by the Grantee of the Reverſion, he did but allow the Demandant's Writ to be true, which mentions him as Tenant of the Freehold.

Then for the Matter of the Plea, he ſays it was good, and that the Tenant might well plead the Leaſe for Years.

By the * Statute of Merton, Damages are given in Dower, where the Husband died ſeiſed, which he did in this Caſe; but yet no Damages ought to be paid here, but for the third Part of the Rent, and the third Part of the Reverſion, and therefore to acquit himſelf thereof, he may well plead, as here, for which there is a Precedent in Hern's Pleader 335. *3 Inſt. 32. b.

Then he ſaid, That the Traverſe was ill, for the principal Point in the Plea which he ought to have traverſed, was the Continuance of the Term; and 'tis not material who granted the Reverſion, or to whom it was granted; for if there is a Leaſe in Being, the Demandant cannot have Execution.

The Court were all of Opinion, That the Subſtance of the Plea was good, becauſe there was a Privity in the Grantee, and it was for his Benefit to avoid the Demandant's Seiſin, he being thereby entituled to the Rent, and he may plead this Plea to ſave himſelf from Damages given by the Statute of Merton: But as to the Traverſe,

North Chief Juſtice, and Wyndham Juſtice, inclined, That the Traverſe was well taken; for if a Diſſeiſor pleads the like Plea, as here, 'tis not good, and therefore when the Tenant alledges a Grant of the Reverſion, the Demandant may well traverſe it.

But Juſtice Ellis and Atkins were of Opinion, That the Traverſe was immaterial, for it was the Leaſe and not the Grant that was traverſable.

But becauſe it was alledged by the Demandants (who offered to refer it to the Counſel on the other Side) that this Leaſe ſo pleaded, was an old Mortgage, long ſince ſatisfied; it was referred accordingly.

## Wilſon *verſus* Drake.

Prohibition.

A Prohibition being granted upon the late Statute for diſpoſing of Inteſtates Eſtates: The Defendant demurred, and the Caſe was no more than this: Whether the Husband being Adminiſtrator of the Wife's Eſtate, be compellable to make Diſtribution amongſt her Kindred or not?

29 C. 2. c. 35---25. Feme Sole hath Debts due by Specialty, ſhe marries, and dies, the Husband ſhall have Adminiſtration; *Quære*, whether he may make Diſtribution to her Kindred.

This Caſe was argued by Serjeant Seys for the Defendant, and by Serjeant Jones for the Plaintiff.

The Circumſtances of the Caſe were:

A Feme Sole had divers Debts owing to her by Specialty, ſhe marries the Plaintiff and died, (the Bonds being not put in Suit during the Coverture) the Plaintiff adminiſters, and her Brother ſues to have a Diſtribution; and it was inſiſted for him, that a Conſultation ought to go, becauſe the * Statute extendeth to all Perſons, and therefore the Husband, though not named, ſhall make Diſtribution, like the Statute de Donis, which only mentions ſome Eſtates Tail; but it has been held, that there are ſeveral other Eſtates Tail beſides thoſe particular Inſtances there mentioned.

* 22 & 23 Car. 2. c. 10.

The Title of this Act is general, and there is no Preamble to reduce it to Particulars; the enacting and proviſional Clauſe ſpeaks in Three Places of all Perſons dying Inteſtate, within which general Words a Feme-Covert, as well as others, is contained.

Ex parte Quer.

But on the other Side it was ſaid, That this Caſe is not inſtanced in that Act which provides only where the Husband dies Inteſtate.

As to what was objected, That this Act is a general Proviſion, and extends in all Caſes of the like Nature, the Title of it alſo being general, for ſettling of Inteſtates Eſtates; to that it was ſaid, That before the making this Act there were many Doubts in thoſe Caſes againſt which a Proviſion was thereby made, and therefore it well became the Prudence of that Parliament to take away all Scruples, and to ſettle thoſe Things which were ſo apt to be queſtioned: But no Doubt was ever made before this Statute to whom Adminiſtration of the Wife's Eſtate ſhould be committed; for by the Statute of 31 Ed. 3. cap. 11. Power was given to the Ordinary to commit Adminiſtra-

miniſtration to the beſt Friend of the Inteſtate; and therefore it has been agreed, that the * Husband, as being the beſt Friend of the Wife, was intituled to the † Adminiſtration.

* 4 Co. 51. Ognel's Caſe Cro. Car. 106. Johns *verſus* Row.

† *Quære*, For Adminiſtration is not granted to the Husband *de jure*, the Ordinary may grant it to whom he pleaſes.

And 'tis agreed on all Sides, that no Diſtribution is to be made by an Adminiſtrator; for if any Suit had been commenced in the Spiritual Court to that Purpoſe, a Prohibition was preſently granted. What Need was there to ſettle this Matter by Act of Parliament, which was ſo clear before?

And 'tis the more unlikely, that the Eſtates of Feme-Coverts ſhould be intended to be diſpoſed by this Act, when 'tis conſidered that all their Eſtates conſiſt only in Things in Action, which the Husband might releaſe during the Coverture (for all the Goods in Poſſeſſion are by Law veſted in the Husband by the Intermarriage) and therefore ſuch inconſiderable Things may be well intended not worthy the Care and Proviſion of a Parliament.

Beſides, the Husband and Wife are but one Perſon in Law, and this Act provides for the ſettling Inteſtates Eſtates; now the Wife cannot be ſaid to die Inteſtate, when her Husband (the better Part) ſurvives.

Before the making thoſe Acts of 31 Ed. 3. cap. 11. and 21 H. 8. cap. 5. the Ordinary might have granted Adminiſtration to a Stranger; but now by the firſt of thoſe Laws he is reſtrained to the next Friend, and by the other to the Widow or next of Kin; ſo that the Power which he had at the Common Law, and which was too often by him abuſed, being now reſtrained, Adminiſtration muſt be granted as preſcribed by this Law, and no equitable Conſtruction can take it from the Husband: For how can it be intended that the Parliament would take from him that Right which he had by thoſe former Laws, and prefer the Relations of his Wife before him?

But if the Wife ſhall be adjudged an Inteſtate within this Act, then the Husband muſt loſe all her Eſtate in Action, and he will be then alſo within the Rules of Diſtribution; ſo that he muſt be at all the Labour and Pains of Adminiſtration (which muſt be granted to him) to defend and get in the Eſtate, and receive no Benefit, for he muſt only deduct his Expences out of the Profits, and diſtribute the Overplus.

He is intituled to the Adminiſtration within the Statute of Edw. 3. He is alſo intituled to it within the Clauſe of the Statute of H. 8. which enacts, That 'tis to be granted to the Wife or next of Kin; and it ſeems very unreaſonable that he ſhould have no Profit for his Labour.

Laſtly,

Laſtly, A Feme-Covert can never be intended to die Inteſtate within the Meaning of this Act; for that Clauſe which directs what Bond the Ordinary ſhall take of the Adminiſtrator is very remarkable to this Purpoſe, which provides, That if it appear the Deceaſed made any Will, *&c.* which a Feme-Covert cannot do without her Husband's Conſent, and therefore ſhe is not a Perſon dying Inteſtate within the Intent of this Law. Curia adviſare vult.

# DE

# Termino Paſchæ,

## Anno 27 Car. II. in Communi Banco.

Naylor *verſus* Sharpleſs, *and others, Coroners of* Lancaſhire.

Caſe for a falſe Return. Mod. Rep. 194.

AN Action on the Caſe was brought for a Falſe Return, in which the Plaintiff ſets forth, That upon a Writ iſſuing out of this Court to the Chancellor of the Dutchy of Lancaſter, Proceſs was directed to Six Coroners being the Defendants, which was delivered to one of them, being then in the Preſence of the Party who was to be arreſted, but he did not execute it, and afterwards at the Return of the Writ they all returned Non eſt inventus.

This Action was laid in Middleſex, and upon Not-Guilty pleaded, the Cauſe came to Trial, and there was a Verdict for the Plaintiff.

Baldwyn Serjeant moved in Arreſt of Judgment.

1. Except. That the Action ought not to be laid in Middleſex, but in Lancaſhire, where the Tort was committed.

But as to that, it was anſwered by Serjeant Turner, When Two Matters, both of which are material and are laid in Two Counties, the Action may be brought in either; as if Two libel in the Admiralty for a Contract made at Land in Dorſetſhire, and for which the Plaintiff brings an Action in London againſt one of them, it has been adjudged the Action lies in either County.

2. Except. The Action will not lie againſt the Six Coroners, for the Tort was done by one alone.

As to that it was ſaid, All the Coroners are but one Officer; ſo if one Sheriff ſuffer an Eſcape, both are liable; but in this Caſe it had been ill to have brought

the

the Action only againſt One, becauſe the Ground of it is the falſe Return, which was made by Six Coroners.

And as to the firſt Exception, there could be no Doubt now, ſince after Verdict 'tis * helped, though the Trial be in a wrong County.

* Stat. 16 & 17 Car. 2. c. 8.

But the Court ſaid, that Statute helps a Miſ-trial in the proper County, but not where the County is miſtaken; and inclined likewiſe that this Action was well brought againſt the Six for this Tort committed by one Coroner; but if it had been for not arreſting the Party, in ſuch a Caſe it ought to have been brought againſt the Coroner who was preſent with the Perſon to be arreſted; for that had been a perſonal Tort which could not have been charged upon the reſt.

## Edwards *verſus* Roberts.

That he did totally forbear, and doth not ſay *hucuſque*, good.

THE Plaintiff declares, That the Defendant promiſed to pay him ſo much Money, in Conſideration that he would forbear to ſue him, and then he avers that he did extunc totaliter abſtinere, *&c.* Upon Non Aſſumpſit pleaded, a Verdict was found for the Plaintiff. And it was now moved by Turner Serjeant in Arreſt of Judgment.

1. Except. The Conſideration intends a total Forbearance, and the Averment is, that from the making of the Promiſe he did totally forbear, but doth not ſay hucuſque: Sed non allocatur, for that ſhall be intended. And it was the Opinion of the whole Court, that if the Conſideration be (as in this Caſe) wholly to forbear, the Plaintiff by an Averment that from the making the Promiſe hucuſque he did forbear, is well entituled to an Action.

A like Caſe was this Term, where the Conſideration was as before, and the Averment was, that he forbore Seven Months; and being moved in Arreſt of Judgment by Serjeant Baldwyn becauſe 'tis not ſaid hucuſque, which implies, that after the Seven Months he did not forbear, it was notwithſtanding held good, it being a reaſonable Time; and the rather, becauſe if the Action had been brought within the Seven Months, and the Plaintiff had averred, that huſuſque he forbore, it had been good enough. Quære.

Reed

## Reed *verſus* Hatton.

IN a ſpecial Verdict in Ejectment, the Queſtion did ariſe upon the Conſtruction of the Words in a Will; The Caſe being this: John Thatcher was ſeiſed in fee of the Houſes in Queſtion, and did deviſe them to his Son Robert; in which Will there was this Clauſe, viz. Which Houſes I give to my Son *Robert*, upon this Condition, That he pay unto his Two Siſters Five Pounds a Year, the firſt Payment to begin at the Firſt of the Four moſt uſual Feaſts that ſhall happen after the Death of the Teſtator, ſo as the ſaid Feaſt be a Month after his Death, with a Clauſe of Entry for Non-payment. The Teſtator dies; the Houſes are worth 16 l. per Annum; and whether Robert the Son ſhall have an Eſtate for Life only or in Fee, was the Queſtion. Deviſe paying 5 *l. per Annum*, 'tis a Fee.

This was argued by Jones Serjeant for the Plaintiff, and by Seys Serjeant for the Defendant.

And for the Plaintiff it was ſaid, That Robert had but an Eſtate for Life: 'Tis true, in moſt Caſes the Word Paying makes a Fee, where there is no expreſs Fee limited, but the Difference is, viz, Where the Money to be paid is a Sum in Groſs, let it be equivalent or not to the Value of the Thing deviſed, the Deviſee ſhall have a Fee, though the Eſtate be not deviſed to him and his Heirs; but if it be an Annual Payment out of the Thing deviſed, as in this Caſe, it will not create a Fee without apt Words, becauſe the Deviſee hath no Loſs; and therefore it hath been held, That if a Deviſe be made to Two Sons, to the Intent that they ſhall bear equal Share towards the Payment of 40 l. to his Wife for Life, the Sons had only an Eſtate for Life, becauſe 'tis quaſi an Annual Rent out of the Profits, and no Sum in Groſs, * Cro. Car. 157. Broke Abr. tit. Eſtate 78. Ex parte Quer. * Jones 211.

And * Collier's Caſe was much relied on where this very Difference was taken, and allowed that paying 25 l. in Groſs makes a Fee, but paying 50 s. per Annum creates only an Eſtate for Life. * 6 Co. 16.

All Deviſes are intended for the Benefit of the Deviſee, and therefore where a Sum in groſs is deviſed to be paid, which is done accordingly; in ſuch Caſe, if the Deviſee ſhould die ſoon after, the Money ſhould be loſt, if he ſhould have only an Eſtate for Life; but in the Caſe at Bar, the Teſtator by a nice Calculation had appointed when the firſt

Payment ſhould be made, viz. Not until a Month after his Deceaſe, which hath prevented that Damage which otherwiſe might have happened to the Deviſee, if no ſuch Proviſion had been made. Vide Hob. 65. Green's Caſe.

Ex parte Def Moor 852. 2 Cro. 415. Bridg. 84. 3 Bulſt. 193.

But on the other Side it was ſaid, That Robert had a Fee, for though here is a Sum to be paid Annually, 'tis a Sum in Groſs, and Collier's Caſe was alſo relied upon on this Side.

It was agreed, where Payment is to be made, by which the Deviſee can ſuſtain no Loſs, the Word Paying there will not make a Fee; but if there be any Poſſibility of a Loſs, there it will create a Fee, which is the expreſs Reſolution in Collier's Caſe. T. Jones 106.

Here the Five Pounds is payable Quarterly, and the firſt Payment is to be made the next Quarter after the Death of the Teſtator, ſo as it be a Month after his Deceaſe; if then he ſhould die a Month before Chriſtmas, the Deviſee is to pay the whole Quarterly Payment at Chriſtmas: So that if he ſhould die the next Day after, inſtead of having any Benefit, he would loſe by this Deviſe, in caſe it ſhould be conſtrued that he had an Eſtate only for Life.

The Court were of Opinion, that a Legacy or Deviſe is always intended for the Benefit of the Party; ſo that 'tis reaſonable to make ſuch Conſtruction of the Will, That he may have no Poſſibility of a Loſs. And it hath been reſolved where a Deviſe was to A. upon Condition to pay a Sum of Money to B. and in caſe of Failure that B. may enter; 'tis no Condition, but an Executory Deviſe, and that * Mary Portington's Caſe was denied to be Law in the Reſolution of Fry and Porter's Caſe in the King's-Bench. * 10 Co. 36.

Judgment. And afterwards in this Term Judgment was given for the Defendant. For if there be a Deviſe to one upon Condition to pay a Sum of Money, if there be a Poſſibility of a Loſs, though not very probable that the Deviſee may be damnified, it ſhall be conſtrued a Fee, and ſuch Conſtruction hath been always allowed in Wills. If A. deviſe 100 l. per Annum to B. paying 20 s. 'tis not likely that the Deviſee ſhould be damnified, but 'tis poſſible he may; and therefore the Eſtate in this Caſe being limited to Robert, and charged with Payments to the Siſters during their Lives, doth plainly prove the Intent of the Teſtator was, that the Deviſee ſhould have an Eſtate in Fee-Simple; and Judgment was given accordingly.

## Bridges *versus* Bedingfield.

DEBT was brought upon a Bond of Award, and the Breach assigned was for not delivering of quiet Possession to the Plaintiff of Seats in a Church. Arbitrament.

The Defendant craves Oyer of the Bond and Condition, which was for Performance of an Award to be made de Præmissis vel aliquâ Parte inde; and if there should be no Award made then for the Performance of an Umpirage, and pleads that the Arbitrators made no Award de Præmissis, but the Umpire awarded that the Plaintiff should abinde upon all Occasions hold Two Seats quietly and peaceably in such a Church, without any Disturbance made by the Defendant; and that on the First Day of November following, the Defendant should deliver up the Seats to the Plaintiff, and that each should bear his own Charge; and by his Plea he farther sets forth, that the Plaintiff enjoyed the Seats prout till the 30th Day of October next following, on which Day the Seats were pulled down without his Knowledge or Consent, per quod he could not deliver them to the Plaintiff on the said First Day of November. Where the Thing awarded is hindred to be done by the Act of a Stranger.

The Plaintiff demurred, and Serjeant Jones maintained the Demurrer, and said, that the Pleading of nullum fecerunt Arbitrium is not good; for 'tis said de Præmissis only, whereas it should have been nec de aliqua Parte inde; for if a Bond be to perform an Award of Two Persons or either of them, it will not be sufficient to plead that those Two Persons made no Award, without adding nec eorum aliquis. Ex parte Quer.

But if an Award be to be made of the Manors of Dale and Sale, or either of them, and the Award is made only of Dale, 'tis well enough.

2. Except. Viz. The Umpirage is that the Plaintiff should hold the Seats abinde, which is for ever; and the Defendant pleads that the Plaintiff enjoyeth them till the Thirtieth Day of October.

3. Except. Viz. The Seats were to be delivered to the Plaintiff on the First Day of November, and the Defendant pleads that they were pulled down before that Day without his Privity, which is not a good Plea by way of Excuse; for being bound to deliver the Seats, he is to prevent what may hinder the Performance of the Condition.

'Tis agreed, That if a Thing be poſſible, and afterwards by the Act of * God becomes impoſſible to be done, that will be a good Excuſe; as if I promiſe to deliver a Horſe at ſuch a Day, and he dies before the Day, I am excuſed. 21 E. 4. 70. b.

* Jones 179. Win's Caſe.

So if a Scire Fac' be brought againſt the Bail, and they plead that before the Writ brought the Principal was dead; this was held not good upon Demurrer, unleſs he is alledged to be dead before the Capias awarded againſt him. Cro. Jac. 97.

But if the Action of a Stranger interpoſe, which makes the Thing impoſſible, that is no Excuſe, 22 E. 4. 27. And therefore 'tis no Plea for the Bail to ſay, that the Principal was arreſted at another Man's Suit and had to Priſon, for which Reaſon he could not render him. Cro. Eliz. 815.

So if I deliver Goods to the Defendant, and in Action of Detinue brought, he pleads they were ſtole; 'tis no good Plea; becauſe the Delivery charges him at his Peril, unleſs he undertake to keep them as his own, 4 Co. * Southcot's Caſe. So if an Eſcape be brought againſt a Gaoler, he is not excuſed by alledging that Traitors broke the Priſon. Roll. Abr. 1 Part. 808. Et ſic de ſimilibus.

* Cro. El. 815.

Ex parte Def.

Seys Serjeant, contra. As to the firſt Exception, nullum fecerunt Arbitrium de Præmiſſis is well enough, for that implies nec de aliqua inde Parte, eſpecially if the Contrary is not ſhewn in the Replication, and therefore it ſhall never be intended that an Award was made of ſome Part.

2. 'Tis ſaid, he enjoyed the Seas till the Thirtieth of October, and then they were taken down, ſo not being in Rerum Natura, they could not be enjoyed longer.

3. And this is a good Excuſe for not delivering them to the Plaintiff on the firſt Day of November, and ſo a good Performance of the Award. Co. Lit. 206. b.

If A. be bound to B. that C. ſhall marry Jane ſuch a Day, and B. the Obligee doth marry her himſelf before that Day, the Obligor is excuſed; becauſe by his Means the Condition could not be performed.

There is a Difference taken where a Man is bound to deliver Things which are in his Cuſtody, and other Things which are not in his Poſſeſſion; as in the firſt Caſe, to deliver my Horſe or Dog, for ſuch I may ſecure in my Stable from Caſualties: But in this Caſe it is expreſly ſaid in the Award, that the Property of the Seats was in the Plaintiff, and that they were fixed in the Church, ſo that he could not poſſibly ſecure them in his own Houſe, without

out ſubjecting himſelf to an Action; and an Award that one Man ſhall take the Goods of another, is void.

But if the Plea is not good, yet if the Umpirage be naught, Judgment is to be given for the Defendant, for the Advantage is ſaved to him upon the Demurrer.

And as to that, the Umpirage is but of one Side, for the Plaintiff is to do nothing, nor is the Defendant to be acquitted of all Suits.

To which it was anſwered by the Plaintiff's Counſel, That the Umpirage was of both Sides; for there being Suits depending, 'tis awarded that each ſhall bear his own Charges, which is a Benefit to the Defendant; for otherwiſe (ſeeing the Right was in the Plaintiff) the Defendant ſhould have paid the Plaintiff's Coſts as well as his own, for which he cannot now ſue without forfeiting his Bond: Curia adviſare vult.

## Squibb *verſus* Hole.

Eſcape. Action of Eſcape; the Proceſs was upon Bond, not made within the Juriſdiction of an Inferiour Court, and therefore no Eſcape.

THE Plaintiff brought an Action of Eſcape, and declared, That he proſecuted one J. S. in the Court of Ely, upon a Bond made infra Juriſdictionem of that Court upon which he was taken, and the Defendant ſuffered him to eſcape.

Upon Not Guilty pleaded, the Jury found a ſpecial Verdict to this Effect, viz. That there was ſuch a Bond, upon which there was ſuch a Proſecution, and ſuch an Eſcape as in the Declaration; but they find farther, that this Bond was not made infra Juriſdictionem Curiæ.

Maynard Serjeant, who argued for the Plaintiff, ſaid, That this Action was commenced in an Inferiour Court, upon a Bond which the Plaintiff ſets forth to be infra Juriſdictionem Curiæ; and that the Defendant was arreſted, and ſuffered to eſcape; and whether (if in truth the Bond was not made infra Juriſdictionem) an Action of Eſcape would lie, or whether all the Proceedings are coram non Judice, was the Doubt.

He took a Difference where an Inferiour Court hath an Original Juriſdiction of the Cauſe, and hath Conuſance of ſuch a Suit as is brought there; for in ſuch Caſes the Proceedings are not Extra-judicial; but if an Action is brought where properly no Action doth lie, all the Proceedings there are coram non Judice.

At

At the Common Law, one who had a particular Juriſdiction to hold Pleas within a Liberty, could not hold any Plea of a Thing which did ariſe out of the Liberty; for though it was tranſitory in its Nature, yet being alledged not within his Jurisdiction, it was ill. 2 Inſt. 231.

But when the Cauſe of Action ariſes infra Juriſdictionem, that gives them Authority to proceed; and therefore it would be hard that the Judge and Officer ſhould be puniſhed by a Conſtruction to make all Extra-judicial, when they have no poſſible Way of finding whether in truth the Cauſe did ariſe within the * Jurisdiction of the Court or not: But the Officer is bound to obey the Proceſs of the Court, if it appear (as in this Caſe) that they had Conuſance of it; the Judge is likewiſe bound to grant the Proceſs, otherwiſe he is ſubject to the Plaintiff's Action for his Refuſal.

* Poſt. Crowder *and* Goodwin.

In ſome Caſes, The Plaintiff himſelf may not know where the Bond was made; as if he be Executor of the Obligee, &c. Beſides, in this Caſe 'tis ſet forth, That in the Action below, the Defendant pleaded non eſt factum, and ſo had admitted the Jurisdiction, or at leaſt had waved it; and it would be an inſufferable Miſchief, if after all this Labour and Charge the Defendant might avoid all again.

North Chief Juſtice ſaid, That if this Cauſe had been tried before him, he would have nonſuited the Plaintiff, becauſe he had not proved the Truth of what he laid down in his Declaration, viz. That the Bond was made infra Juriſdictionem Curiæ. But as to the Matter as it ſtood upon the ſpecial Verdict, he inclined, that as to the Plaintiff (who knew where the Bond was made) all the Proceedings were coram non Judice; but as to the Officer it was otherwiſe, for the Pleint and Proceſs would be a good Excuſe for him in an Action of falſe Impriſonment.

Judgment. And afterwards by the Opinion of Three Judges, viz. the Chief Juſtice, Windham and Atkyns Juſtices, Judgment was given for the Defendant, That this was no Eſcape, and that though the Party had admitted the Jurisdiction, by his Plea non eſt factum below, yet that could not give the Court any Jurisdiction, which had not any originally in the Cauſe; and the Caſe of * Richardſon *verſus* Bernard was cited as an Authority in Point, where the Plaintiff in an Action brought againſt an Officer, declared in Hull, upon a Bond made at Halliſax, and had Judgment and

*Roll. Abr. tit. Eſcape, 809. pl. 45.

Execution and the Defendant eſcaped: And in an Action brought for this Eſcape, the Declaration was held ill, becauſe it did not alledge the Bond to be made infra Juriſdictionem Curiæ.

Ellis Juſtice, of a contrary Opinion in omnibus.

## Sams *verſus* Dangerfield.

THE Plaintiff being Collector of the Hearth-Money, brought an Action of Debt upon a Bond againſt his Sub-Collector, conditioned to pay ſuch Sums as he ſhould receive (within 14 Days after Receipt) at ſuch a Place in the City of Worceſter, as the Plaintiff ſhould appoint. Departure.

The Defendant pleads Payment.

The Plaintiff aſſigns a Breach in Non-payment of ſuch a Sum received at a Place by him appointed.

The Defendant rejoins that the Plaintiff appointed no Place; and the Plaintiff demurr'd.

And after Argument for the Plaintiff by Jones Serjeant, this was adjudged a Departure, becauſe the Defendant ought to have pleaded firſt, That he had paid all but ſuch a Sum, for which as yet the Plaintiff had appointed no Place of Payment; and Judgment was given accordingly.

## Smith *verſus* Hall.

IN an Action brought againſt the Defendant for falſe Impriſonment, he juſtified by Vertue of a Latitat, which the Plaintiff agreed in his Replication; but farther ſet forth, that after the Arreſt, and before the Return of the Writ, he rendred ſufficient Bail, which the Defendant refuſed; and Iſſue was joined upon the Tender, which was found for the Plaintiff. Falſe Impriſonment doth not lie, but an Action on the Caſe againſt the Sheriff for refuſing ſufficient Bail.

Newdigate Serjeant, moved in Arreſt of Judgment:

1. Though it was an Offence in the Defendant, who was the Sheriff's Bailiff, to refuſe good Bail when tendred, yet 'tis not an Offence within the Statute 23 H. 6. cap. 10. becauſe a Sheriff's Bayliff is not an Officer intended in that Statute, neither will this Offence make him

him a Treſpaſſer ab initio, becauſe the Taking was by lawful Proceſs. Cro. Car. 196.* Salmon *verſus* Percival.

*Roll. Abr. 2 Part 561. pl. 9.

The Defendant, as Bayliff to the Sheriff, is not the proper Officer to take Bail, but the Sheriff himſelf muſt do it, and therefore an Action on the Caſe muſt lie againſt the Bayliff, for not carrying the Party before the Sheriff, in order to put in Bail; but an Action of falſe Impriſonment will not lie.

2. The Action is laid, Quare vi & armis, *&c.* in ipſum (the Plaintiff) inſultum fecit & ipſum Impriſonavit, & ut Priſonar' à tali loco ad talem locum adducebat, & detinuit contra conſuetudinem Angliæ, & ſine cauſa rationabili per ſpatium trium dierum.

The Defendant pleaded quoad venire vi & armis, necnon totam tranſgreſſionem, præter the Taking and Detaining him Three Days, non Culp. and as to that, he pleaded the Latitat, Warrant and Arreſt, ut ſupra; but the Verdict being only againſt the Defendant upon the Second Iſſue, and nothing appearing to be done upon this, and entire Damages given; 'tis for that Reaſon ill.

North Chief Juſtice, if the Writ and Warrant were good, then the refuſing Bail is an Offence within the Statute of 23 H. 6. And as 'tis an Oppreſſion, ſo 'tis an Offence alſo at the Common Law; but an Action on the Caſe, and not of falſe Impriſonment, lieth againſt the Officer; for it would be very unreaſonable, by the Refuſal of Bail, to make the Arreſt tortious ab initio.

A ſpecial Action on the Caſe had therefore been the proper Remedy againſt the Sheriff, but not againſt the Officer; for an Eſcape will not lie againſt him, but it muſt be brought againſt the Sheriff.

## Keen *verſus* Kirby.

Surrender by a Diſſeiſor, not good. 1 Mod. 199.

IN Ejectment, the Leſſor of the Plaintiff claimed under a Surrender made to him by William Kirby, who had an Eſtate in the Land after the Deceaſe of his Father, but entred during his Life, and thereby became a Diſſeiſor; and his Eſtate being now turned into a Right, he made the Surrender to the Leſſor of the Plaintiff; all which was found by ſpecial Verdict at the Trial; and it was adjudged that the Surrender was void.

It was pretended at the Trial, that the Father, who was Tenant for Life, had ſuffered a Common Recovery in the Lord's Court, and ſo his Eſtate was forfeited, for which the Son might enter, and then his Surrender is good.

But the Court anſwered, That without a particular Cuſtom for that Purpoſe, the ſuffering a Recovery would work no Forfeiture of the Eſtate; but if it did, 'tis the Lord and none elſe who can enter: And ſo Judgment was given for the Defendant.

## Duck *verſus* Vincent.

DEBT upon Bond conditioned to perform Covenants, one of which was for Payment of ſo much Money upon making ſuch Aſſurances. Plea to Debt upon Bond not good.

The Defendant pleaded he paid the Money ſuch a Day, but doth not mention when the Aſſurance was made, that it might appear to the Court the Money was immediately paid purſuant to the Condition; and for that Reaſon the Court were all of Opinion that the Plea was not good: And Judgment was given for the Plaintiff upon Demurrer.

## Smith *verſus* Shelberry.

IN Aſſumpſit, the Plaintiff declared that he was poſſeſſed of a Term of 80 Years; and it was agreed between him and the Defendant, that he ſhould aſſign all his Intereſt therein to the Defendant, who proinde ſhould pay 250 l. and that he promiſed, that in Conſideration that the Plaintiff at his Requeſt had likewiſe promiſed to perform all on his Part, that he would alſo perform all on his Part; and then ſets forth, that the Defendant had paid a Guinea in Part of the ſaid 250 l. and that he, viz. the Plaintiff, obtulit ſe to aſſign the Premiſſes by Indenture to the Defendant, which was written and ſealed, and would have delivered it to him; but he refuſed, and aſſigns the Breach in Non-payment of the Money, to which the Defendant demurred. Aſſumpſit upon a mutual Promiſe.

And it was ſaid for him by Baldwin Serjeant, That this was not a good Declaration, becauſe the Aſſignment ought to precede the Payment, and that it was not a mutual Promiſe, neither was the obtulit ſe well ſet forth; but this was a Condition precedent on the Plaintiff's Side, Ex parte Def.

without the Performance whereof no Action would lie againſt the Defendant. Vide 7 Co. Ughtred's Caſe, fol. 10. b. becauſe it was apparent by the Plaintiff's own ſhewing, that the Money was not to be paid till the Aſſignment made; for the Plaintiff is to aſſign, and the Defendant proinde, which is as much as to ſay, pro Aſſignatione, is to pay the Money: Like the Caſe in Dyer 76. a. Aſſumpſit againſt the Defendant, that he promiſed pro 20 Marks to deliver 400 Weight of Wax to the Plaintiff, the Pronoun Pro makes the Contract Conditional.

Ex parte Quer. Hill & Thorn Poſtea.

But Pemberton, Serjeant for the Plaintiff, held the Declaration good, and that it was a mutual Promiſe, and that the Plaintiff need not aver the Performance, for in ſuch Caſes each has Remedy againſt the other; and 'tis as reaſonable that the Plaintiff ſhould have his Money before he make the Aſſignment, as that the Defendant ſhould have the Term aſſigned before he paid the Money: And of that Opinion was the Court, only Juſtice Atkins doubted.

Cond. Lutw. 252. Lib. B. 109.

Ellis Juſtice cited a Caſe adjudged in the King's-Bench, which was as he thought very hard, viz. An Aſſigment was made between A. and B. that A. ſhould raiſe Soldiers, and that B. ſhould tranſport them beyond Sea, and reciprocal Promiſes were made for the Performance (as in this Caſe) That A. who never raiſed any Soldiers, may yet bring his Action upon this Promiſe againſt B. for not tranſporting them; which is a far ſtronger Caſe than this at Bar.

Stile Rep. 186. Poſtea.

Lutw. 253.

It was agreed here, that the Tender and Refuſal (had it been well pleaded) would have amounted to, and have been equivalent with a full Performance; but the Plaintiff hath not done as much as he might, for he ſhould have delivered the Indenture to the Defendant's Uſe, and then have tendered it: But Judgment was given for the Plaintiff.

## Hays *verſus* Bickerſtaffe.

Vaugh 118. Covenant not Conditional by the Words *Paying* and *Performing*.

IN Covenant brought by the Leſſee, who declared that the Leſſor covenanted with him, that he paying the Rent and performing the Covenants on his Part to be performed, ſhall quietly enjoy.

The Breach aſſigned was a Diſturbance by the Leſſor, who pleads, That till ſuch a Time the Plaintiff did quietly enjoy the Thing demiſed without Diſturbance; but then

he cut down Wood, which was contrary to his Covenant, and then and not before he entred; and ſo by the Plaintiff's not performing his Covenant, the Defendant's Covenant ceaſes to oblige him; whereunto the Plaintiff demurred.

The Queſtion was, Whether the Defendant's Covenant was Conditional or not? For if it amount to a Condition, then his Entry is lawful; but if it be a Covenant, 'tis otherwiſe, for then he ought to bring his Action.

Pemberton Serjeant for the Plaintiff. That this Covenant is not Conditional, for the Words Paying and Performing ſignify no more than that he ſhall enjoy, &c. under the Rents and Covenants, and 'tis a Clauſe uſually inſerted in the Covenant for quiet Enjoyment: Indeed the Word Paying in ſome Caſes may amount to a Condition; but that is where without ſuch Conſtruction the Party could have no Remedy. Ex parte Quer. T. Jones 206.

But here are expreſs Covenants in the Leaſe, and a direct Reſervation of the Rent, to which the Party concerned may have Recourſe when he hath Occaſion.

A Liberty to take Pot-water, paying ſo many Turns, &c. 'tis a Condition.

The Words Paying and Yielding make no Condition, nor was it ever known that for ſuch Words the Leſſor entred for Non-payment of Rent; and there is no Difference between theſe Words and the Words Paying and Performing, Bennet's Caſe in B. R. ruled no Condition; Duncomb's Caſe, Owen Rep. 54. Cook *and* Herle, Poſtea Vaugh. 32.

Barrel Serjeant for the Defendant ſaid, That the Covenant is to be taken as the Parties have agreed; and the Leſſor is not to be ſued if the Leſſee firſt commit the Breach: Modus & Conventio qualify the general Words concerning quiet Enjoyment. Ex parte Def.

The Court took Time to conſider, and afterwards in this Term Judgment was given for the Plaintiff, that the Covenant was not Conditional. Sid. 266, 280.

Atkins Juſtice doubted.

## Simpſon *verſus* Ellis.

Debt by a Bailiff of a Liberty.

DEBT upon Bond by the Plaintiff, who was Chief Baiſiff of the Liberty of Pontefract in Yorkſhire, but he did not declare as Capital' Ballivus, but yet by the whole Court it was held good; for otherwiſe the Defendant might have craved Oyer, and have it entred in hæc verba, and then have pleaded the Statute of 23 H. 6. that it was taken * colore Officii, but now it ſhall be intended good upon the Demurrer to the Declaration.

* Sand. 161. Sid. 383. Latch. 143.

And Ellis Juſtice ſaid, That ſo it was lately reſolved in this Court in the Caſe of one Conqueſt. And Judgment was given for the Plaintiff.

## Maſon *verſus* Stratton, *Executor*, &c.

Judgment kept on Foot *per Fraudem.*

DEBT upon Bond. The Defendant pleads Two Judgments had againſt his Teſtator, and ſets them forth, and that he had but 40 s. Aſſets towards Satisfaction.

The Plaintiff replies, That the Defendant paid but ſo much upon the firſt Judgment, and ſo much upon the Second, and yet kept them both on Foot per Fraudem & Covinam.

2 Cro. 35. 102. Vaugh. 103, 104.

And the Defendant demurred ſpecially.

Becauſe the Replication is ſo complicated, that no diſtinct Iſſue can be taken upon it; for the Plea ſets forth the Judgments ſeverally, but the Plaintiff puts them both together, when he alledges them to be kept per Fraudem.

1 Roll. Abr. 802. 2 Cro. 626.

But on the other Side it was ſaid, that all the Precedents are as in this Caſe; 8 Co. Turner's Caſe 132. 9 Co. Meriel Traſham's Caſe 108. And of that Opinion was all the Court, that the Replication was good: And Judgment was given for the Plaintiff.

Sid. 333.

## Suffeild *verſus* Baskervil.

No Breach can be aſſigned upon a Proviſo.

DEBT upon Bond for Performance of all Covenants, Payments, &c. In an Indenture of Leaſe, wherein the Defendant for and in Conſideration of 400 l. lent him by the Plaintiff, granted the Land to him for 99 Years, if G. ſo long lived, provided if he pay 60 l. per Annum

Quarterly, during the Life of G. or ſhall within Two Years after his Death pay the ſaid 400 l. to the Plaintiff, then the Indenture to be void, with a Clauſe of Re-entry for Non-payment.

The Defendant pleads Performance.

The Plaintiff aſſigns for Breach, that 30 l. for half a Year was not paid at ſuch a Time during the Life of G.

The Defendant demurs.

For that the Breach was not well aſſigned, becauſe there is no Covenant to pay the Money, only by a Clauſe Liberty is given to re-enter upon Non-payment.

The Court inclined, That this Action would not lie upon this Bond, in which there was a Proviſo and no expreſs Covenant, and therefore no Breach can be aſſigned.

## Benſon *verſus* Idle.

AUdita Querela. The Caſe upon Demurrer was, That before the King's Reſtauration, the now Defendant brought an Action of Treſpaſs againſt the Plaintiff for taking his Cloth, who then pleaded that he was a Soldier, and compelled by his Fellow Soldiers, who threatned to hang him as high as the Bells in the Belfry if he refuſed: To this the Plaintiff then replied, de Injuriâ ſuâ propriâ, &c. And it was found for him, and an Elegit was brought, and the now Plaintiff's Lands extended. Eſtoppel not well pleaded with a Traverſe.

Then comes the Act of * Indempnity, which pardons all Acts of Hoſtility done in the Times of Rebellion, and from thenceforth diſcharges Perſonal Actions for or by Reaſon of any Treſpaſs committed in the Wars, and all Judgments and Executions thereon before the firſt Day of May, 1658. but doth not reſtore the Party to any Sums of Money, mean Profits or Goods taken away by Vertue of ſuch Execution, or direct the Party to give any Account for the ſame; which Act made by the Convention, was confirmed by 13 Car. 2. cap. 7. * 12 Car. 2. cap. 11.

And upon theſe Two Acts of Parliament, the Plaintiff (expreſly averring in his Writ, That the former Recovery againſt him was for an Act of Hoſtility) now brought this Audita Querela.

The Defendant pleads the former Verdict by way of Eſtoppel, and concludes with a Traverſe, abſque hoc, that the Taking of his Goods was an Act of Hoſtility.

This

This was argued by Holloway Serjeant for the Plaintiff, and by Jones Serjeant for the Defendant, who chiefly inſiſted, That the Defendant having pleaded the Subſtance of this Matter before, and being found againſt him, that he being now Plaintiff could not aver any Thing againſt that Record.

But the Court were all of Opinion, that Judgment ſhould be given for the Plaintiff; for his Remedy was very proper upon the Convention, and without the Statute of Confirmation. And here is no Eſtoppel in the Caſe; for whether this was an Act of Hoſtility or not, is not material; neither was it or could it be an Iſſue upon the former Trial, becauſe all the Matter then in Queſtion was concerning the Treſpaſs, which though found againſt the now Plaintiff, yet it might be an Act of Hoſtility but if it were an Eſtoppel, 'tis not well pleaded with a Traverſe, and the Court hath ſet it at large.

Hob. 207.

# DE

# Termino Sanctæ Trin.

## Anno 27 Car. II. in Communi Banco.

### Mayor and Commonalty of *London verſus* Gatford.

Conſtruction of an Act of Parliament.

IN an Action of Debt brought by the Plaintiffs, for a Fine of 13 l. 6 s. 8 d. ſet upon the Defendant by the Steward of the Borough of Southwark, for that he refuſed to take the Oath and ſerve as a Scavenger in the ſaid Borrough, though duly elected according to Cuſtom there; and upon nil Debet pleaded, the Jury found a ſpecial Verdict: The Subſtance of which was, Viz.

They find the Act of 14 Car. cap. 2. And the Proviſo therein, which governed this Caſe, viz. That all Streets and Lanes in *London*, *Weſtminſter*, and the Liberties thereof, ſhall be paved as they have always uſed to be.

Then follows another Clauſe, by which it is enacted, That *Scavengers* ſhall be choſen in the City of *London*, and the Liberties thereof, according to the Ancient Uſage and Cuſtom; ſo likewiſe in the City of Weſtminſter; but nothing is therein mentioned of Southwark. And in all other Places, a new Form of chooſing is preſcribed.

Viz. In the other Pariſhes, the Conſtables, Church-wardens, *&c.* ſhall meet in the *Eaſter*-Week, and chooſe Two *Scavengers* in every reſpective Pariſh; ſo that the Intent of the Act muſt be (though Southwark is not named) that ſtill Scavengers ſhall be choſen there as formerly; becauſe London and the Liberties thereof are to follow their Ancient Cuſtom in the Choice of this Officer: And Southwark is within the City Liberties.

But whether the Cuſtom of chooſing of him was not taken away by this Statute, and ſo the Fine not well aſſeſſed, was the Queſtion.

Bald-

Ex parte Quer. Baldwyn for the Plaintiffs argued, That admitting in Southwark a Scavenger may be chosen, according to the new Form prescribed in the Act; yet this Statute was only in
* Hob. 173. Dyer 341. b. the *Affirmative, and did not thereby take away the Custom of Choosing him at the Leet.

Like the Case in Dyer 50. An Act that the Youngest Son
Hob. 17. shall have an Appeal of the Death of his Father; yet that doth not exclude the Eldest, because 'tis the Common Law, and there are no Words to restrain him.

In the 11 Co. 63. Doctor Foster's Case: By the Statute of 35 Eliz. against Recusants, which gives the Penalty of 20 l. per Month against the Offender; the 12 d. for the Ne-
* 1 Eliz. glect of every Sunday, given by a former *Statute, is not taken away.

But where there is a Negative Clause in an Act of Parliament, the Law is otherwise: As an Act that the Sessions of the Peace shall be kept at Beaumarris tantum, & non alibi infra Com', &c. and the Justices kept it at another Place, and several were indicted before them at that Time; but the Justices were fined, and all their Proceedings held Coram non Judice, by Reason of the Negative Prohibition. Dyer 135.

1 Inst. Sect. 500. 2 Inst. 68. By the Statute of Magna Charta, cap. 34. a Woman shall bring no Appeal but for the Death of her Husband, which she might at Common Law before the making of this Statute; if therefore she is Heir to her Father, the Appeal which she might have brought for his Death by these Negative Words is taken away.

Ex parte Def. Barrel for the Defendant: Though this Law be in the Affirmative, yet since it doth not prejudice any Person, neither can it be injurious, if Scavengers are chosen as directed by the Act, it shall be taken as a Negative Clause: And for this, many Instances may be given; as the Statute for devising Part of the Testator's Land, doth not take away the Custom to devise the whole, for that would be an apparent Prejudice to the Parties; but not so in this Case, where 'tis not found that the Lord of the Manor sustains any Loss, for he is to have nothing when a Scavenger is chosen in the Leet; nor are the Inhabitants prejudiced, for by this New Choosing their Streets shall be kept as clean as before.

The Form here established doth not consist with the Custom, and so hath the Effect of a Negative Clause. Hob. 298.

It appears by the Scope of the Act, That the Intent of the Parliament was to take away those old Customs of

Chooſing, becauſe the Cuſtoms are expreſly ſaved in London and Weſtminſter; but in all other Places a new Way is appointed.

The Pavement of the Streets in Southwark ſhall be as before; but that Clauſe goes no farther, and therefore concerns not the Caſe of a Scavenger, whoſe Duty is not to pave, but cleanſe the Streets.

And the Words, viz. Liberties of the City of London, will not help, becauſe Southwark is not comprehended under them in that Clauſe, no more than are the Lands which they have in Yorkſhire; for the Word Liberties * there, is taken for Limits, and can admit of no other Conſtruction.

* Poſtea 48.

Laſtly, That the Plaintiff cannot have Judgment, becauſe he hath not alledged the Cuſtom to be, That the Steward may fine in Caſe of the Refuſal to take the Oath, &c. and Cuſtoms are to be taken ſtrictly.

The Chief Juſtice and Juſtice Atkins ſaid, That 'tis true, Scavengers are under the Power of the Court-Leet by Cuſtom, and in caſe of Refuſal may be fined, as well as an Ale-Taſter.

But this Act of Parliament having taken Notice, That there were Scavengers before that Time, and Southwark being therein named as diſtinct from the Liberties of London; for 'tis provided, That Weſtminſter, London, and the Liberties thereof, and Southwark, are to have the Streets paved, as before, which doth not belong to the Office of a Scavenger; and ſo that Clauſe in the Act concerns not this Caſe.

But where it enacts, That in *London* and *Weſtminſter*, *Scavengers* ſhall be choſen as before; but in all other Places appoints a new Way: This is as much as if he had ſaid, That Scavengers ſhall be choſen in every Place as by the Act preſcribed, and no other way, except in London and Weſtminſter; and ſo great is the Inconſiſtency between the Cuſtom and the Act, that they cannot ſtand both together: Therefore, though the Act is but Temporary; the Cuſtom is ſuſpended; and though it may be ſome Damage to the Lord to make ſuch Conſtruction, yet that will not alter the Caſe, for Law-makers are preſumed to have Reſpect to the Publick Good more than to any Private Man's Profit; and the Lord may be ſaid in this Caſe to have diſpenſed with his Intereſt, being a Party to the Act, and conſenting thereunto.

But Wyndham and Ellis Juſtices, inclined, That the Cuſtom did continue, becauſe the Act was in the Affirma-

tive; and therefore they would not construe it to take away a Man's Right and Interest, or a Custom where he hath a Benefit, as the Lord of the Manor had in this Case, who is prejudiced by the Loss of his Fees; and the Intent of the Statute seemed to them to be, That Scavengers should be chosen where none were before, but not to take away Customs for chusing of them: But another Argument was desired by Serjeant Howel, the Recorder of London.

## Rozal *versus* Lampen.

Variance in the Actions no Bar.

COnspiracy. Rozal declares, That a Replevin was brought against him and others, and that the Defendant Lampen appeared for him without any Warrant, and avowed in his Name, and suffered Judgment to pass against him, and that 22 l. 10 s. Damages were recovered against him at such a Place.

Lampen pleads a Recovery in a former Action brought by the now Plaintiff, the Record of which being recited in the Plea, appears to be the same with this; but only here the Place is mentioned where the Damages were recovered, which was omitted in the former Action, to which Lampen had pleaded a Reteiner, by one of the then Defendants in Replevin, and upon a Demurrer had Judgment. But the Truth of the Case was, That Judgment was not then given for him that his Plea was good; for the Court were all of Opinion, that it was naught; but because the Declaration was not good, for want of mentioning the Place where the Damages were recovered, which the Plaintiff had amended now.

The Plaintiff demurred again; because of this Variance between the Two Actions upon the Defendant's own shewing.

Ex parte Quer.

Post. *Rose* and *Standen*, *Putt* and *Rosier*.

Sir Robert Shaftoe for the Plaintiff, insisted, That a Recovery in an Action is no Bar where there is a substantial Variance, as here there is; and that so it has been adjudged in the Case of Leach and Thompson, 1 Roll. Abr. 353. lit. B. pl. 1. where the Plaintiff declared, That he, at the Defendant's Request, having promised to marry the Defendant's Daughter, he promised to pay him 1000 l. Upon Non Assumpsit pleaded, Judgment was given for the Defendant. And the Plaintiff brought another Action for the same Sum, and then laid the Promise to pay 1000 l. cum inde requisitus esset; and it was adjudged, that the former Judgment was no Bar to the last Action; because

there was a Material Difference between the Two Promiſes, One being laid without Requeſt, and ſo the Money was to be paid in a convenient Time; and in the laſt, the Requeſt is made Part of the Promiſe, and muſt be ſpecially alledged, with the Time and Place where it was made.

So in this Caſe, The Plaintiff had not declared Right in his firſt Action, which he had amended now, and therefore the former Judgment ſhall be no Bar to him.

In Robinſon's Caſe there was a Miſtake in the Writ, viz. A Formedon in Remainder, for that in Reverter, and held no Bar; ſo by a Parity of Reaſon there ſhall be no Bar here, becauſe the Firſt Declaration was miſtaken, and it was vitium Clerici. Vide 2 Cro. 284. Level *verſus* Hall. Stat. 3 H. 7. c. 1. Syd. 316.

Barton, Serjeant, contra. This is no new Action, for the Ground of it is, not where the Damages were done, or recovered, but the Appearing without a Warrant; and ſo having pleaded a Reteiner and had Judgment, and now pleading that Judgment to this Action, and averring it was for one and the ſame Thing, 'tis a good Bar which the Plaintiff by his Demurrer hath confeſſed. Adjornatur. Ex parte Def.

## Milward *verſus* Ingram.

INdebitatus Aſſumpſit for 50 l. and quantum meruit, the Defendant confeſſes both; but pleads, That after the Promiſe made, and before the Action brought, they came to an Accompt concerning divers Sums of Money, and that he was found in Arrear to the Plaintiff 30 s. Whereupon, in Conſideration the Defendant promiſed to pay him the ſaid 30 s. the Plaintiff likewiſe promiſed to releaſe and acquit the Defendant of all Demands.

The Plaintiff demurred. One Promiſe pleaded in Diſcharge of another, good before the Breach. Mod. Rep. 205.

Says, Serjeant, argued for the Plaintiff, that though one Promiſe may be diſcharged by another, yet a Duty certain cannot, (as in this Caſe) where a Demand was of a Sum certain by the Indebitatus; beſides, this Plea is in Nature of an Accord, which cannot be good without an Averment of Satisfaction given. Broke Accompt 46, 48. Ex parte Quer.

Neither is it ſaid, That the Plaintiff promiſed in Conſideration that the Defendant ad Inſtantiam of the Plaintiff had promiſed.

Ex parte Def. 2 Cro. 100.

But it was answered by Serjeant Hopkins, and admitted to be true, That where a Matter is pleaded by way of Accord, it must be averred to be executed in all Points; but that was not the present Case.

The Defendant hath pleaded, That he and the Plaintiff had accounted together, and so the Contract is gone by the Accompt.

2. That he was discharged of the Contract by Parol, both which the Plaintiff had now admitted by his Demurrer.

And it will not be denied that a Parol Discharge of an Assumpsit is good; as if A. promises to perform such a Voyage within a Time limited, and the Breach assigned was, that he did not go the Voyage: The Defendant pleads, That the Plaintiff exoneravit eum, and upon Demurrer it was held good. 22 Ed. 4. 40. 3 H. 6. 37.

Object. If it be objected, That 'tis no Consideration to pay a just Debt; for if 30 s. were due, of Right it ought to be paid, and that can be no Reason upon which to ground a Promise.

Answ. 'Tis a good Consideration to pay Money on the Day which the Party is bound to upon Bond, because it is paid without Suit or Trouble, which might be otherwise a Loss to the Plaintiff.

But in this Case here is an express Agreement, and before there was only a Contract in Law. Cro. Car. 8. Flight *versus* Crasden.

Curia.

North, Chief Justice. It has been always taken, that if there be an Assumpsit to do a Thing, and there is no Breach of the Promise, that it may be discharged by Parol; but if it be once broken, then it cannot be discharged without Release in a Writing.

In this Case there are two Demands in the Declaration, to which the Defendant pleads an Accompt stated, so that the Plaintiff can never after have Recourse to the first Contract which is thereby merged in the Accompt. If A. sells his Horse to B. for 10 l. and there being divers other Dealings between them; if they come to an Accompt upon the Whole, and B. is found in Arrear 5 l. A. must bring his insimul Computassent, for he can never recover upon an Indebitatus Assumpsit; and of the same Opinion were the other three Justices: And though it was not said ad Instantiam of the Plaintiff that he promised, yet it was adtunc & ibidem, and so should be intended that the Defendant made the Promise at the Instance of the Plaintiff, and so Judgment was given for the Defendant.

## Daws *verſus Sir* Paul Pindar.

COvenant to pay a Sum of Money within a Year after one Nokes ſhall be admitted to the Office of Secretary to the Governour of Barbadoes.

*Barbadoes*, Whether governed by the Laws of *England*, ſo that the Statute of buying Offices extends to it?

The Defendant pleads, That the Governour of Barbadoes and the Council there have Power of Probate of Wills, and Granting of Adminiſtration; that the Secretary belongs, and is an Officer to the ſaid Governour and Council as Regiſter, and is concerned about the regiſtring the ſaid Wills, and ſo his Office concerns the Adminiſtraſtion of Juſtice; and then ſets forth, that this Covenant, upon which the Plaintiff brought his Action, was entred into upon a corrupt Agreement, and for that Reaſon void.

The Plaintiff replies, Proteſtando, that this Office concerned not the Adminiſtration of Juſtice; and proteſtando, that here was no corrupt Agreement; pro placito he ſaith, that Barbadoes is extra quatuor Maria, and was always out of the Allegiance and Power of the Kings of England, till King Charles the Firſt reduced that Iſland to his Obedience, which is now governed by Laws made by him, and not by the Laws of England.

The Defendant rejoins, Proteſtando that this Iſland was governed by the Laws of England long before the Reign of King Charles the Firſt, and confeſſes it to be extra quatuor Maria, but pleads that before King Charles had that Iſland, King James was ſeiſed thereof, and died ſuch a Day ſo ſeiſed; after whoſe Death it deſcended to King Charles the Firſt, as his Son and Heir; and that he being ſo ſeiſed, 2 Julii, in the Third Year of his Reign, granted it under the Great Seal of England to the Earl of Carliſle and his Heirs at ſuch a Rent, abſque hoc that King Charles the Firſt acquired this Iſland by Conqueſt.

Ex parte Quer.

Baldwyn, Serjeant, demurred, for that the Traverſe is ill; for the moſt material Thing in the Pleadings was, Whether Barbadoes was governed by the Laws of England, or by particular Laws of their own? And if not governed by the Laws of England, then the Statute made 5 E. 6. cap. 16. concerning the Sale of Offices, doth not extend to this Place.

He ſaid, that it was but lately acquired, and was not governed by the Laws of England; that it was firſt found out in King James his Reign, which was long after the making of that Statute, and therefore could not extend to it.

The

The Statute of 1 Ed. 6. cap. 7. Enacts, That no Writ ſhall abate if the Defendant (pending the Action) be created a Duke or Earl, *&c.* And it has been doubted whether this Act extended to a Baronet, being a Dignity created after the Making thereof. Sir Simon Bennet's Caſe. Cro. Car. 104.

Syd. 40.

Statutes of England extend no more to Barbadoes than to Scotland or Virginia, New England, Iſles of Jerſey and Gernſey: 'Tis true, an Appeal lies from thoſe Iſlands to the King in Council here, but that is by Conſtitutions of their own. No Statute did extend to Ireland till Poyning's Law, nor now unleſs named. In Barbadoes they have Laws different from ours, as, That a Deed ſhall bind a Feme-Covert, and many others.

Ex Parte Def.

Seys, Serjeant, contra. He agreed that the Traverſe was ill, and therefore did not endeavour to maintain it, but ſaid there was a Departure between the Declaration and the Replication; for in the Declaration the Plaintiff ſets forth, that Nokes was admitted Secretary apud Inſulam de Barbadoes, *viz.* in Parochia Sancti Martini in Campis; and in the Replication he ſets forth, that this Iſle was not in England, which is in the Nature of a Departure; as Debt ſur obligat' 1 Maii, the Defendant pleads a Releaſe 3 Maii; the Plaintiff replies primo deliberat' 4 Maii; 'tis a Departure; for he ſhould have ſet forth that the Bond was 4 Maii primo deliberat', Quære. Bro. Departure 14.

So in a Quare Impedit, the Biſhop pleaded that he claimed nothing but as Ordinary. The Plaintiff replies, Quod tali Die & Anno he preſented his Clerk, and the Biſhop refuſed him; the Biſhop rejoins, that at the ſame Day another preſented his Clerk, ſo that the Church became litigious; and the Plaintiff ſur-rejoins, That after that Time the Church was litigious he again preſented, and his Clerk was refuſed; this was a Departure. Bro. Departure.

So likewiſe as to the Place, The Tenant pleads a Releaſe at C. The Demandant ſaith, That he was in Priſon at D. and ſo would avoid the Releaſe as given by Dureſs; and the Tenant ſaith, That he gave it at L. after he was diſcharged and at large. 40 E. 3. Bro. 32. 1 H. 6. 3.

The Plaintiff might have ſaid that Nokes was admitted here in England, without ſhewing it was at Barbadoes; for the Grant of the Office of Secretary might be made to him here under the Great Seal of England, as well as a Grant of Adminiſtration may be made by the Ordinary out of his Dioceſe.

2. Except. Viz. By the Demurrer to the Rejoinder; the Plaintiff hath confeſſed his Replication to be falſe in another

3

other Reſpect, for by that he hath owned it: The Defendant hath pleaded that King James was ſeiſed of this Iſland, and that it deſcended to King Charles, &c. and ſo is a Province of England; whereas before he had only alledged that it was reduced in the Time of King Charles, his Son, and ſo he hath falſified his own Replication.

And beſides, this is within the Statute of 5 Ed. 6. for the Defendant ſaith, that the Plaintiff hath admitted Barbadoes to be a Province of England; and it doth not appear that ever there was a Prince there, or any other Perſon who had Dominion, except the King and his Predeceſſors; and then the Caſe will be no more than if the King of England take Poſſeſſion of an Iſland, where before there was vacua Poſſeſſio, by what Laws ſhall it be governed? Certainly by the Laws of England.

This Iſland was granted to the Earl of Carliſle and his Heirs, under a Rent payable at the Exchequer, for which Proceſs might iſſue, and it deſcends to the Heirs of the Earl at the Common Law. And if it be objected, That they have a Book of Conſtitutions in Barbadoes, that is eaſily anſwered, for 'tis no Record, neither can the Judges take any Notice of it.

'Tis reaſonable that ſo good a Law as was inſtituted by this Statute of Ed. 6. ſhould have an extenſive Conſtruction, and that it ſhould be interpreted to extend as well to thoſe Plantations as to England; for if another Iſland ſhould be now diſcovered, it muſt be ſubject to the Law of England. Curia adviſare vult.

## Lever *verſus* Hoſier.

Recovery ſuffered of Lands in a Liberty, paſſeth Lands in a Vill diſtinct within that Liberty.

Mod. Rep. 206. Poſtea.

This was a ſpecial Verdict in Ejectment. The Caſe upon the Pleadings was, viz. Sir Samuel Jones being Tenant in Tail of Lands in Shrewsbury and Cotton, being within the Liberties of Shrewsbury, ſuffers a Common Recovery of all his Lands lying within the Liberties of Shrewsbury; and whether the Lands in Cotton, which is a diſtinct Vill, though within the Liberties, ſhall paſs, was the Queſtion.

And it was argued by Serjeant Jones, that they ſhould not paſs; for though Lands would paſs ſo by a Fine, becauſe it was the Agreement of the Parties; yet in a Recovery 'tis otherwiſe, becauſe more Certainty is required therein.

But in Fines no ſuch Certainty is required, and therefore a Fine de Tenementis in Golden-Lane hath been held good, tho' neither Vill, Pariſh or Hamblet, is mentioned.

But

Cro. El. 693. Cro. Jac. 574 Addiſon *and* Ottoway, Poſtea.

But there being a Mill called Walton in the Pariſh of Street, and a Fine being levied of Land in Street, the Lands in Walton did not paſs, unleſs Walton had been an Hamlet of Street, and the Fine had been levied of Lands in the Pariſh of Street.

And the Reaſon of this Difference is, becauſe in Fines there are Covenants, which, though they are Real in reſpect of the Land, yet 'tis but a Perſonal Action, in which the Land is not demanded ex directo; but in a Recovery greater Preciſeneſs is required, that being a Præcipe quod reddat where the Land it ſelf is demanded, and the Defendant muſt make Anſwer to it. Cro. Jac. 574. 5 Co. 40. Dormer's Caſe.

* Antea 41.

The Word *Liberty properly ſignifies a Right, Privilege, or Franchiſe, but improperly the Extent of a Place. Hill. 22 & 23 Car. 2. Rot. 225. B. R. Waldron's Caſe, Hutton 106. Baker and Johnſon's Caſe.

Liberties in Judgment of Law are Incorporeal and therefore 'tis abſurd to ſay, that Lands which are Corporeal ſhall be therein contained.

They are not permanent, having their Exiſtence by the King's Letters Patents, and may be deſtroyed by Act of Parliament; they may alſo be extinguiſh'd, abridged or increaſed, and a Venire Fac' of a * Liberty or Franchiſe is not good; 'tis an equivocal Word, and of no Signification that is plain, and therefore is not to be uſed in real Writs. Raſt. Entr. 382.

* Raſt. Ent. 267.

There is no Præcipe in the Regiſter to recover Lands within a Liberty, neither is there any Authority in all the Law-Books for ſuch a Recovery; and therefore if ſuch a Thing ſhould be allowed, many Inconveniences would follow; for a good Tenant to the Præcipe would be wanting, and the Intent of the Parties could not ſupply that.

But Barton, Serjeant, ſaid, That this Recovery would paſs the Lands in Cotton; for as to that Purpoſe, there was no Difference between a Fine and a Recovery; they are both become Common Aſſurances, and are to be guided by the Agreement of the Parties. Cro. Car. 270, 276.

Poſtea. 2 Roll. Abr. 20. Godb. 440.

'Tis true, a Fine may be good of Lands in an Hamlet, Lieu Conus or Pariſh, 1 H. 5. 9. Cro. Eliz. 692. Jones 301. Cro. Jac. 574. Monk *verſus* Butler. Yet in a * Scire Fac' to have Execution of ſuch Fine, the Mill muſt be therein mentioned. Bro. Brief 142.

* Godb. 440. contra.

The Demand muſt be of Lands in a Mill, Hamlet, or at fartheſt in a Pariſh, Cro. Jac. 574.

And of that Opinion was the whole Court (abſente Ellis) who was alſo of the ſame Opinion at the Argument; and accordingly in Michaelmas Term following Judgment was given, that by this Recovery the Lands in Cotton did well paſs.

And North Chief Juſtice denied the Caſe in Hutton 106. to be Law, where 'tis ſaid, A common Recovery of Lands in a Lieu Conus is not good; and ſaid, That it had been long diſputed whether a Fine of Lands in a Lieu Conus was good; and in King James his Time the Law was ſettled in that Point, that it was good; and by the ſame Reaſon a Recovery ſhall be good, for they are both Amicable Suits and Common Aſſurances, and as they grew more in Practice, the Judges have extended them farther. Poſtea.

A Common Recovery is held good of an Advowſon; and no Reaſons are to be drawn from the Viſne, or the Execution of the Writ of Seiſin, becauſe 'tis not in the Caſe of adverſary Proceedings, but by Agreement of the Parties, where 'tis to be preſumed each knows the others Meaning.

Indeed, the Curſitors are to blame to make the Writ of Entry thus, and ought not to be ſuffered in ſuch Practice.

Where a Fine is levied to Two, the Fee is always fixed in the Heirs of one of them; but if it be to them and their Heirs, yet 'tis good, though incertain; but a Liberty is in the nature of a Lieu Conus, and may be made certain by Averment.

The Jury in this Caſe have found Cotton to be a Mill in the Liberty of Shrewsbury, and ſo 'tis not Incorporeal.

## Alford *verſus* Tatnel.

Judgment againſt Two, who are both in Execution, and the Sheriff ſuffers one to eſcape; the Plaintiff recovers againſt the Sheriff, and hath Satisfaction, the other ſhall be diſcharged by an Audita Querela. Mod. Rep. 170.

## Osbaſton *verſus* Stanhope.

General Replication good.

DEBT upon Bond againſt an Heir, who pleaded, that his Anceſtor was ſeiſed of ſuch Lands in Fee, and made a Settlement thereof to Truſtees, by which he limited the Uſes to himſelf for Life, Remainder to the Heirs Males of his Body, Remainder in Fee to his own right Heirs, with Power given to the Truſtees to make Leaſes for Three Lives, or 99 Years.

The Truſtees made a Leaſe of theſe Lands for 99 Years, and that he had not Aſſets præter the Reverſion expectant upon the ſaid Leaſe.

The Plaintiff replies, Proteſtando that the Settlement is fraudulent, pro Placito ſaith, that he hath Aſſets by Deſcent ſufficient to pay him; and the Defendant demurs.

Ex parte Def.

Newdigate, Serjeant. The Bar is good, for the Plaintiff ſhould not have replied generally that the Defendant hath Aſſets by Deſcent, but ſhould have replied to the Præter. Hob. 104.

Like the Caſe of Goddard and Thorlton, Yelv. 170. where in Treſpaſs the Defendant pleaded, that Henry was ſeiſed in Fee, who made a Leaſe to Saunders, under whom he derived a Title, and ſo juſtifies.

The Plaintiff replies, and ſets forth a long Title in another Perſon, and that Henry entred and intruded.

The Defendant rejoins, That Henry was ſeiſed in Fee, and made a Leaſe ut prius, abſq; hoc that intravit & ſe ſic intruſit; and the Plaintiff having demurred, becauſe the Traverſe ought to have been direct, viz. abſq; hoc quod intruſit, and not abſq; hoc that Henry intravit, &c. it was ſaid the Replication was ill; for the Defendant having alledg'd a Seiſin in Fee in Henry, which the Plaintiff in his Rejoinder had not avoided, but only by ſuppoſing an Intruſion which cannot be of an Eſtate in Fee, but is properly after the Death of Tenant for Life; for that Reaſon it was held ill.

Ex parte Quer.

But Pemberton, Serjeant for the Plaintiff, held the Replication to be good. The Defendant's Plea is no more than Riens per deſcent; for though he pleads a Reverſion, 'tis not chargeable, becauſe 'tis a Reverſion after an Eſtate Tail, and therefore the pleading the Leaſe is not material; for if there were a Leaſe expired, yet the Plaintiff could not recover, and therefore the Præter is wholly idle and inſignificant, of which the Plaintiff ought not to

take Notice, because the Lands, which come under the Præter, are not chargeable.

The Plaintiff hath traversed, as he ought, what is material, and is not bound to take Notice of any Thing more.

And of that Opinion was the whole Court, and held that Præter idle, and the general Replication good; and Judgment was given for the Plaintiff.

## Prince *versus* Rowson, *Executor of* Atkinson.

EXecutor de son Tort cannot retain. The Defendant in this Case pleaded, That the Testator owed his Wife dum sola 800 l. and that he made his Will, but doth not shew that he was thereby made Executor; and therefore having no Title he became Executor de son Tort, for which Cause his Plea was held ill; and Judgment was given for the Plaintiff.

*Executor de son Tort* cannot retain. 1 Mod. 128.

## Norris *versus* Palmer.

THE Plaintiff brought an Action on the Case against the Defendant, for causing him falso & malitioſe to be indicted for a Common Trespass in taking away One hundred Bricks, by which Means he was compelled to spend great Sums of Money, and that upon the Trial the Jury had acquitted him.

Case after an Acquittal upon an Indictment for Trespass.

The Defendant demurred to the Declaration; and Barrel Serjeant said for him, that the Action would not lie; and for a Precedent in the Case, he cited a like Judgment between Langley *versus* Clerk in the King's-Bench, Trin. 1658. In which Action the Plaintiff was indicted for a Battery with an Intent to ravish a Woman, and being acquitted, brought this Action; and the Court, after a long Debate, gave Judgment for the Plaintiff; but agreed, that the Action would not lie for a Common Trespass, as if it had been for the Battery only; but the Ravishing was a great Scandal, and for that Reason the Plaintiff recovered there; but this is an ordinary Trespass, and therefore this Action will not lie.

2 Sid. 100.

But Pemberton Serjeant held, that the Action would lie, because it was in the Nature of a Conspiracy, and done falsly and malitiously knowing the Contrary, and thereby the Plaintiff was put to great Charges, all which is confessed by the Demurrer.

Sid 463, 464. 1 Cro. 291.

And the Case cited on the other Side is express in the Point; for the Court in that Case could take Notice of nothing else but the Battery; for the Intent to Ravish was not traversable, and therefore it was idle to put it into the Indictment.

It is now settled, that an Action on the Case will lie for a malitious Arrest where there is no probable Cause of Action; and this Case is stronger than that, because in the one the Party is only put to Charges, and in the other, both to Charges and Disgrace, for which he hath no Remedy but by this Action.

The Court agreed, that the Action would lie after an Acquittal upon an Indictment for a greater or lesser Trespass: The like for citing another into the Spiritual Court without Cause. F. N. B. 116. D. 7 E. 4. 30. 10 H. 4. Fitz. Conspiracy 21. 13. 3 E. 3. 19.

3 Ass. 13. T. Jones 132. 1 Rol. Abr. 112. pl. 9. Postea.

The Defendant's Counsel consented to wave the Demurrer, and plead and go to Trial.

## The King *versus* Turvil.

The King presented, being intituled by a Simoniacal Contract, his Presentee shall not be removed tho' the Simony is pardoned.

QUare Impedit. The King was intituled to a Presentation by the Statute of 31 Eliz. cap. 6. because of a Simoniacal Contract made by the rightful Patron, and he accordingly did present.

Then comes the Act of General Pardon, 21 Jac. cap. 35. by which under general Words (it was now admitted) that Simony was pardoned: In which Act there is a beneficial Clause of Restitution: Viz. The King giveth to his Subjects all Goods, Chattels, Debts, Fines, Issues, Profits, Amerciaments, Forfeitures, and Sums of Money forfeited by reason of any Offence, *&c.* done.

And whether the King's Presentee or the Patron had the better Title, was the Question.

This Case was only mentioned now, but argued in Michaelmas Term following by Serjeant Jones, that the King's Presentee is intituled; he agreed that Simony was pardoned, but not the Consequences thereof; for 'tis not like the Case where a Stroke is given at one Time, and Death happens at another; if the Stroke, which is the first Offence, is pardoned before the Death of the Party, that is a Pardon likewise of the Felony; for 'tis true, the Stroke being the Cause of the Death, and that being pardoned, all the natural Effects are pardoned with the Cause.

But legal Consequences are not thus pardoned; as if a Man is outlawed in Trespass, and the King pardons the Outlawry, the Fine remains. 6 E. 4. 9. 8 H. 4. 21. 2 Roll. Abr. 179.

In

In this Act of Pardon there are Words of Grant, but the Presentation is not within the Clause of Restitution; for 'tis an Interest and not an Authority vested in the King, and therefore a Thing of another Nature than what is intended to be restored; because it is higher, and shall not be comprehended amongst the general Words of Goods and Chattels, &c. which are Things of a lower Nature, and are all in the Personality. Cro. Car. 354.

Conyers, Serjeant, argued for the Title of the Patron, and said, that there were Three material Clauses in this Act. Ex parte Def.

1. A Pardon of the Offences therein mentioned in general and particular Words.

2. That all Things not excepted shall be pardoned by General Words, as if particularly named.

3. The Pardon to be taken most favourably for the Subject; upon which Clauses it must necessarily follow, that this Offence is pardoned, and then all the Consequences from thence deduced will be likewise pardoned; and so the Patron restored to his Presentation, for all Charters of Restitution are to be taken favourably. Pl. Com. 252.

The Presentation vests no legal Right in the Presentee; for in the Case of the King, 'tis revocable after Institution and before Induction. Co. Lit. 344. b.

So likewise a Second Presentation will repeal the First. Rolls 353. And if the King's Presentee dies before Induction, that is also a Revocation; if therefore the Party hath no legal Right by this Presentation, and the King by the Simony had only an Authority to present, and no legal Interest vested, then by this Act he hath revoked the Presentation, and the right Patron is restored to his Title to present.

The Court were all of Opinion (absente Ellis) That the King's Presentee had a good Title, and by Consequence the Patron had no Right to present this Turn; for here was an Interest vested in the King; like the Case where the King is intituled to the Goods of a Felo de se by Inquisition, and then comes an Act of Indempnity, that shall not devest the King of his Right.

But where nothing vests before the Office found, a Pardon before the Inquisition extinguishes all Forfeitures, as it was resolved in Tomb's Case. 1 Sand. 361. Sid. 167. 764. Lev. 120.

So if the Pardon in this Case had come before the Presentation, the Party had been restored Statu quo, &c. Hob. 167.

The King can do no more, the Bishop is to do the rest; neither is the Presentation revoked by this Act; it might have been revoked by Implication in some Cases; as where there is a second Presentation; but such a general Revocation will not do it; and Judgment was given for the Plaintiff, and a Writ of Error brought, but the Cause was ended by Agreement.

## Hill *versus* Pheasant.

Gaming at several Meetings, whether within the Statute.

An Action of Debt was brought upon the Statute of 16 Car. 2. cap. 7. made against deceitful and disorderly Gaming, which enacts, That if any Person shall play at any Game, other than for ready Money, and shall lose any Sum, or other Thing played for, above the Sum of 100 l. at any one Time or Meeting upon Tick, and shall not then pay the same; that all Contracts and Securities made for the Payment thereof shall be void, and the Person winning shall pay treble the Money lost.

It happened that the Defendant won 80 l. at one Meeting, for which the Plaintiff gave Security; and another Meeting was appointed, and the Defendant won 70 l. more of the Plaintiff; being in all above 100 l. And if this was within the Statute, was a Question.

1 Vent. 253. 2 Lev. 92.

The like Case was in the King's-Bench, Trin. 25 Car. 2. Rot. 1230. between Edgberry and Roseberry; and in Michaelmas Term following this Case was argued, and the Court was divided, which the Plaintiff perceiving, desired to discontinue his Action; but the better Opinion was, that it was not within the Statute, though if it had been pleaded, That the several Meetings were purposely appointed to elude the Statute, it might be otherwise.

Anonymus, Postea.

Sid 394.

## Calthorp *versus* Heyton.

Traverse not good; *viz. Absque hoc quod legitimo modo oneratus.*

In Replevin; The Defendant avowed, for that the King being seised in Fee of a Manor, and of a Grange, which was Parcel of the Manor, granted by Inheritance to a Bishop, reserving 33 l. Rent to the Yearly issuing out of the whole, and alledges a Grant of the Grange from Sir W. W. (who claimed under the Bishop) to his Ancestors in Fee; in which Grant there was this Clause:

Viz. If the Grantee or his Heirs shall be legally charged by Distress, or with any Rent due to the King or his Successors,

upon account of the ſaid *Grange*, that then it ſhould be lawful for them to enter into *Blackacre*, and diſtrein till he or they be ſatisfied.

And afterwards the Grantee and his Heirs were, upon a Bill exhibited againſt them in the Exchequer, decreed to pay the King 4 l. per Annum, as their Proportion ut of the Grange, for which he diſtreined, and ſo juſtified the Taking.

The Plaintiff pleads in Bar to the Avowry, and traverſeth, that the Defendant was lawfully charged with the ſaid Rent; and the Defendant demurred.

Baldwyn, Serjeant, maintained the Avowry to be good, having alledged a legal Charge, and that the Bar was not good; for the Plaintiff traverſeth quod Defendens eſt legitimo modo oneratus, which being part Matter of Law, and part likewiſe Matter of Fact, is not good; and therefore if the Decree be not a legal Charge, the Plaintiff ſhould have demurred. Ex parte Def.

But on the other Side, it was argued by Seys Serjeant, That the Avowry is not good; becauſe the Defendant hath not ſet forth a legal Charge, according to the Grant, which muſt be by Diſtreſs, or ſome other lawful Way, and that muſt be intended by ſome Execution at Common Law; for the Coactus fuit to pay, is not enough; a Suit in Equity is no legal Diſturbance. Moor 559. The ſame Caſe is reported in 1 Brownl. 23. Selbey *verſus* Chute. Ex parte Quer.

Beſides, the Defendant doth not ſhew any Proceſs taken out, or who were Parties to the Decree, and a Que Eſtate in the Caſe of a Biſhop is not good, for he muſt paſs it by Deed.

North and the whole Court: A Rent in the King's Caſe lies in Render, and not in Demand, and after the Rent-Day is paſt, he is oneratus, and the Decree is not material in this Caſe; for the Charge is not made thereby, but by the Reſervation, for Payment whereof the whole Grange is chargeable.

The King may diſtrain in any Part of the Land, he is not bound by the Decree to a particular Place; that is in Favour only to the Purchaſer, that he ſhould pay no more than his Proportion.

As to the Que Eſtate, the Defendant hath admitted that, by ſaying bene & verum eſt, that Sir W. W. was ſeiſed.

The Traverſe is ill, and Judgment was given for the Avowant.

Vaughan

## Vaughan *verſus* Wood.

Treſpaſs juſtified, for taking corrupt Victuals. Mod. Rep. 202.

TReſpaſs for taking Beef; The Defendant pleads a Cuſtom to chooſe Superviſors of Victuals at a Court Leet; That he was there choſen, and having viewed the Plaintiff's Goods, found the Beef to be corrupt, which he took and burned.

The Plaintiff demurs, for that the Cuſtom is unreaſonable, and when Meat is corrupt and ſold, there are proper Remedies at Law, by Action on the Caſe, or Preſentment at a Leet. 9 H. 6. 53. 11 Ed. 3. 4. 6. Vide Stat. 18 Eliz. cap. 3.

But the Court held it a good Cuſtom, and Judgment was given for the Defendant; the Chief Juſtice being not clear in it.

## Chapter of *Southwel verſus* Biſhop of *Lincoln.*

Grant of next Avoidance, not to bind the Succeſſor. Mod. Rep. 204.

* Yelv. 106.

† Cro. Eliz. 441.

IN a Quare Impedit, the Queſtion upon pleading was, Whether the Grant of the next Avoidance by the Chapter was good or not to bind the Succeſſor?

The Doubt did ariſe upon the Statute of 13 Eliz. cap. 10. which was objected not to be a publick * Act, becauſe it extends only to thoſe who are Eccleſiaſtical Perſons; or if it ſhould be adjudged a publick Law, yet this is not a good Grant to bind the Succeſſor; for though the Grant of an Avoidance is not a Thing of which any Profit can be made, yet it is an † Hereditament within the Meaning of that Statute; by which, among other Things, 'tis enacted, That all Grants, &c. made by Dean and Chapter, &c. of any Lands, Tythes, Tenements, or Hereditaments, being Parcel of the Poſſeſſions of the Chapter, other than for the Term of 21 Years, or Three Lives, from the Time of the making the ſaid Grant, ſhall be void.

But it was agreed by the Court to be a general Law; like the Statute of Non-Reſidency, which hath been ſo ruled; and that this Preſentment or Grant of the next Avoidance was not good, becauſe it was made by thoſe who were not Head of the Corporation, and it muſt be void immediately, or not at all; and Judgment was given accordingly.

## Threadneedle *verſus* Lynham.

THere being Two Manors uſually let for 67 l. 1 s. 5 d. by the Year; a Biſhop lets one of them for 21 Years reſerving the whole Rent, and whether this was a good Leaſe within the Statute of 1 Eliz. cap. 19. was the Queſtion, which depended upon the Conſtruction of the Words therein, viz. All Leaſes to be void upon which the old accuſtomed Rent is not reſerved; and here is more than the old Rent reſerved; and this being a private Act, is to be taken literally. Leaſe by a Biſhop and more than the old Rent reſerved, good. Mod. Rep. 203.

North Chief Juſtice agreed, that private Acts, which go to one particular Thing, are to be interpreted literally; but this Statute extends to all Biſhops, and ſo may be taken according to Equity; and therefore he, and Wyndham and Atkins Juſtices, held the Leaſe to be good: But this Caſe was argued when Vaughan was Chief Juſtice, and he and Juſtice Ellis were of another Opinion.

# DE

# Term. Sancti Mich.

## Anno 27 Car. II. in Communi Banco.

### Thorp *verſus* Fowle.

No more Coſts than Damage.

NOTA. In this Caſe the Court ſaid, That ſince the Statute, which gives no more Coſts than Damage, 'tis uſual to turn Treſpaſs into Caſe.

### Cooper *verſus* Hawkeſwel.

Words.

IN an Action upon the Caſe for theſe Word: I dealt not ſo unkindly with you when you ſtole a Stack of my Corn: *Per Curiam*, the Action lies.

### Eſcourt *verſus* Cole.

Words.

IN an Action on the Caſe for Words laid Two Ways; the laſt Count was Cumque etiam, which is but a Recital, and dubitatur whether good.

### Sharp *verſus* Hubbard.

6 Months for proving of a Suggeſtion.

THE Six Months in which the Suggeſtion is to be proved, muſt be reckoned according to the Calendar Months, and 'tis ſo computed in the Eccleſiaſtical Court.

Hob. 179.

### Crowder *verſus* Goodwin.

Juſtification by Proceſs out of inferiour Court.

IN Aſſault and Battery, and falſe Impriſonment: As to the Aſſault, &c. the Defendant pleads Not-Guilty; and as to the Impriſonment, he juſtifies by a Proceſs out of an inferiour Court; and upon Demurrer theſe Exceptions were taken to his Plea.

1. The Defendant hath ſet forth a Precept directed Servienti ad Clavem, and 'tis not ſaid Miniſtro Curiæ.

2. It was to take the Plaintiff, and have him ad proximam Curiam, which is not good; for it ſhould have been on a Day certain, like * Adam's and Flythe's Caſe, where a Writ of Error was brought upon a Judgment in Debt by Nil dicit in an inferiour Court; and the Error aſſigned was, That after Imparlance a Day was given to the Parties 'till the next Court; and this was held to be a Diſcontinuance, not being a Day certain. 1 Rol. 484. Cro. Car. 254. Dyer 262. b. * Cro. Jac. 571. Mod. Rep. 81. Raim 204.

3. 'Tis not ſaid ad reſpondend' alicui.

4. Nor that the Action aroſe infra Burgum.

5. The Precept is not alledged to be returned by the Officer.

To all which it was anſwered, That a Plaint is but a Remembrance, and muſt be ſhort, Raſt. 321. and when 'tis entred, the Officer is excuſed; for he cannot tell whether 'tis * infra Juriſdictionem or not. * Squibb *verſus* Hole antea 29.

And as to the firſt Exception, a Precept may be directed to a private Perſon, and therefore Servienti ad Clavem is well enough.

Then as to the next Exception, 'tis likewiſe well ſet forth to have the Plaintiff ad proximam Curiam; for how can it be on a Day certain, when the Judge may adjourn the Court de Die in Diem?

Then ad reſpondendum, though 'tis not ſaid alicui, 'tis good, tho' not ſo formal; and 'tis no Tort in the Officer, but 'tis to be intended that he is to anſwer the Plaintiff in the Plaint.

As to the fourth Exception, the Defendant ſets forth, That he did enter his Plaint ſecundum Conſuetudinem Curiæ Burgi, and when the Plaintiff declared there, he ſhewed that the Cauſe did ariſe infra Juriſdictionem.

And as to the laſt, The Officer is not puniſhable tho' he do not return the Writ. The End of the Law is, That the Defendant ſhould be preſent at the Day; and if the Cauſe ſhould be agreed, or the Plaintiff give a Releaſe when the Defendant is in Cuſtody, no Action lies againſt the Officer if he be detained afterwards.

But the Chief Juſtice doubted, that for the Second Exception the Plea was ill, for it ought to be on a Day certain, and likewiſe it ought to be alledged infra Juriſdictionem.

But the other Three Juſtices held the Plea to be good in omnibus, and ſaid, that the inferior Court had a Juriſdiction to iſſue out a Writ, and the Officer is excuſable, tho' the Cauſe of Action did not ariſe within the Juriſdiction, which ought to be ſhewn on the other Side: And ſo Judgment was given for the Defendant.

## Snow *and others, verſus* Wiſeman.

Traverſe neceſſary where omitted, is Subſtance.

TRespaſs for taking of his Horſe: The Defendant pleads, that he was ſeiſed of ſuch Lands, and intitles himſelf to an Herriot.

The Plaintiff replies, That another Perſon was jointly ſeiſed with the Defendant. Et hoc paratus eſt verificare.

The Defendant demurs generally, becauſe the Plaintiff ſhould have traverſed the ſole Seiſin.

Sid. 300. But it was ſaid for him, that the ſole Seiſin need not be traverſed, becauſe the Matter alledged by him avoids the Bar without a Traverſe.

In a Suggeſtion upon a Prohibition for Tithes, the Plaintiff entituled himſelf by Preſcription under an Abbot, and ſhews the Unity of Poſſeſſion by the Statute of 31 H. 8. by which the Lands were diſcharged of Tithes.

Yelv. 231. Pl. Com. 230, 231. The Defendant pleads, That the Abbey was founded within Time of Memory, and confeſſeth the Unity afterwards, and the Plea was held good; for he need not traverſe the Preſcription, becauſe he had ſet forth the Foundation of the Abbey to be within Time of Memory, which was a ſufficient Avoiding the Plaintiff's Title. Yelv. 31.

The Plaintiff therefore having ſaid enough in this Caſe to avoid the Bar; if he had traverſed it alſo, it would

*Cro. Jac. 221. have made his Replication naught, like the Caſe of* Bedel and Lull, where in an Ejectment upon the Leaſe made by Elizabeth, the Defendant pleads, that before Elizabeth had any Thing in the Lands, James was ſeiſed thereof in Fee, and that it deſcended to his Son, and ſo derives a Title under him, and that Elizabeth was ſeiſed by Abatement.

The Plaintiff confeſſes the Seiſin of James, but that he deviſed it to Elizabeth in Fee, and makes a Title under her, abſque hoc that ſhe was ſeiſed by Abatement; and upon a Demurrer, the Replication was held ill, becauſe the Plaintiff had made a good Title before the Deviſe to James; and ſo need not traverſe the Abatement.

The Chief Juſtice held, that the omitting of a Traverſe where neceſſary is Matter of Subſtance, and the concluding with hoc paratus eſt verificare, when it ſhould be Et hoc pet' quod inquiratur per Patriam, or de hoc ponit ſuper Patriam, or vice verſa, is Matter of Subſtance, and the wanting a Traverſe is of the ſame Nature; and here the Traverſe of the ſole Seiſin is neceſſary, becauſe it is iſſuable: And of the ſame Opinion were the other Judges (abſente Ellis) and therefore Judgment was given for the Defendant.

## Wilſon *verſus* Ducket.

TRespaſs for taking of his Corn; the Defendant pleads Not-Guilty to all, but 360 Sheaves made into Stacks, which the Defendant diſtrained for Rent and Services in Arrear and due to him, The Plaintiff demurs, for that they could not be diſtrained in Sheaves: A Diſtreſs of them is lawful Damage feaſant, or in a Cart for Rent, but not here. Diſtreſs not good of Corn in Shocks.

Per Jones, Serjeant, it is naught, becauſe nothing is to be diſtrained, but what may be known and returned in the ſame Condition as when taken; and therefore a Replevin will not lie of Money out of a Bag or Cheſt, and in this Caſe the *Corn cannot be returned in the ſame Condition, becauſe a great deal may be loſt in the carrying of it Home. 18 H. 3. 4. 2 H. 4. 15. 22 E. 4. 50. 11 H. 5. 14. 1 Inſt. 47. Roll. 667. pl. 17. And of that Opinion was all the Court. Ex parte Quer. *Altered by Stat. 2 *Will.* & *Mar.*

## Curtis *verſus* Bourn.

IN Waſte, one Tenant in Common brings an Action of Waſte alone; and the Queſtion upon the Pleadings was, Whether he ſhould not have joined with his Companion; and for an Authority that they ſhould join in this Action, Scroggs, Serjeant, cited Rolls Abr. 2 Part 825. pl. 11. where it is ſaid, That if a Reverſion be granted to Two, and the Heirs of one of them, yet they muſt join in an Action of Waſte. Tenant in Common need not join in an Action of Waſte.

But it was anſwered by Pemberton, Serjeant, That Rolls cited that Caſe in his Abridgment out of the 1 Inſt. 53. which ſeemed to be the Opinion of my Lord Coke, grounded upon the Authorities there cited in the Margin, which he ſaid did not warrant any ſuch Opinion.

The Difference upon the Books is, where Tenant in Common demands an Intirety, the Writ ſhall abate; and therefore in the Caſe of Hill and Hart, where the Plaintiff had only a third Part of a Reverſion in Common, it was held he ſhould not have an Action of Waſte alone, becauſe it would be very inconvenient that the third Part ſhould be delivered in Execution. Cro. Eliz. 357. Co. Lit. 197. b. Moor 374.

'Tis

Co. Lit. 198. Yelv. 161.

'Tis true, they shall join in the Personality, where Damages are to be recovered, but they shall always sever in Reality, and therefore in this Case, Waste being a mixt Action, and savouring of the Reality, that being the more worthy, draws over the Personality with it, and therefore the Action by one alone is good; but if they had made a Lease for Years, then they should have joined in an Action of Waste: And of that Opinion was the whole Court.

## Anonymus.

*Tout temps prist*, no good Plea after Imparlance.

THE Question was, Whether Tout tempus prist was a good Plea, after a general Imparlance?

And it was insisted for the Plaintiff, That this Plea was repugnant, because the Imparlance proves the Contrary.

'Tis true, in an Action of Debt upon a Bond, such Plea is good after an Imparlance, because 'tis to save the Penalty; and 'tis held in Dyer f. 300. b. That Uncore prist alone, without saying Tout temps, in such Case is good, though Leonard the Custos Brevium, and who was a Learned Man, was there of another Opinion.

Cro. Jac. 627 *contra.*

But when a single Duty is demanded, and the Party is intituled to Damages for Non-payment, in such Case the Plea of Tout temps prist is not good.

And though it was objected, that the Difference is, That the Defendant after Imparlance should not plead any Thing contrary to the Matter in the Declaration to which he had imparled; as Bastardy to an Action brought by an Heir, &c. Yet the Court were all of Opinion, That the Plea was not good, because 'tis inconsistent with the Imparlance; for Petit licentiam interloquendi, is no more in English than for the Defendant to say, I will take Time, and resolve what to do; which is contrary, to be always ready.

# DE
# Termino Sancti Hill.

## Annis 27 & 28 Car. II. in Communi Banco.

### Stubbins *verſus* Bird *& alios.*

IN an Action of Trover and Converſion; the Plaintiff declared for taking 600 Load of Oar.

The Defendant pleads, That the Plaintiff never had any Thing in the ſaid 600 Load of Oar, niſi conjunctim & pro indiviſo, with Two others, and ſo concludes in Abatement.

The Defendant concludes in Abatement, it ſhall be in his Election to have it taken in Bar.

The Plaintiff replies, That J. S. was ſeiſed in Fee of a Cloſe, in which this Oar was digged; and being ſo ſeiſed, he died; after whoſe Death the ſaid Cloſe deſcended to A. and B. his Two Daughters and Co-heirs; and that the Plaintiff married one of them, and the other was alſo married: And ſo the Plaintiff and the other Husband, and their Wives, were ſeiſed in Right of their ſaid Wives of this Cloſe.

Mod. Rep. 117.

That afterwards, and before the Action brought, 2000 Load of Lead Oar was digged out of the ſaid Cloſe, and laid there in Heaps; and then a Partition was made by Deed of the ſaid Cloſe and the Oar, and 1000 Load was allotted to one Siſter and her Husband, and the other 1000 Load was allotted to the Plaintiff, per quod he became ſolus Poſſeſſionat' of the ſaid 1000 Load in Severalty; and being ſo poſſeſſed, the Defendant found 600 Load, Parcel of the ſaid 1000 Load, and converted it, Abſque hoc that the Plaintiff had any Thing after the Partition conjunctim with any other Perſon.

The Defendant rejoins, That at the Time of the Converſion the Plaintiff had nothing but Conjunctim with the other, as before.

1. And the Plaintiff demurred, for that the Defendant ought to have traverſed the Partition; for though the Poſſeſſion was joint, the Partition had made it ſeveral, by which the joint Poſſeſſion was confeſſed and avoided, and there-

Ex parte Quer.

therefore the Traverse good; like the Rule laid down in my Lord Hobart 104. in Digby and Fitzherbert's Case, Trespass, tali die; the Defendant confesses it, but pleads a Release of all Actions, and traverseth all Trespasses after; so here the Plaintiff hath traversed the joint Possession after the Partition.

2. The Rejoinder is a Departure from the Plea, which is, that the Plaintiff never had any Thing but jointly with others; and the Rejoinder is, That at the Time of the Conversion he was jointly possessed; which is a manifest Difference in Point of Time, and such as will make a Departure. 33 H. 14. Bro. Departure 28. 13.

Ex parte Def. It was argued by Serjeant Hopkins for the Defendant, That the Replication was not good; for the Plaintiff therein had alledged a Partition by Deed, and doth not say, hic in Curia Prolat': And in all Cases where a Man pleads a Deed, by which he makes himself either Party or Privy, he must produce it in Court: As where the Defendant justifies in Trespass, that before the Plaintiff had any Thing. One Purfrey was seised in Fee of the Place where, &c. And by Indenture, &c. demised it to Corbet, excepting the Wood, &c. Habendum for the Life of Ann, and covenanted quod licitum foret for the said Corbet to take Houseboot, &c. That he assigned his Interest to Ann, and that the Defendant, as her Servant, took the Trees; and upon Demurrer the Plea was held naught, because (though a Servant) having justified by force of a Covenant, he did not shew the Indenture. 2 Cro. 291. Purfrey *versus* Grimes. 6 Rep. Bellamy's Case.

1 Leon. 309. Rol. Rep. 20. If a Thing will pass without a Deed, yet if the Party pleads a Deed, and makes a Title thereby, he must come with a * Profert hic in Curia.

As to the Objection, That there was a Departure, he argued to the Contrary: For the Defendant in his Rejoinder insists only on that which was most material; and the Plaintiff in his Replication had given him Occasion thus to rejoin; and though he had left out some of the Time mentioned in the Bar, yet that would not hurt the Pleadings, because a fair Issue was tendred; for if at the Time of the Conversion he was jointly seised, he could not be entituled to the Action alone.

Judgment. And afterwards, in Trinity-Term following, the Chief Justice delivered the Opinion of the Court, That the Plea was good in Bar, though pleaded in Abatement, and the Defendant hath Election to plead either in Bar or Abatement;

ment; the Nature of a Plea in Abatement, is to entitle the Plaintiff to a better Writ; but here the Defendant shews, that the Plaintiff hath no Cause of Action, and so it shall be taken to be in Bar: And it hath been expressly resolved, That where the Plea is in Abatement, if it be of Necessity, that the Defendant must disclose Matter of Bar, he shall have his Election to take it either by way of Bar or Abatement. 2 Roll. Rep. 64. Salkil *versus* Shilton.

So where Waste was brought in the Tenet, the Tenant pleads a Surrender to the Lessor, and demands Judgment, if he should be charged in the Tenet, because it should have been in the Tenuit, and this was held a good Plea, 10 H. 7. cap. 11. Whereupon Judgment was given for the Defendant; the Chief Justice at first doubting about the Departure, and advised the Plaintiff to wave his Demurrer, and to take Issue upon Payment of Costs.

## Daws *versus* Harrison.

THE Plaintiff intitles himself as Administrator to Daws, and shews that the Administration was granted to him by the Official of the Bishop of Carlisle, but did not alledge him to be Loci istius Ordinarius; And

Administration pleaded and not *loci istius Ordinarius*, good.

Jones, Serjeant, demurred to the Declaration, because it did not appear that the Official had any Jurisdiction. Pl. Com. 277. a. 31 H. 6. 13. Fitz. Judg. 35. 22 H. 6. 52. 36 H. 6. 32, 33. Sed non allocatur. For the whole Court were of Opinion, That the Declaration was good, and that he shall be intended to have Jurisdiction; but if it had been in the Case of a Peculiar, it cannot be intended that they have any Authority, unless set forth: And so Judgment was given for the Plaintiff.

Cro. Jac. 556 Palm. 97. Sid. 322.

## Mason *versus* Cæsar.

IN Trespass for pulling down of Hedges, the Defendant pleads, That he had Right of Common in the Place where, &c. and that the Hedges were made upon his Common, so that he could not in ea parte enjoy his Common in tam amplo modo, &c. and so justifies the pulling them down.

Commoner may abate Hedges made upon his Common.

And they were at Issue, whether the Defendant could enjoy the Common in tam amplo modo, &c. and there was a

Verdict for the Defendant, and Judgment being ſtayed till moved on the other Side.

Scroggs, Serjeant, moved in Arreſt of Judgment, becauſe the Plea was ill, and the Iſſue frivolous; for 'tis impoſſible that he ſhould have Common where the Hedges are: And therefore the Defendant ought to have brought an Action upon the Caſe, or a Quod permittat. He cannot abate the Hedges, though he might have pulled down ſo much as might have opened a Way to his Common.

5 Rep. 100. 9 Rep. 55.

2 Cro. 195, 222.

The Lord hath an Intereſt in the Soil, and a Commoner hath no Authority to do any thing but to enter and put in his Beaſts, and not to throw down Quick-Set Hedges, for that is a Shelter to his Beaſts.

2 Inſt. 88.

But the Court were of Opinion, That the Defendant might abate the Hedges, for thereby he did not meddle with the Soil, but only pulled down the Erection; and the Book of 29 E. 3. 6. was expreſs in this Point. Vide 17 H. 7. 10. 16 H. 7. 8. 33 H. 6. 31. 2 Aſſ. 12. And nothing was ſaid concerning the Plea, and ſo the Defendant had Judgment.

## Hocket *and his Wife verſus* Stiddolph *and his Wife.*

Verdict cured a bad Declaration. 2 Ven. 29. 1 Ven. 93, 328.

IN an Action of Aſſault and Battery brought by the Plaintiff and his Wife, againſt the Defendant and his Wife; the Jury found quoad the Beating of the Plaintiff's Wife only, that the Defendants are guilty, and quoad reſid' they find for the Defendants.

And it was moved in Arreſt of Judgment, by Scroggs, Serjeant, That the Declaration is not good, becauſe the Husband * joins with the Wife, which he ought not to do upon his own ſhewing; for as to the Battery made upon him, he ought to have brought his Action alone; and the finding of the Jury will not help the Declaration, which is ill in Subſtance, and thereupon Judgment was ſtayed; but being moved again the next Term, the Court were all of Opinion, That the Declaration was cured by the Verdict, and ſo Judgment was given for the Plaintiff.

* Yelv. 106. Drury *verſus* Dennis. Sid. 376.

## Goodwin *qui tam, &c. verſus* Butcher.

AN Information was brought upon the Statute of 32 H. 8. cap. 9. made againſt Buying pretended Titles, which gives a Forfeiture of the Value of the Land purchaſed, unleſs the Seller was in Poſſeſſion within a Year before the Sale. Buying a pretended Title.

After Verdict for the Plaintiff, it was moved in Arreſt of Judgment by Serjeant Barrell, becauſe the Information had ſet forth the Right of theſe Lands purchaſed to be in J. S. and that the Son of J. N. had conveyed them by general Words, as deſcending from his Father; which Title of the Son, the Defendant bought; whereas, if in Truth the Title was in J. S. then nothing deſcended from the Father to the Son, and ſo the Defendant bought nothing. 2 Anderſ. 57.

Sed non allocatur; for if ſuch Conſtruction ſhould be allowed, there could be no Buying of a pretended Title within the Statute, unleſs it was a good Title; but when 'tis ſaid, as here, That the Defendant entred and claimed Colore of that Grant or Conveyance, which was void, yet 'tis within the Statute, ſo the Plaintiff had his Judgment.

## Wine *verſus* Rider *& al'.*

TReſpaſs againſt Five, Quare clauſum fregerunt, and took Fiſh out of the Plaintiff's Several and Free-Fiſhery. Traverſe immaterial.

Four of them pleaded Not Guilty, and the Fifth juſtified, for that one of the other Defendants is ſeiſed in a Fee of a Cloſe adjoining to the Plaintiff's Cloſe; and that he and all thoſe, &c. have had the ſole and ſeparate Fiſhing in the River which runs by the ſaid Cloſes, with Liberty to enter into the Plaintiff's Cloſe to beat the Water, for the better carrying on of the Fiſhing; and that he as Servant to the other Defendant, and by his Command, did enter, and ſo juſtified the Taking, abſque hoc that he is guilty aliter vel alio modo.

The Plaintiff replies, That he did enter de Injuria ſua propria, abſque hoc, That the Defendant's Maſter hath the ſole Fiſhing.

The Defendant demurs; and Newdigate, Serjeant, argued for him, That the Juſtification is good, for when he had Ex parte Def.

2 Cro. 45, 372. had made a local Juſtification, he muſt traverſe both before and after, as he has done in this Caſe.

2. The Plaintiff's Replication is ill, for he ought not to have waved the Defendant's Traverſe, and force him to accept of another from him; becauſe the firſt is material to the Plaintiff's Title, and he is bound up to it. Hob. 104.

There was no Occaſion of a Traverſe in the Replication: for where a Servant is Defendant, de injuria ſua propria is good, with the Traverſe of the Command.

Ex parte Quer. 2 Cro. 372. But on the Plaintiff's Side, Serjeant Baldwin held the Defendant's Traverſe to be immaterial; for having anſwered the Declaration fully in alledging a Right to the ſole Fiſhing, and an Entry into the Plaintiff's Cloſe, 'tis inſignificant afterwards to traverſe that he is Guilty aliter vel alio modo.

Then the Matter of the Plea is not good, becauſe the Defendant juſtifies by a Command from one of the other Defendants, who have all pleaded Not-Guilty, and they muſt be Guilty if they did command him, for a Command will make a Man a Treſpaſſer.

Curia. The Court were all of Opinion, That Judgment ſhould be given for the Plaintiff: For as to the laſt Thing mentioned, which was the Matter of the Plea, they held it to be well enough; for the *Servant ſhall not be ouſted of the Advantage which the Law gives him by pleading his Maſter's Command.

* Mires *and* Solebay, Poſtea.

Then as to the Replication 'tis good, and the Plea is naught with the Traverſe; for where the Juſtification goes to a Time and Place not alledged by the Plaintiff, there muſt be a Traverſe of both.

In this Caſe the Defendant ought to have traverſed the Plaintiff's free fiſhing, as alledged by him in his Declaration, which he having omitted, the Plea for that Reaſon alſo is ill, and ſo Judgment was given for the Plaintiff.

# DE

# Termino Paſchæ,

## Anno 28 Car. II. in Communi Banco.

### Lee *verſus* Brown.

IN a Special Verdict in Ejectment, the Caſe was this: viz. There were Lands which re vera were not Parcel of a Manor, and yet were reputed as Parcel. A Grant is made of the Manor, and of all Lands reputed Parcel thereof; and whether by this Grant, and by theſe General Words, thoſe Lands would paſs which were not Parcel of the Manor, was the Queſtion. Where reputed Lands ſhall paſs under General Words.

This Term the Lord Chief Juſtice delivered the Opinion of the Court, That thoſe Lands would paſs; and they grounded their Opinions upon Two Authorities in Co. Entr. fol. 330, 384. The King *verſus* Imber & Wilkins. Poſtea. Cro. Car. 308.

If the Jury had found that the Lands in Queſtion had been reputed Parcel of the Manor, it would not have paſſed had they found no more; becauſe the Reputation ſo found might be intended a Reputation for a ſmall Time, ſo reputed by a few, or by ſuch as were ignorant and unſkilful.

But in this Caſe 'tis found, that not only the Lands were reputed Parcel, but the Reaſon why they were reputed Parcel; for the Jury have found that they were formerly Parcel of the Manor, and after the Diviſion they were again united in the Poſſeſſion of him who had the Manor, which being alſo Copyhold, have ſince been demiſed by Copy of Court-Roll, together with the Manor; and theſe were all great Marks of Reputation, and therefore Judgment was given that the Lands did well paſs. 2 Roll. Abr. 186. Dyer 350.

Wakeman

## Wakeman *verſus* Blackwell.

1 Mod. 418. Common Recoveries how to be pleaded.

QUare Impedit. The Caſe was, The Plaintiff entituled himſelf to an Advowſon by a Recovery ſuffered by Tenant in Tail; in pleading of which Recovery he alledges Two to be Tenants to the Præcipe, but doth not ſhew how they came to be ſo, or what Conveyance was made to them, by which it may appear that they were Tenants to the Præcipe; and after Search of Precedents as to the Form of Pleading of Common Recoveries, the Court inclined that it was not well pleaded, but delivered no Judgment.

## Searl *verſus* Bunion.

Juſtification where good.

IN Treſpaſs for taking of his Cattle, the Defendant pleads, That he was poſſeſſed of Blackacre pro Termino Diverſorum Annorum adtunc & adhuc ventur'; and being ſo poſſeſſed, the Plaintiff's Cattle were doing Damage, and he diſtrained them Damage feaſant ibidem, and ſo juſtifies the Taking, &c.

The Plaintiff demurs, and aſſigns ſpecially for Cauſe, That the Defendant did not ſet forth particularly the Commencement of the Term of Years, but only that he was poſſeſſed of an Acre for a Term of Years to come; and regularly where a Man makes a Title to a particular Eſtate, in pleading he muſt ſhew the particular Time of the Commencement of his Title, that the Plaintiff may reply to it.

Curia.

The Chief Juſtice, and the whole Court held, That the Plea was good upon this Difference, where the Plaintiff brings an Action for the Land, or doing of a Treſpaſs upon the Land, he is ſuppoſed to be in Poſſeſſion; but if he will juſtify by Vertue of any particular Eſtate, he muſt ſhew the Commencement of that Eſtate, and then ſuch Pleading as here will not be good.

* Yelv. 75. Cro. Car. 138. Con. Lut. 1492.

But when the Matter is* collateral to the Title of the Land, and for any thing which appears in the Declaration, the Title may not come in Queſtion, ſuch a Juſtification as this will be good.

In this Caſe no Man can tell what the Plaintiff will reply; 'tis like the Caſes of Inducements to Actions, which do not require ſuch Certainty as is neceſſary in other Caſes.

So where an Action is brought for a Nuſance, and he intitles himſelf generally, by ſaying he is Poſſeſſionat' pro

Termino Annorum, 'tis well enough, and he need not ſo ſet forth particularly the Commencement, becauſe he doth not make the Title his Caſe; for which Reaſon, Judgment was given for the Defendant.

## Croſier *verſus* Tomlinſon *Executor.*

IN an Action on the Caſe, the Plaintiff declared, That the Defendant's Teſtator being in his Life-time (viz. ſuch a Day) indebted to the Plaintiff in the Sum of 20 l. for ſo much Money before that Time to his Uſe had and received, did aſſume and promiſe to pay the ſame when he ſhould be thereunto required; and that the Teſtator did not in his Life-time, nor the Defendant ſince his Death, pay the Money, though he was thereunto required. Statute of Limitations of Perſonal Actions extends to *Indebitatus Aſſumpſit.*

The Defendant pleads, That the Teſtator did not at any Time within Six Years make ſuch Promiſe.

The Plaintiff replies, That he was an Infant at the Time of the Promiſe made, and that he came not to full Age till the Year 1672. and that within Six Years after he attained the Age of One and twenty Years he brought this Action, and ſo takes Advantage of the Proviſo in the Statute of * Limitations, that the Plaintiff ſhall have Six Years after the Diſability by Infancy, Coverture, &c. is removed. * 21 Jac. c. 16.

And the Defendant demurred by Serjeant Rigby; and the Reaſon of his Demurrer was, becauſe in the ſaid Proviſo Actions on the Caſe on Aſſumpſit are omitted. Ex parte Def.

This Act was made for quieting of Eſtates, and avoiding of Suits, as appears by the Preamble, and therefore ſhall be taken ſtrictly; there is an Enumeration of ſeveral Actions in the Proviſo, and this is Caſus omiſſus, and ſo no Benefit can be taken of the Proviſo.

In a Writ of Error upon a Judgment brought in the Court of Windſor, the Judges held, That an Action on the Caſe for * ſlandering of a Man's Title is out of this Act, becauſe ſuch an Action was rare, and not brought without Special Damages: But Hide, Chief Juſtice, doubted. 1 Cro. 141. 4 Car. 1. * Cro. Car. 163, 513, 535. Debt upon Eſcape is out of the Statute, 1 Sand. 37. But an Action for Eſcape is not, Sid. 305. So is Debt for not ſetting out of Tythes; for theſe are not grounded upon any Contract. Cro. Car. 513 Hut. 109.

The Law-Makers could not omit this Caſe unadviſedly, becauſe 'tis within thoſe Sorts of Actions enumerated by this Act.

This Promiſe was made to the Plaintiff when he was but a Day old, and it would be very hard, now after ſo many Years, to charge the Executor.

But

Ex parte Quer.

But Turner, Serjeant, argued, That though an Indebitat' Aſſumpſit is not within the expreſs Words of the Proviſo, yet 'tis within the Intent and Meaning thereof; and ſo the Rule is taken in 10 Co. 101. in Bewſage's Caſe, Quando verba ſtatuti ſunt ſpecialia, ratio autem generalis, ſtatutum intelligendum eſt generaliter.

And this is a Statute which gives a General Remedy, and the Miſchief to the Infant is as great in ſuch Actions of Indebitatus Aſſumpſit, as other Actions; and therefore 'tis but reaſonable to intend, that the Parliament, which have ſaved their Rights in Debts, Trovers, &c. intended likewiſe, that they ſhould not be barred in an Indebitatus Aſſumpſit.

In 2 Anderſ. 55. Smith *verſus* Colſhil: Debt was brought upon a Bond; the Defendant there pleaded the Statute of the 5 E. 6. of Selling of Offices; the Words of which are, viz. That every Bond to be given for Money or Profit for any Office, or Deputation of any Office mentioned in the Statute, ſhall be void againſt the Maker. In that Caſe the Bond was given to procure a Grant of the Office, and alſo to exerciſe the ſame: Now though this was not within the expreſs Words of the Statute, yet the Bond was held void: And if it ſhould be otherwiſe, the Miſchiefs which the Statute intended to remedy would ſtill continue; and therefore the Intent of the Law-Makers in ſuch Caſes is to be regarded; for which Reaſon, if Actions of Indebitatus Aſſumpſit are within the ſame Miſchief with other Actions therein mentioned, ſuch alſo ought to be conſtrued to be within the ſame Remedy.

2 Anderſ. 123, 150. Cro Car. 533 19 H. 8. 11.

* Cro. Car. 245.

But he took the Caſe of * Swain *verſus* Stephens to rule this Caſe at Bar, in which Caſe this very Statute was pleaded to an Action of Trover, and the Plaintiff replied, That he was beyond Sea; and upon a Demurrer to the Replication, the Court held Trover to be within the Statute, it being named in the Paragraph of Limitation of perſonal Actions, which directs it to be brought within the Time therein limited; that is to ſay, all Actions on the Caſe within Six Years; and then enumerates ſeveral other Actions, amongſt which Trover is omitted, yet the Court were then of Opinion, that Trover is implied in thoſe General Words.

Curia. 2 Sand. 120.

And of that Opinion was the Chief Juſtice, and Wyndham and Atkins, Juſtices, That upon the whole Frame of the Act, it was ſtrong againſt the Defendant; for it would be very ſtrange that the Plaintiff in this Caſe might bring an Action of Debt, and not an Indebitatus Aſſumpſit.

When the Scope of an Act appears to be in a general Senſe, the Law looks to the Meaning, and is to be extended to particular Caſes within the ſame Reaſon; and therefore they were of Opinion, That Actions of Treſpaſs, mentioned in the Statute, are comprehenſive of this Action, becauſe 'tis a Treſpaſs upon the Caſe, and the Words of the Proviſo ſave the Infants Right in Actions of Treſpaſs.

And therefore, though there are not particular Words in the enacting Clauſe, which relate to this Action, yet this Proviſo reſtrains the Severity of that Clauſe, and reſtores the Common Law, and ſo is to be taken favourably; and this Action being within the ſame Reaſon, with other Actions therein mentioned, ought alſo to be within the ſame Remedy.

But Juſtice Ellis doubted, Whether Actions of Treſpaſs could comprehend Actions on the Caſe; and that when the Parliament had enumerated Actions of Treſpaſs, Trover, Caſe for Words, &c. if they had intended this Action, they would have named it; he ſaid he was reſtoring the Common Law as much as he could, but doubted much, whether this Proviſo did help the Plaintiff: But Judgment was given for the Plaintiff.

## Doctor Samways *verſus* Eldſly.

COvenant. The Plaintiff declares, That by Indenture made between him and the Defendant, reciting that there were divers Controverſies between them, as well concerning the Right, Title and Occupation of Tythes ariſing and renewing upon the Freehold of the Defendant in T. and upon other Lands held by the Defendant, by a Leaſe for Years from the Plaintiff, under the Annual Rent of, &c. and concerning the Arrearages of Rent due upon that Demiſe, as concerning other Matters; for the Determination thereof, the ſaid Parties did by the ſaid Indenture bind themſelves, in Conſideration of 12 d. given to each other, to obſerve the Arbitration of an Arbitrator, indifferently to be choſen between them, to arbitrate, order and judge between them de & ſuper Præmiſſis; and the Plaintiff and Defendant mutually covenanted to do ſeveral other Matters. Where Covenants are mutual, and where not.

That the Arbitrator did thereupon afterwards award, and the Defendant did covenant with the Plaintiff, That in Conſideration of the Plaintiff's Sealing and Delivering

(at the Defendant's Requeſt) one Part of a Leaſe for Years (to the Award annexed) for the Rent therein reſerved, That the Defendant ſhould pay ſo much Money for the Tythes.

That it was alſo awarded by the ſaid Arbitrator, and the Defendant did covenant, that he would be accountable to the Plaintiff for all ſuch Arrearages of Rent, Tythes, and Compoſition-Money for Tythes, as ſhould be ariſing and renewing upon the ſaid Land, &c. according to ſuch a Value per Annum, whereof the Defendant could not lawfully diſcharge himſelf.

And the Plaintiff avers, That he hath obſerved all the Covenants on his Part, and that the Defendant hath not obſerved all the Covenants on his Part, and aſſigns for Breach, That he hath not accounted with him for all Arrears of Tythes and Compoſition-Money for Tythes ariſing upon the Lands in, &c. and that he hath requeſted him to account, which he hath refuſed.

The Defendant pleads Actio non: for he ſays, That 'tis true there was ſuch an Indenture as in the Declaration is ſet forth, and ſuch a Covenant to be accountable as the Plaintiff hath declared.

But ſaith in eadem Indentura agreatum fuit ulterius & proviſum, That the Plaintiff ſhould allow and diſcount upon the Account, all Sums of Money for Parſons Dinners at the Requeſt of the Plaintiff, and for his Concerns laid out and diſburſed by the Defendant, and ſuch other Sums which he had Direction to lay out; and that ſuch a Day paratus fuit & obtulit ſe, & adhuc paratus eſt, to account for all Arrears of Rent, &c. if the Plaintiff would diſcount, &c.

That ſuch a Day the Plaintiff would not, and often after refuſed, and yet doth refuſe to allow upon ſuch Account all ſuch Sums of Money as the Defendant, at the Requeſt and for the Concern of the Plaintiff, had laid out, and this he is ready to aver: And then he avers, that after, &c. on ſuch a Day he did expend ſeveral Sums of Money for the Plaintiff, which were juſt and reaſonable to be allowed by the Plaintiff, upon Account made by him.

To this Plea the Plaintiff demurred, and the Defendant joined in Demurrer, which was argued by Turner Serjeant for the Plaintiff, and by Serjeant Seys for the Defendant.

Ex parte Quer. This was a bad Plea, for 'tis a Rule in all Law Books, That every Plea ought to anſwer the Matter which is charged upon the Defendant in the Declaration, which is

not done here, becauſe the Defendant doth neither aver that he did account, or confeſs, or avoid or traverſe it, which he ought to do, after the Plaintiff had alledged a Requeſt to account, and a Refuſal.

'Tis an abſolute Covenant which charges him to be accountable; and not if the Plaintiff would allow Parſons Dinners, &c. for 'tis impoſſible that the Plaintiff can make any ſuch Allowance, till the Defendant hath accounted: for how can there be a diſcounting without an Account?

If the Plaintiff had told him before the Account, That he would not allow any Thing upon the Account; this would not have been prejudicial to bar him of his Action, ſo as if had been before the Requeſt: For if a Man makes a Feoffment in Fee, upon Condition that if the Feoffor pay 100l. at Michaelmas, the Feoffment ſhall be void; and before Michaelmas the Feoffee tells him, that he will not receive the Money at that Time; this ſhall not prejudice him, becauſe 'tis no Refuſal in Law.

The Defendant in this Caſe is to do the firſt Act, viz. to account; and when that is neglected by him, it ſhall never prejudice him who is to do a ſubſequent Act. 5 Co. 19, 20. Higginbottom's Caſe, 22 & 23 Hallin and Lamb's Caſe.

One covenants to make an Eſtate in Fee at the Coſts of the Covenantee; the Covenantor is to do the firſt Act, viz. to let him know what Conveyance he will make.

The like Caſe was in this Court between Twiford and Buckly, upon an Indenture of Covenants, wherein One of the Parties did covenant to make a Leaſe for the Life of the Covenantee, and for Two other Lives as he ſhould name, and the Covenantor was to give Poſſeſſion.

The Breach aſſigned was, That the Defendant had not made Livery and Seiſin, and upon Performance pleaded, the Plaintiff did demur, and upon great Debate it was reſolved that the Covenant was not broken, becauſe the Plaintiff had not performed that which was firſt to be done on his Part, viz. to name the Lives.

It may be objected, That theſe Covenants have a Relation one to the other; and ſo Non-performance of the one, may be pleaded in Bar to the other.

But to that he anſwered, They are diſtinct and mutual Covenants, and there may be ſeveral Actions brought againſt each other. The Caſe of *Ware and Chappel comes up to this Point. Ware was to raiſe 500 Soldiers, and bring them to ſuch a Port, and Chappel was to find Shipping, for which he ſued upon the Covenant, though the other had not raiſed the Soldiers; for that can be only alledged in Mitigation of Damages, and is no Excuſe for

* Stile 186, 187.

the Defendant, and it was adjudged that this was not a Condition precedent, but diſtinct and mutual Covenants, upon which ſeveral Actions might be brought.

This cannot be a Condition precedent, for the Defendant pleads, & ulterius agreat' & proviſum eſt, that the Plaintiff ſhall diſcompt and reimburſe the Defendant; and here the Word proviſum eſt doth not make a Condition, but a Covenant. 27 H. 8. 14, 15. Bro. Condition 7.

There is another Fault in the Plea; for the Defendant avers, that the Plaintiff hath not reimburſed him ſeveral Sums of Money, which is altogether incertain, for it doth not appear what is due. 28 H. 8. Dyer 28. 9 Ed. 4. 16. 12 H. 8. 6. a.

Ex parte Def. But it was argued for the Defendant, that he need not traverſe the Accompt.

As to the Firſt Objection made, That the Plea is not good, becauſe it doth not anſwer the Declaration, the Rule as to that Purpoſe is generally good; but then the Plaintiff muſt tell all his Caſe, which if he omits, he muſt then give the Defendant Leave to tell where his Omiſſion is.

Sometimes a Thing which belongs properly to another, may be pleaded in Bar or Diſcharge, to avoid Circuity of Actions; as one Covenant may be pleaded to another. 1 H. 7. 15. 20 H. 7. 4. So where the Leſſee is to be diſpuniſhable of Waſte, he may plead it to a Writ of Waſte.

The Books note a Difference where the Covenant is One or Two Sentences; for in the Firſt Caſe, one Covenant may be pleaded in Diſcharge of another, but not in the laſt. Keilway 34.

'Tis true, if the Second Covenant had been diſtinct and independent, it could not have been thus pleaded; but in this Caſe 'tis not ſaid, That the Covenantor for himſelf, his Executors and Adminiſtrators, doth covenant, &c. but ulterius agreat' & proviſum eſt; ſo that as 'tis penned, proviſum eſt makes a Condition, and then the Senſe is, I will accompt, if you will diſcompt; and if you refuſe to diſcompt, I cannot be charged. Dyer 6.

'Tis inutilis labor to make up an Accompt, If the other will not allow what he ought, if there be an Annuity pro conſilio impenſo, &c. and he will not pay the Money, the other is not to be compelled to give his Advice. Fitzh. Annuity 27. 25 E. 2. Annuity 44.

Curia. The Chief Juſtice and the whole Court were of Opinion, That Judgment ſhould be given for the Plaintiff; for Arbitra-

bitrations, Wills, and Acts of Parliament, are to be taken according to the Meaning of the Parties, and Damages are to be given according to the Merit of the Caſe. In this Caſe the Defendant is bound to accompt upon Requeſt, and to pay what Money is due upon the Accompt; and 'tis an Impertinent Queſtion for the Defendant to aſk him to make Allowance for Parſons Dinners before they come to Accompt: 'Tis as if a Bailiff ſhould ſay to his Lord, I have laid out ſo much Money, and I will not accompt with you unleſs you will allow it; this is a Capitulation beforehand, and is very inſignificant by way of Diſcharge.

They have each a Remedy upon theſe mutual Covenants, and the proviſum & agreat' eſt doth not amount to a Condition, but is a Covenant; and Judgment was given accordingly.

Juſtice Ellis ſaid, he had a Manuſcript Report of the Caſe of Ware *and* Chappel, which he ſaid was adjudged upon great Debate.

## Stoutfil's Caſe.

PRohibition. It was agreed clearly that no Tythes ought to be paid for Brick, becauſe 'tis Part of the Soil, and ſo it has been often adjudged: And it was alſo ſaid that Tythes ſhall not be paid for Pidgeons, unleſs it be by ſpecial Cuſtom.

Tythes not to be paid for Brick or Pidgeons. 1 Mod. 35.

## Columbel *verſus* Columbel.

THE Plaintiff brought an Action of Debt upon a Bond of 500 l. The Defendant demands Oyer of the Bond and Condition, which was to obſerve an Award of A. B. Arbitrator, indifferently choſen to determine all Manner of Controverſies, Quarrels and Demands, concerning the Title of certain Lands, ſo as the ſaid Award were made and put into Writing under the Hand and Seal of the Arbitrator, &c. and then he pleads, that the Arbitrator made no Award.

Award pleaded under Seal, and not under Hand, not good.

The Plaintiff replies an Award, by which ſuch Things were to be done, and ſets it forth (in hæc verba) under the Seal of the Arbitrator.

The Defendant rejoins, that the Arbitrator made no Award under his Hand and Seal according to the Condition of the Bond.

The Plaintiff demurs; but the Defendant had Judgment for that the Plaintiff ought to plead the Award under

der the Hand as well as the Seal of the Arbitrator; for when he produces it in Court, as he doth by a profert hic in Curia, he muſt plead it formally, as well as produce it; and Judgment was given for the Defendant.

## Norris *verſus* Triſt.

Livery *ſecundum formam Chartæ*, where good.

IN a Special Verdict in Ejectment: The Caſe was, A Deed is made to Three, Habendum to Two for their Lives, Remainder to the Third for his Life, and Livery and Seiſin is made to all Three ſecundum formam Chartæ.

And whether the Livery ſo made, as if they had all Eſtates in Poſſeſſion, whereas in truth One of them had but an Eſtate in Remainder, was good, was the Queſtion.

On the one Side it was ſaid by Serjeant Seys, That Poſſeſſion in this Caſe was delivered according to the Form of the Deed within mentioned, which muſt be to Two for Life, Remainder to the Third Perſon, and Livery and Seiſin being only to accompliſh and perfect the Common Aſſurances of the Land, ought to be taken favourably, ut res magis valeat quam pereat; and therefore if a Feoffment be made of Two Acres, and a Letter of Attorney to give Livery, and the Attorney only enters into One Acre, and gives Livery ſecundum formam Chartæ, both the Acres paſs. Coke Lit. 52. a.

Dyer 131. 40.

But on the other Side, Serjeant Maynard ſaid, that there was ſomething more in this Caſe than what had been opened; for there was a Letter of Attorney made to give Livery to Two, and inſtead of doing that, he makes Livery to them all, which is no good Execution of his Authority, and therefore no Livery was made, the Authority not being purſued.

As to the Caſe in the Firſt Inſtitutes, my Lord Coke errs very much there in that Diſcourſe; for in ſaying, That if there be a Feoffment of Two Acres, and a Letter of Attorney to take Poſſeſſion of both, and he maketh Livery of both, but taketh Poſſeſſion but of one, and that both paſs, 'tis not Law; but if the Authority be general, as to make Livery and Seiſin, and he take Poſſeſſion of one, and then makes Livery of more ſecundum formam Chartæ, that is good; and this is the Difference taken in the Books. 5 Ed. 3. 65. 3 Ed. 3. 32. 43 Ed. 3. 32. 27 H. 8. 6.

The Remainder-Man in this Caſe is a meer Stranger to the Livery.

There is alſo a manifeſt Difference between a Matter of Intereſt, and an Execution of an Authority; for in the firſt Caſe, it ſhall be conſtrued according to the Intereſt which either hath, but an Authority muſt be ſtrictly purſued.

The Court were all of Opinion, that the Livery in this Caſe was good to Two for their Lives, Remainder to the Third Perſon. And the Chief Juſtice ſaid, That whatever the ancient Opinions were about purſuing Authorities with great Exactneſs and Nicety, yet this Matter of Livery upon Endorſements of Writing was always favourably expounded of later Times, unleſs where it plainly appeared that the Authority was not purſued at all; as if a Letter of Attorney be made to Three jointly and ſeverally, Two cannot execute it, becauſe they are not the Parties delegated, they do not agree with the Authority: And Judgment was given accordingly. Curia. Sid. 428.

## Richards *verſus* Sely.

THIS was a Special Verdict in Ejectione firmæ, for Lands in the County of Cornwal. The Caſe was this, viz. Covenant made to enjoy a Copyhold *de Anno in Annum*, 'tis a Leaſe, and ſo a Forfeiture.

Thomas Sely was ſeiſed of the Lands in Queſtion for Life, according to the Cuſtom of the Manor of P. and he together with one Peter Sely were bound in a Bond to a Third Perſon for the Payment of 100 l. being the proper Debt of the ſaid Thomas, who gave Peter a Counter-bond to ſave himſelf harmleſs.

And that Thomas being ſo ſeiſed, did execute a Deed to Peter as a Collateral Security to indempnify him for the Payment of this 100 l. by which Deed after a Recital of the Counter-bond given to Peter, and the Eſtate which Thomas had in the Lands, he did covenant, grant and agree for himſelf, his Executors, Adminiſtrators and Aſſigns, with the ſaid Peter, that he, his Executors and Adminiſtrators, ſhould hold and enjoy theſe Lands from the Time of the making the ſaid Deed for Seven Years, and ſo from the End of Seven Years to Seven Years, for and during the Term of 49 Years, if Thomas ſhould ſo long live.

In which Deed there was a Covenant, That if the ſaid 100 l. ſhould be paid, and Peter ſaved harmleſs according to the Condition of the ſaid Counter-bond, then the ſaid Deed to be void. 2 Cro. 301.

The Queſtion was, Whether this being in the Caſe of Copyhold Lands will amount to a Leaſe thereof, and ſo make a Forfeiture of the Copyhold Eſtate, there being no Cuſtom to warrant it?

This

Ex parte Quer.

This Caſe was argued this Term by Serjeant Pemberton for the Plaintiff; and in Trinity Term following by Serjeant Maynard on the ſame Side, who ſaid that this was not a good Leaſe to entitle the Lord to a Forfeiture. It hath been a general Rule, that the Word Covenant will make a Leaſe, though the Word Grant be omitted; nay a Licence to hold Land for a Time without either of thoſe Words will amount to a Leaſe, much more when the Words are, To * have, hold and enjoy his Land for a Term certain, for thoſe are Words which give an Intereſt, and ſo it hath been ruled in Tiſdale *and Sir* William Eſſex's Caſe, which is reported by ſeveral, and is in Hob. 35. and 'tis now ſettled that an Action of Debt may be brought upon ſuch a Covenant.

* 2 Cro. 92. 398. Noy 14. 1 Roll. Abr. 848, 849. Cro. Car. 207.

And all this is regularly true in the Caſe of Freehold. But if the conſtruing of it to be a Leaſe will work a Wrong, then 'tis only a Covenant or Agreement, and no Intereſt veſts, and therefore it ſhall never be intended a Leaſe in this Caſe, becauſe 'tis in the Caſe of a Copyhold Eſtate; for if it ſhould, there would be a Wrong done both to the Leſſor and Leſſee; for it would be a Forfeiture of the Eſtate of the one, and a Defeating of the Security of the other.

It has been generally uſed in ſuch Caſes, to conſider what was the Intention of the Parties, and not to intend it a Leaſe againſt their Meaning, for which there is an expreſs Authority. 2 Cro. 172. in the Caſe of Evans *and* Thomas, in which Howel covenants with Morgan to make a Conveyance to him of Land by Fine, provided that if he pay Morgan 100 l. at the End of Thirteen Years, that then the Uſe of the Fine ſhall be to the Coniſor, and covenants that Morgan ſhall enjoy the ſaid Lands for Thirteen Years, and for ever after if the 100 l. be not paid.

Noy 128.

The Aſſurance was not made, and this was adjudged no Leaſe for Thirteen Years, becauſe it was the Intent of the Parties to make an Aſſurance only in the Nature of a Mortgage, which is but a Covenant.

And this appears likewiſe to be the Intention of the Parties here, becauſe in the very Deed 'tis recited that the Lands are Copyhold.

It alſo ſounds directly in Covenant, for 'tis that Peter ſhall or may enjoy without the lawful Let or Interruption of the Leſſor.

All Agreements muſt be conſtrued ſecundum ſubjectam materiam, if the Matter will bear it, and in moſt Caſes are governed by the Intention of the Parties, and not to work a Wrong; and therefore if Tenant in Tail makes a Leaſe

for Life, it ſhall be taken for his own Life; and yet if before the Statute of Entails he made ſuch Leaſe, he being then Tenant in Fee-Simple, it had been an Eſtate during the Life of the Leſſee; but when the Statute had made it unlawful for him to bind his Heir, then the Law conſtrues it to be for his own Life, becauſe otherwiſe it would work a Wrong. Co. Lit. 42. Hob. 276.

So in this Caſe it ſhall not amount to a Leaſe for the manifeſt Inconvenience which would follow, but it ſhall be conſtrued as a Covenant, and then no Injury is done.

On the Defendant's Part it was argued by Serjeant Newdigate, that though this was in the Caſe of Copyhold, that did not make any Difference; for the plain Meaning of the Parties was to make a Leaſe: But where the Words are doubtful, and ſuch as may admit of divers Conſtructions, whether they will amount to a Leaſe or not, there they ſhall be taken as a Covenant to prevent a Forfeiture. Ex parte Def.

So alſo if they are only Inſtructions, as if a Man by Articles ſealed and delivered is contented to demiſe ſuch Lands, and a Rent is reſerved, and Covenants to repair, &c.

Or if One covenants with another to permit and ſuffer him to have and enjoy ſuch Lands, theſe and ſuch like Words will not amount to a Leaſe, becauſe (as hath been ſaid) the Intention of the Parties is only to make it a Covenant; but here the Words are plain, and can admit of no Doubt. 1 Roll. Abr. 848.

But for an Authority in the Point, the Lady * Mountague's Caſe was cited, where it was adjudged, That if a Copyholder make a Leaſe for a Year warranted by the Cuſtom, & ſic de Anno in Annum during Ten Years, 'tis a good Leaſe for Ten Years, and a Forfeiture of the Copyhold Eſtate. Vide Hill. 15 & 16 Car. 2. Rot. 233. the Caſe of Holt *and* Thomas in this Court. * 2 Cro. 301.

The Court inclined, That it was a good Leaſe, and by conſequence a Forfeiture of the Copyhold, and that a Licence in this Caſe could not be ſuppoſed to prevent the Forfeiture, becauſe if that had been, the Jury would have found it, the Meaning of the Parties muſt make a Conſtruction here, and that ſeems very ſtrong that 'tis a good Leaſe; but they gave no Judgment. Curia.

## Wilkinſon *verſus Sir* Richard Lloyd.

Where the Parties ſhall join in an Action, where not.

THE Defendant covenanted, that he would not agree for the taking the Farm of the Exciſe of Beer and Ale for the County of York without the Conſent of the Plaintiff and another, and the Plaintiff alone brought this Action of Covenant, and aſſigns for Breach, the Defendant's agreeing for the ſaid Exciſe without his Conſent, upon which the Plaintiff had a Verdict, and 1000 l. Damages given.

And Serjeant Pemberton moved in Arreſt of Judgment, for that an Action of Covenant would not lie in this Caſe by the Plaintiff alone, becauſe he ought to have joined with the other, both of them having a joint Intereſt; and ſo is Slingsby's Caſe, 5 Co. If a Bond is made to Two jointly and ſeverally, they muſt both join in an Action of Debt, ſo here 'tis a joint Contract, and both muſt be Plaintiffs: So alſo if One covenants with Two to pay each of them 20 l. they muſt both join.

'Tis true, in Slingsby's Caſe 'twas held, if an Aſſurance is made to A. of White-Acre, and to B. of Black-Acre, and to C. of Green-Acre, and a Covenant with them and every of them; theſe laſt Words make the Covenant ſeveral.

But here is nothing of a ſeveral Intereſt, no more than that One covenants with Two, that he will not join in a Leaſe without their Conſent, ſo that their Intereſt not being divided the Covenant ſhall be entire, and taken according to the firſt Words to be a joint Covenant; and the rather, becauſe if the Plaintiff may maintain this Action alone, the other may bring a Second Action, and the Defendant will be ſubject to entire Damages which may be given in both.

Judgment.

But the Court was of another Opinion, That here was no joint Intereſt; but that each of the Covenantees might maintain an Action for his particular Damages, or otherwiſe one of them might be Remedileſs: for ſuppoſe one of them had given his Conſent that the Defendant ſhould farm this Exciſe, and had ſecretly received ſome Satisfaction or Recompence for ſo doing, it is reaſonable that the other ſhould loſe his Remedy who never did conſent: For which Reaſon the Plaintiff had his Judgment.

## Page *verſus* Tulſe *Mil' & alios Vic'* Midd'.

THE Plaintiff brought an Action on the Caſe againſt the Sheriff for a falſe Return, ſetting forth, That he ſued a Capias out of this Court directed to the Sheriff of Middleſex, by vertue whereof he arreſted the Party, and took Bail for his Appearance, and at the Day of the Return of the Writ the Sheriff returned Cepi Corpus & paratum habeo, but he had not the Body there at the Return of the Writ, but ſuffered him to eſcape.

Caſe lies not againſt the Sheriff for returning a *Cepi Corpus & paratum habeo*, tho' the Party doth not appear. Mod. Rep. 239. Ellis *and* Yarborough, Poſtea.

The Defendant pleads the Statute of 23 H. 6. cap. 10. and ſaith that he took Bail, viz. Two ſufficient Sureties, and ſo let him go at large, &c.

The Plaintiff demurs; and whether this Action lies againſt the Defendant was the Queſtion, who refuſed to proceed againſt him by way of Amerciament, or to take an Aſſignment of the Bail-Bond.

This Caſe depended in Court ſeveral Terms. It was argued by Serjeant Pemberton and Serjeant Coniers for the Plaintiff, and by Serjeant George Strode for the Defendant; and Judgment was given in Eaſter-Term in the 29th Year of this King.

In the Argument for the Defendant that this Action would not lie, it was conſidered, Ex parte Def.

1. What the Common Law was before the making of this Statute.

2. What Alteration thereof the Statute had made.

At the Common Law Men were to appear perſonally to anſwer the Writ, the Form of which required it, and no Attorney could be made in any Action 'till Edw. 1. de gratia ſpeciali gave Leave to his Subjects to appoint them, and commanded his Judges to admit them. 2 Inſt. 377. After the Arreſt the Sheriff might tie the Party to what Conditions he pleaſed, and he might keep him 'till he had complied with ſuch Conditions, which often ended in taking extravagant Bonds, and ſometimes in other Oppreſſions, for Remedy whereof the Statute was made, in which the Clauſe that concerns this Caſe is, viz. If the Sheriff return upon any Perſon *Cepi corpus* or *Reddidit ſe*, that he ſhall be chargeable to have the Body at the Day of the Return of the Writ in ſuch Form as before the making the Act; ſo that as to the Return of the Writ this Statute hath made no Alteration, the Sheriff being bound to have the Party at a Day as before.

All the Alteration made of the Common Law by this Statute is, That the Sheriff now is bound to let the Party out of Priſon upon reaſonable Sureties of ſufficient Perſons, which before he was not obliged to do; and it would be a Caſe of great Hardſhip upon all the Sheriffs of England, if they (being compellable to let out the Party to Bail) ſhould alſo be ſubject to an Action for ſo doing, becauſe they have him not at the Day; ſo that the Intent of the Law muſt be (when it charges the Sheriff to have the Body at the Return) that he ſhould be liable to a Penalty if the Party did not then appear, not to be recovered by Action, but by Amerciament.

Cro. Jac. 286. The Security directed by this Act is to be taken in the Sheriff's own Name; 'tis properly his Buſineſs and for his own Indempnity, and therefore it is left wholly in his Power; for which Reaſon no Action will lie againſt him for taking inſufficient Bail, that being to his own Prejudice, in which the Plaintiff is no wiſe concerned; for if that had been intended by the Act, ſome Proviſion would have been made as to his being ſatisfied in the Sufficiency of the Perſons.

When the Security is thus taken, if the Defendant doth not appear at the Return of the Writ, the Plaintiff by Amerciaments, ſhall compel him to bring in the Body, or to aſſign the Bond, either of which is a full Satisfaction, and as much as is required.

* 2 Sand. 59, 154. 1 Roll. Abr. 807, 808. Cro. Eliz. 460, 852. Noy 39. Moor 428. Sid. 23. If the Sheriff refuſe to take * ſufficient Sureties when offered, he is liable to an Action on the Caſe at the Suit of the Defendant for his Refuſal; and it would be very unreaſonable to enforce him to have the Party in Court at the Return, when he is obliged under a Penalty to let him at large.

This Action is grounded upon a falſe Return, when in truth there is no Return made, or if any, 'tis a very imperfect Return 'till the Body be in Court; and this is the Reaſon why the Court will not allow it, but amerce the Sheriff 'till he make the Party appear; 'tis not like a compleat Return, as a Non eſt inventus, or the Return of Nulla Bona upon a Fi' Fa'.

*1 Roll. Abr. 93. pl. 17. Poſtea. Cro. Eliz. 852. The Caſe of * Bowls and Laſſels is full in the Point, where it was adjudged that this Action would not lie, becauſe the Sheriff had not done any Thing unjuſtly, but what he was commanded to do by the Statute, and therefore he is to be amerced if the Defendant doth not appear.

But for the Plaintiff it was ſaid, That unleſs this Action lie he is Remedileſs, and that for Two Reaſons:

1. Becauſe the Aſſignment of the Bail-Bond is at the Diſcretion of the Court, and not demandable by the Plaintiff in foro.

2. The

2. The Plaintiff hath no Benefit by the Amerciaments, becauſe they go to the King, and in ſome Places are granted to Patentees; now 'tis agreed that the Sheriff may be amerced, and certainly if an Action be brought againſt him he is but in the ſame Caſe, for ſtill he is to pay: And if it be objected, that the Amerciaments may be compounded cheaper, then the Plaintiff hath not ſo good Remedy, nor is ſo likely to recover his Debt, as if the Action would lie, which would be a greater Penalty upon him than the Amerciaments on the Sheriff.

Neither will it follow, that becauſe the Sheriff may be amerced, therefore no Action will lie againſt him; for in many Caſes he may be amerced, and yet an Action on the Caſe will lie againſt him at the Suit of the Party. 14 Aſſ. pl. 12. fol. 254. Latch 187.

That this Action will not lie is againſt the very End of the Statute, and the reaſonable Conſtruction thereof in the laſt Clauſe, which enacts, That if the Sheriff return a *Cepi Corpus*, he ſhall be charged to have the Body at the Return as before the making of the Statute: Now before this Law he was liable to an Action, if after ſuch a Return made the Party did not appear, and therefore this Action being grounded upon the Common Law, is ſtill preſerved, ſince no Alteration hereof hath been made by this Statute.

'Tis true, an Action of Eſcape is taken away, but not an Action on the Caſe for a falſe Return, and upon this Difference are all the Authorities cited on the other Side, as Cro. Eliz. 416, 621. Cro. Jac. 286. Moor 428. and the Caſe of Bowls and Leſſels.

And for an Authority in Point is the Caſe of Franklin and* Andrews, 24 Car. 1. where Judgment was given for the Plaintiff in an Action brought for a falſe Return of Cepi Corpus; and the Statute pleaded as in this Caſe. It has been objected, that Judgment was there given upon the Defect of Pleading, becauſe the Traverſe was naught; 'tis true, there was a Traverſe, abſque hoc quod the Defendant retornavit aliter vel alio modo; but that was held good, becauſe it anſwered the falſo alledged in the Plaintiff's Declaration: In this Caſe there is no Traverſe, but 'tis confeſſed by the Demurrer that he did falſly and deceitfully return Cepi Corpus, and ſo the Plaintiff is at apparent Damage, and hath no Remedy without this Action, and the Defendant is at no Prejudice, but hath his Remedy over on the Bail-Bond. *1 Mod. 33, 57, 58.

North Chief Juſtice, Wyndham and Atkins, Juſtices, held, that the Action would not lie; for when the Sheriff returns Cepi Corpus & paratum habeo, though he have him not in Court, Judgment.

Court, 'tis no falſe Return; for if he hath taken Bail, he hath done what by Law he ought to do; if he arreſt a Man in Yorkſhire, the Law will not compel him to bring the Party hither to the Bar, becauſe of the Charge; if he make an inſufficient Return, neither the Party or the Court are deluded, becauſe the common Method in ſuch Caſes muſt be purſued, by which the Party will have Remedy. This Return is true; and Juſtice Atkins held, that the Sheriff was not obliged by the Statute to return only a Cepi Corpus & paratum habeo, but might return, that he took Bail; for the Statute provides, that if he return a Cepi Corpus, he ſhall be chargeable as before, but doth not enjoin him to make ſuch Return; the Caſe of Bowles and Laſſels is full in this Point, and therefore Judgment was given for the Defendant.

But Juſtice Scroggs was of another Opinion; ſays he, This Action being brought becauſe the Defendant ſaid he had the Body ready, when in truth he had not, was an apparent Injury to the Plaintiff, of whom the Statute muſt have ſome Conſideration; for it doth not require the Sheriff to ſay Cepi Corpus & paratum habeo, but he muſt make his Return good, or otherwiſe thoſe Words are very inſignificant; and if the Statute obliges him to let the Party to Bail, and nothing more is thereby intended for the Benefit of the Plaintiff, why doth the Court amerce the Sheriff, and puniſh him for doing what the Statute directs? Therefore if the Plaintiff brings a Habeas Corpus upon the Cepi, and the Defendant doth not appear, the Plaintiff is then well entituled to this Action.

## Hollis *verſus* Carr, *in Cancellaria.*

Decree of the Execution of a Fine in Specie.

THE Lord Chancellor Finch having called to his Aſſiſtance Juſtice Wild and Juſtice Windham, to give their Opinions what Relief the Plaintiff was to have for the recovering of 6000 l. which was his Lady's Portion. After thoſe Judges had ſpoken ſhortly to the Matter, he put the Caſe: Viz. The Plaintiff by his Bill demands 6000 l. due to him for his Wife's Portion, with Intereſt for Non-payment, according to the Purport of certain Articles of Agreement, dated in Auguſt 1661, and mentioned to be made between old Sir Robert Carr (the Defendant's Father), his Lady and Son (the now Defendant), and Lucy Carr his Daughter, on the one Part, and my Lord Hollis and Sir Francis his Son (the now Plaintiff) on the other Part.

The Articles mention an Agreement of a Marriage to be had between the ſaid Sir Francis Hollis and Lucy Carr, with Covenants on the Plaintiff's Side to ſettle a Jointure, &c. and on the other Side to pay 6000 l. and 'tis agreed in the Articles, that a Fine was intended to be levied of ſuch Lands, &c. for ſecuring the Payment of 6000 l. &c.

The Marriage takes Effect, but old Sir Robert Carr did never ſeal theſe Articles; the Lady Carr ſeals before, and the Defendant after Marriage.

Sir Francis had Iſſue by his Lady Lucy, one Child ſince dead; the Lady is likewiſe dead; the Jointure was not made, nor the Portion paid.

Afterward, viz. Anno 1664. an Act of Parliament was made for ſettling old Sir Robert Carr's Eſtate, whereby the Truſtees therein named are appointed to ſell it for Payment of Debts, and Raiſing this Portion; by which Act all Conveyances made by old Sir Robert Carr, ſince the Year 1639. are made void, except ſuch as were made upon valuable Conſiderations; but all thoſe made by him before the ſaid Year, with Power of Revocation (if not actually revoked) are ſaved; and in the Year 1636. he had executed a Conveyance, by which he had made a Settlement of his Eſtate in Tail, with a Power of Revocation; but it did not appear that he did ever revoke the ſame.

The greateſt Part of the Lands appointed by this Act of Parliament, to be ſold by the Truſtees, are the Lands compriſed in that Settlement; and now, after the Death of Sir Robert Carr, the Plaintiff exhibits his Bill againſt the Son, (not knowing that ſuch a Settlement was made in the Year 1636, till the Defendant had ſet it forth in his Anſwer; and by this Bill he deſired that the Truſtees may execute their Truſt, &c. and that he may have Relief.

On the Defendant's Side it was urged, That after the Marriage there was a Bond given for an Additional Jointure, and it was upon that Account that the Defendant was drawn in to execute theſe Articles: And if the very Reaſon and Foundation of his entring into them failed, then they ſhall not bind him in Equity; and in this Caſe it did fail, becauſe the Plaintiff had diſabled himſelf to make any other Jointure, by a Pre-conveyance made and executed by him, of his whole Eſtate; and if this Agreement will not bind him, then this Court cannot enlarge the Plaintiff's Remedy, or appoint more than what by the Articles is agreed to be done; neither can the Defendant's Sealing incumber the Eſtate-Tail in Equity, becauſe the Lands were not then in him, his Father Ex Parte Def.

ther being Tenant in Tail, and then living: and the ſubſequent Deſcent by which the Lands are caſt upon him, alters not the Caſe, for the very Right which deſcends is ſaved by the Act from being charged.

But on the other Side it was argued, That though the Marriage did proceed upon the Defendant's Sealing, yet the Aſſurance which was to be made, was a principal Motive thereunto; and it being agreed before Marriage, though not executed, it was very juſt that he ſhould ſeal afterwards; and though the additional Jointure was not made, yet there was no Colour that the Defendant ſhould break his Articles for that Reaſon; becauſe if the Bond be not perform'd, 'tis forfeited, and may be ſued; and nothing appeared in the Caſe of any Conveyance made by Sir Francis, whereby he had diſabled himſelf to make an additional Jointure, and he hath expreſly denied it upon his Oath. And though it was objected, That the Money was raiſed by the old Lady Carr, and by the Direction of the Truſtees lodged in the Hands of one Cook, who is become Inſolvent; it was anſwered, That there was no Proof of the Conſent of the Truſtees, and therefore this Payment cannot alter the Caſe.

After the Matter thus ſtated, the Lord Chancellor delivered his Opinion, That the 6000 l. is due to the Plaintiff, unpaid and unſatisfied; for though the Marriage had not taken Effect, yet the Covenant binds the Defendant, becauſe a Deed is good for a Duty without any Conſideration.

2. The Plaintiff has Remedy againſt the Perſon of the Defendant at Law for this 6000 l.

3. He has Remedy againſt ſuch of the Defendant's Lands, which are not compriſed in the Settlement made 1636, for as to them the Truſtees may be enjoined to execute the Truſt.

And he deſired the Opinions of the Two Juſtices, if any Thing more could be done in this Caſe.

Juſtice Windham was of Opinion, That nothing more could be done, but to make a Decree to enforce the Execution of the Truſt.

And Juſtice Wild ſaid, That the Plaintiff has his Remedy at Law againſt the Defendant, and upon the Act of Parliament againſt the Truſtees; but upon theſe Articles no Decree could be made to bind the Lands, for that would be to give a much better Security than the

Parties had agreed on. But if there had been a Covenant in the Articles, that a Fine ſhould be levied, it might have been otherwiſe; 'tis only that a Fine is intended to be levied.

But as to that, the Lord Chancellor was of Opinion, That it was a good Covenant to levy a Fine, for the Words [Articles of Agreement, &c.] go quite through, and make that Clauſe a Covenant; but becauſe Juſtice Wild was of another Opinion, he deſired the Attorney General to argue theſe Three Points:

1. Whether this was a Covenant to levy a Fine or not?

2. If it was a Covenant, whether this Court can decree him to do it; for though the Party has a good Remedy at Law, yet whether this Court might not give Remedy upon the Land?

3. If it was a Covenant to levy a Fine, and the Court may decree the Defendant to do it; yet whether ſuch a Decree can be made upon the Prayer of this Bill, it not being particularly prayed; for the Plaintiff concluded his Bill, with praying Relief in the Execution of the Truſt, &c.

In Trinity-Term following theſe Points were argued by Serjeant Maynard, Sir John Churchil, and Sir John King for the Plaintiff; Mr. Attorney and Mr. Solicitor, and Mr. Keck for the Defendant, all in one Day, and in the ſame Order as named.

The Counſel for the Defendant urged, That this was no Covenant in Law to enforce the Defendant to levy a Fine: 'Tis agreed that there is no need of the Word [Covenant] to make a Covenant; but any Thing under the Hand and Seal of the Parties, which imports an Agreement, will amount to a Covenant; ſo in 1 Roll. Abr. 518. theſe Words in a Leaſe for Years, viz. That the Leſſee ſhall Repair, make a Covenant; ſo in the Caſe of Indentures of Apprentice-ſhip there are not the formal Words of a Covenant, but only an Agreement that the Maſter ſhall do this, and the Apprentice ſhall do that; and theſe are Covenants: But in all theſe Caſes there is ſomething of an Undertaking; as in 1 Roll. 519. Walker *verſus* Walker. If a Deed be made to another in theſe Words, viz. I have a Writing in my Cuſtody, in which W. ſtandeth bound to B. in 100 l. and I will be ready to produce it; This is a Covenant, for there is a preſent Engaging to do it, but there are no ſuch Words here, 'tis only a Recital, That whereas a Fine is intended to be levied to ſuch Uſes, &c. 'Tis only Introductive to another Clauſe, without poſitive or affirmative Words, and therefore can never be intended to make a Covenant, but are

Ex parte Def.

recited to another Purpoſe, viz. To declare the Uſe of a Fine, in caſe ſuch ſhould be levied.

If Articles of Agreement are executed in Conſideration of an intended Marriage, and one Side covenants to do one Thing, and the other Side another Thing; was it ever imagined that upon theſe Words, [Whereas a Marriage is intended, &c.] that an Action of Covenant might be brought to enforce the Marriage: And yet there is as much Reaſon for the one as the other; therefore ſince the Parties have neither made nor intended it for a Covenant, 'tis not neceſſary that it ſhould be ſo conſtrued.

If this is a Covenant, the Parties at Common Law could only bring an Action of Covenant, and recover Damages for not levying of the Fine, and that the Plaintiff may do now upon the expreſs Covenant for Non-payment of the Money; but then the Breach muſt be aſſigned according to the Words, viz. That the Defendant did not levy a Fine as intended, who may plead that a Fine was never intended to be levied; and by what Jury ſhall this be tried?

It may be objected, That every Article ſtands upon its own Bottom, and the Title of them (being Articles of Agreement) extends to every Paragraph.

But as to that, each of theſe Articles is to be conſidered by it ſelf; and every Paragraph begins, viz. It is covenanted, &c. which ſhews it was never intended to make it a Covenant, by the Title of the Articles, and the rather, becauſe 'tis unreaſonable to make ſuch a Conſtruction; for it is not to be ſuppoſed that a Man will covenant that a Fine ſhall be levied, as in this Caſe, by A. and B. and himſelf, when 'tis not in his Power to compel another.

2. Admitting it to be a Covenant, yet it would be very hard to decree the Execution of a Fine in Specie; for the Father of the Defendant was alive when he executed the Deed, and the Father being Tenant in Tail, who never ſealed, the Son could have no preſent Right, who did ſeal; and if Matters had ſtood now as then, how could a Court of Equity decree a Fine, by which a Right might be extinguiſhed, but could never be transferred, and by which no Uſe could be declared? For though ſuch a Fine be good by Eſtoppel, before the Tail deſcends to the Iſſue; yet no Uſe can be declared thereupon, nor upon any Fine by Eſtoppel; and there is no Reaſon why Length of Time ſhould put the Plaintiff into a better Condition than he was when the Articles were executed.

3. And laſtly, ſince here is a particular Relief prayed, in no wiſe concerning the Levying of this Fine, but only a Relief in the Execution of the Truſt, this Court cannot decræ the Defendant to levy one, it being againſt the conſtant Courſe and Rules thereof.

But on the other Side it was ſaid by the Plaintiff's Counſel, that the Words do declare the Intent of the Parties, that a Fine ſhall be levied; and 'tis the Intent which makes the Agræment; and where there is an Agræment, an Action of Covenant will lie. Ex parte Quer.

If a Man covenant to do ſuch a Thing in Conſideration of a Marriage, and then there is this Clauſe, viz. Whereas it is intended that he ſhall marry before *Michaelmas*, that then, *&c.* certainly upon the whole Dæd here is a good Covenant to marry before Michaelmas.

In this Caſe 'tis covenanted, that 6000 l. ſhall be paid, and that it ſhall be ſecured as herein is after mentioned; then 'tis declared, that a Fine is intended to be levied for that Purpoſe; this is a good Covenant to make a Security by a Fine.

But if the particular Manner how the Security was to be made, had been omitted, yet upon the Words [Covenants to ſecure it] the Court hath a good Ground to make a Decræ to levy a Fine, that being the only Way to ſecure it.

2. As to the Objection, That the Defendant had but a Poſſibility of having the Eſtate when he entred into this Covenant, (admitting it to be ſo) yet why ſhould that be a Reaſon to hinder him from making good the Security when he hath it; if Father and Son covenant to make an Aſſurance, the Father who hath the Eſtate in Poſſeſſion dies, the Decræ muſt then operate upon that Eſtate in the Hands of the Son.

3. Here is a general Prayer for a proper Relief, in which the Plaintiff's Caſe is included, and therefore prayed Judgment for him.

The Lord Chancellor, preſently after the Arguments on each Side, delivered his Opinion, That upon the whole Frame of the Articles there was a Covenant to levy a Fine; for wherever there is an Agræment under Hand and Seal, Covenant lies; that in this Caſe there was a plain Covenant, if the firſt Article of giving farther Security be coupled to that Paragraph of intending to levy a Fine, for that is the farther Security intended, ſo that the Meaning of the Parties runs thus: I do intend to levy a Fine, which is for the ſecuring of 6000 l. and this appears Curia.

to be their Agræment. Now there are many Caſes where Words will make a Covenant, becauſe of the Agræment, when the general Words of Covenant, Grant, &c. are wanting; as * Yielding and Paying will make a Covenant, for the Reaſons aforeſaid.

*Hays *verſus* Bickerſtaff. Antea & Poſtea.

And therefore the Party having provided himſelf of real as well as perſonal Security by theſe Articles, he ſaid he would not deprive him of it; eſpecially when it might be more Trouble to bring an Action of Covenant for the not levying of the Fine, for upon that many Queſtions might ariſe, as who ſhould do the firſt act, &c. for which Reaſons he decreed the Execution of the Fine in Specie.

Cook *verſus* Herl.

# DE

# Term. Sanctæ Trin.

## Anno 28 Car. II. in Communi Banco.

### Ingram *verſus* Tothill.

REplevin: The Caſe was, A Man made a Leaſe for 99 Years, if A. B. and C. ſhould ſo long live, rendring an Herriot after the Death of each of them ſucceſſively, as they are all Three named in the Deed; the laſt named died firſt; and if an Herriot ſhould be paid, was the Queſtion.

Juſtification ill. 1 Vent. 314. Mod. Rep. 216. Poſtea.

Stroud, Serjeant, urged that it ſhould not, becauſe the Reſervation is the Leſſor's Creature, and therefore to be taken ſtrongly againſt him: As if Rent be reſerved to him and his* Aſſigns, or to him and his Executors, the Heir ſhall not have it: So is the Authority in 33 Eliz. Owen 9. Reddend' to the Leſſor, his Executors and Adminiſtrators durante termino 21 Annorum, &c. the Heir ſhall not have the Rent, becauſe 'tis not reſerved to him.

* Per *North*, a Deviſee is not Aſſignee to take.

5 Co. 35. Latch. 274. *Reddend annuatim duran' termino prædict'* to the Leſſor and his Aſſigns, the Heir ſhall have it, tho' not named. Latch. 99. 2 Sand. 367.

In this Caſe the Herriot is reſerved if the Three die ſucceſſively, and the Leſſor is contented to truſt to that Contingency.

As to this Point, the Court gave no Opinion, but Judgment was given for the Plaintiff upon the Pleading, becauſe the Defendant had juſtified the taking of a Diſtreſs, by vertue of a Leaſe for a Term of Years, if Three live ſo long, and did not aver that any of the Lives were in Being.

2. He ſets forth, That one of them was ſeiſed, and being ſo ſeiſed died, but doth not ſay obiit inde ſeiſit', and theſe were held incurable Faults.

Anonymus.

## Anonymus.

Exceptions to the Count in a *Formedon in Diſcender.* Mod. Rep. 219. 8 Co. 88.

IN a Formedon in Diſcender: The Tenants by Turner, Serjeant, of Counſel with them, took Three Exceptions to the Count.

1. The Demandant (being Brother to the Tenant in Tail who died without Iſſue) ſets forth, that the Land belonged to him poſt Mortem of the Tenant in Tail, without ſaying, that he died without Iſſue: In the ancient Regiſter in a Formedon, 'tis pleaded, that the Tenant in Tail died without Iſſue, and ſo it is in Co. Entr. 254. b. Raſt. Entr. 341. b. quæ poſt Mortem of the Donæ reverti debeant, eo quod the Donæ obiit ſine Hærede; all the Precedents are ſo. 9 E. 4. 36.

2. The Demandant makes as if there were Two Heirs of one Man, which cannot be pleaded, for he counts that his eldeſt Brother was Heir to his Father, and that after his Death he is now Heir, which cannot be, for none is Heir to the Father but the eldeſt Son, and therefore when they are both dead without Iſſue, the next Brother is Heir to him who was laſt ſeiſed, and not to the Father, and then he ought to be named, which is not done in this Caſe. Hern's Pleader, fol.

'Tis true, in a Formedon in Reverter (the Tail being ſpent) the Donor ought not to name in his Count every Iſſue inheritable to the Tail, becauſe he may not know the Pedigree: and therefore 'tis well enough for him to ſay, quæ poſt Mortem of the Donee ad ipſum reverti debeant, eo quod he died without Iſſue; but in a Formedon in Diſcender, 'tis preſumed that the Demandant knows the Deſcent, and therefore he ought to name every one to whom any Right did deſcend, Jenkin's and Dawſon's Caſe. Hetley 78.

Dyer 216.

1 Inſt. 326.

3. The Demandant hath not ſet forth, That he is Heir of J. begotten on the Body of his Wife, which he ſhould have done, becauſe this being in the Diſcender he muſt make himſelf Iſſue to the Tail.

Ex parte Def.

Theſe Exceptions were anſwered by Serjeant Seys; and as to the firſt, he ſaid, That in a Formedon in Diſcender, he need not to ſet forth that the Tenant in Tail died without Iſſue, which he agreed muſt be done in a Formedon in Remainder or Reverter. 39 E. 3. 27. Old Entr. tit. Formedon pl. 3. 7 H. 7. 7. b. a Caſe expreſs in the Point.

To the Second Exception he ſaid, That it was no Repugnancy in Pleading to ſay, that Two were Heirs to One Man, for they may be ſo at ſeveral Times, and ſo it appears to be in this Caſe, ſince 'tis ſaid Poſt Mortem of his Brother who was Heir.

To the Third Exception, 'Tis well ſet forth that the Demandant was the Iſſue of Ingram, begotten of the Body of Jane; for he ſaith his Brother was ſo, and after his Death he was Brother and Heir of him, which is impoſſible to be, unleſs he was begotten as aforeſaid; and of this Opinion were all the Court; viz. That 'tis well enough ſet forth, That poſt Mortem of the Tenant in Tail deſcendere debet; for if he had any Children alive it could not deſcend to the Demandant as Brother and Heir, which he hath alledged; and they all agreed the Difference betwen a Formedon in the Diſcender, Remainder and Reverter. And as to the Second Exception, there is no Contradiction to ſay Two are Heirs to One tempore diviſo. And the laſt Exception had no Force in it. But then it was obſerved, That the Demandant in his Writ had ſet out his Title after the Death of the Tenant in Tail, and in the Count 'tis only Quæ poſt Mortem, &c. But to that it was anſwered, it relates to the Writ, and what is therein ſhall ſupply the Et cætera in the Count. Judgment.

## Woodward *verſus* Aſton *in Banco Regis.*

INdebitatus Aſſumpſit for 10 l. in Money received to the Plaintiff's Uſe, and upon a Trial at Bar this Term, the Caſe upon Evidence was, viz.

Sir Robert Henly, Prothonotary of the Court of King's-Bench, makes a Grant of the Office of Clerk of the Papers (which of Right did belong to him) unto Mr. Vidian and Mr. Woodward, for their Lives, and the Life of the longeſt Liver of them.

Afterwards Mr. Vidian makes a Parol Surrender of this Grant, and then Sir Robert Henley makes a new Grant to Mr. Woodward and Mr. Aſton the Defendant, for their Lives, and for the Life of the Survivor: Mr. Vidian dies, and whether the Plaintiff Woodward ſhould have all the Profits of the Office by Survivorſhip, was the Queſtion.

It was agreed, That this was one entire Office; and as one of them cannot make a Deputy, ſo he cannot appoint a Succeſſor.

But the Doubt was whether, the Plaintiff had not conſented that the Defendant ſhould be taken into the Office, and had agreed to the new Grant which was made afterwards;

Joint Office for Life and to the Survivor, one conſents that another ſhall be admitted, 'tis a Surrender. 1 Ventris 296.

wards; for it was admitted that if he conſented before Mr. Aſton came in, it muſt then be found for the Defendant; for by his Conſent he had barred himſelf of his Right and Benefit of Survivorſhip, and that by his conſenting to the new Grant, that in Law was a Surrender of the firſt Grant, and then the Defendant is Jointenant with the Plaintiff, and if ſo, his Action is not maintainable.

And upon theſe two Points only it was left to the Jury, who found for the Defendant.

The Evidence to the firſt Point was, That when Mr. Vidian propoſed to the Court that the Defendant might ſucceed him, after ſome Oppoſition and Unwillingneſs in the Plaintiff to agree to it; yet at length he declared that he did ſubmit to it, and accordingly the Defendant was admitted; but there was no formal Entry of his Admittance as an Officer, but only the Court's declaring their Conſent that he ſhould take his Place.

Ex parte Quer. On the other Side it was inſiſted on for the Plaintiff, and proved, That his Submiſſion to the Court was with a ſalvo Jure, and what he did was reluctante Animo, thinking it was a Hardſhip upon him, as he often ſince declared: ſo that it was quaſi a compulſory Conſent made in Obedience to the Court, with whom it was not good Manners in him to contend.

Several Points were ſtirred at the Tryal; as,

1. Whether a Surrender of the Grant of an Office by Parol was good.

2. Whether if a Grant be made of an Office, or of any other Thing which lies in Grant, and the Deed is loſt or cancelled, the Office or the Thing granted falls to the Ground, for the Deed is the Foundation; and a Caſe was cited in the Lord Dyer: If there be Two Jointenants, and one cancels the Deed, it hath deſtroyed the Right of the other; Quære of theſe Things: But it was agreed, That if Two Men who have one Office for their Lives, and the Survivor of them, if one ſurrenders to the other, and then a new Grant is made to this other and a Stranger, he hath barred himſelf of the Survivorſhip, and he and the Stranger are jointly ſeiſed.

## Croſſman *verſus Sir* John Churchil.

IN a Quare Impedit the Plaintiff's Title was ſet forth in his Declaration, which was alſo found in a Special Verdict, That Sir George Rodney was ſeiſed of the Advowſon in Fæ, and died ſeiſed, leaving Two Siſters who were his Coheirs: That Sir John Rodney being alſo one of the ſame Family, and pretending a Right to the Eſtate; for preventing Suits that might happen, they all enter into an Agreement by Indentures mutually executed, by which it was agreed, That Sir John Rodney ſhall hold ſome Lands in Severalty, and the Coheirs ſhall hold other Lands in the like Manner: And as for this Advowſon, a temporary Proviſion was made thereof, That each of them ſhould preſent by Turns, and this was to continue till Partition could be made: Then comes an Act of Parliament and confirms the Indenture, and enacts, That every Agreement therein contained ſhall ſtand, and that all the reſt of the Lands not particularly named, and otherwiſe diſpoſed by the ſaid Indenture, ſhould be held by theſe Three in Common; One of the Three, who by Agreement was next to Preſent, grants the next Avoidance (the Church being then full) to the Plaintiff, and the Queſtion was, Whether theſe Three Perſons were not Tenants in Common of the Advowſon? And if ſo, then the Grant of the next Avoidance cannot be good by One alone, becauſe he hath not the whole Advowſon, but only a Right to the Third Part.

Where an Agreement for a Preſentation by Turns is good.

It was ſaid, That if Tenants in Common had made ſuch an Agreement, it would not have been any Diviſion of their Intereſt, for there muſt be a Partition to ſever the Inheritance.

The Court were all of Opinion, That Judgment ſhould be given for the Plaintiff; for there was an Agreement that there ſhall be a Preſentation by Turns, and therefore for One Turn each hath a Right to the whole Advowſon, by Reaſon of the Act of Parliament by which that Agreement is confirmed, and thereby an Intereſt is ſettled in each of them till Partition made: But this Agreement would have veſted no Intereſt in either of them without an Act of Parliament to corroborate it; therefore there had been no Remedy upon it but by an Action of Covenant. This Caſe was argued four times, and not One Authority cited.

Curia.

6 Co. 12. 2 Rolls 255. 2 Inſt. 365. N. B. 62.

## *The Earl of* Shaftsbury *verſus Lord* Digby. *In Banco Regis.*

For Words upon the Statute of 2 R. 2. c. 5. Jones 49.

Scandalum Magnatum. **The Plaintiff declares upon the Statute of** 2 R. 2. cap. 5. **for theſe Words**, viz. You are not for the King, but for Sedition and for a Commonwealth, and by God we will have your Head the next Seſſions of Parliament.

**After Verdict for the Plaintiff, and** 1000 l. **Damages given, it was moved in Arreſt of Judgment, and ſeveral Exceptions taken.**

1. **As to the Recital of the Statute, the Words of which are,** That no Man ſhall deviſe any Lies, *&c.* **and the Plaintiff for the Word** deviſe **had uſed the Latin Word** contrafactio **in his Declaration, which was very improper, that being to counterfeit and not to deviſe; for it ſhould have been** machino or fingo, **thoſe are more expreſſive Words of Deviſe.**

2. **'Tis alledged, that the Defendant** dixit mendacia **of the Plaintiff,** viz. Hæc Anglicana verba ſequen', **and doth not alledge that he ſpoke the Words.**

3. **The moſt material Objection was a Miſtake in the Recital of the Statute, the Words of which are,** That none ſhall ſpeak any ſcandalous Words of any Dukes, Earls, *&c.* the Juſtices of either Bench, nor of any other great Officer of the Kingdom; **but the Plaintiff in his Declaration recites it thus,** viz. None ſhall ſpeak any ſcandalous Words of any Dukes, Earls, *&c.* Juſtices of either Bench, Great Officers of the Kingdom, **and leaves out the Words,** neque al'; **ſo that it muſt be conſtrued thus,** None to ſpeak of any Dukes, Earls, *&c.* being great Officers of the Kingdom; **and then 'tis not enough that the Plaintiff is** Comes, **but he alſo ought to be a great Officer of the Kingdom, which is not ſet out in this Caſe.**

**But upon great Debate and Deliberation, theſe Exceptions were over-ruled; and the whole Court gave Judgment for the Plaintiff.**

**As to the firſt Exception, they ſaid,** Contrafactio **is a legal Word, and apt enough in this Senſe, and ſo are all the Precedents; and thus it was pleaded in the Lord** Cromwel's Caſe.

**As to the Second Exception, it was ſaid, the** Mendacia **which were told were the Engliſh Words which were ſpoken; and the** [viz. Hæc Anglicana verba ſequen' **being in the Accuſative Caſe** ] **are governed by the ſame Verb which governs the Words precedent** (viz. horribilia Mendacia); **beſides**

ſides for the ſupporting of an Action the [viz.] may be tranſpoſed, and then it will be well enough, viz. the Defendant ſpoke hæc Anglicana verba, viz. Lies of the Plaintiff.

As to the Third Exception it was anſwered, That the Plaintiff need not recite the Statute, it being a * general Law; and admitting there was no Neceſſity, yet if he will undertake to recite it, and miſtake in a material Point, 'tis incurable; but if he recites ſo much as will ſerve to maintain his own Action truly, and miſtakes the reſt, this will not vitiate his Declaration; and ſo he hath done here by reciting ſo much of the Statute, which enacts, That no Man ſhall ſpeak any ſcandalous Words of an Earl, which is enough (he being an Earl) to entitle him to an Action, and he concludes prout per eundem Actum plenius liquet; and the Court grounded themſelves principally upon a Judgment given in this Court, which was thus, viz. There was a Robbery committed, and the Party brought an Action upon the Statute of Huy and Cry, in which he recited incendia Domorum, the ſaid Statute beginning, Foraſmuch as from Day to Day Robberies, Murders, burning of Houſes, &c. and the Precedents are all ſo: But the Parliament Roll is Incendia generally, without Domorum; and it was ſtrongly urged, that it was a Miſrecital, which was fatal: But the Court were all of Opinion, That the Plaintiff's Caſe being only concerning a Robbery, for which the Statute was well recited, and not about Burning which was miſtaken, it was for that Reaſon good enough; and Judgment was given accordingly. * Sid. 348. 13 E. 1. c. 1.

When this Cauſe was tried at the Bar, which was in Eaſter-Term laſt, the Lord Mohun offered to give his Teſtimony for the Plaintiff, but refuſed to be ſworn, offering to ſpeak upon his Honour; but Juſtice Wyld told him, in Cauſes betwæn Party and Party he muſt be upon his Oath.

The Lord Mohun asked him, whether he would anſwer it? The Judge replied, That he delivered it as his Opinion; and becauſe he knew not whether it might cauſe him to be queſtioned in another Place, he deſired the reſt of the Judges to deliver their Opinions, which they all did, and ſaid he ought to be ſworn; and ſo he was, but with a ſalvo jure; for he ſaid there was an Order in the Houſe of Peers, That 'tis againſt the Privilege of the Houſe for any Lord to be ſworn.

## Anonymus.

DEBT upon the Statute for not coming to Church, and concludes Per quod Actio accrevit eidem Domino Regi & quer' ad exigend' & habend'. The Exception after Judgment was taken, that it ought to have been only Actio accrevit eidem the Plaintiff, qui tam, &c. and not exigend' & habend' for the King and himself; Sed non allocatur: For upon Search of Precedents, the Court were all of Opinion that it was good either way.

## Anonymus.

Factor, where he cannot sell but for ready Money.

IN Accompt: Judgment was given quod computet; and the Defendant pleads before the Auditors, That the Goods whereof he was to give a reasonable Accompt were bona peritura; and though he was careful in the keeping of them, yet they were much the worse; That they remained in his Hands for want of Buyers, and were in Danger of being worse, and therefore he sold them upon Credit to a Man beyond Sea.

Curia.

The Plaintiff demurred; and after Argument by Barrel Serjeant for the Plaintiff, and Baldwin Serjeant for the Defendant, the whole Court were of Opinion that the Plea was not good, For if a Merchant deliver Goods to his Factor ad merchandizand', he cannot sell them upon Credit, but for ready Money, unless he hath a particular Commission from his Master so to do; for if he can find no Buyers, he is not answerable; and if they are bona peritura, and cannot be sold for Money upon the Delivery, the Merchant must give him Authority to sell upon Trust. If they are burned, or he is robbed without his own Default, he is not liable; and in this Case it was not pleaded that he could not sell the Goods for ready Money; and the Sale it self was made beyond Sea, where the Buyer is not to be found; like the Case of * Saddock *and* Burton, where in Accompt against a Factor, he pleads that he sold the Jewel to the King of Barbary for the Plaintiff's Use, and upon a Demurrer the Plea was held naught; for when a Factor hath a bare Authority to sell, in such Case he hath no Power to give a Day of Payment, but must receive the Money immediately upon the Sale.

* Bulst. 103. Yelv. 202.

Therefore in the Case at Bar, if the Master is not bound by the Contract of the Servant without his Consent, or at least the Goods coming to his Use; neither shall the Servant have Authority to sell without ready Money, unless he hath a particular Order for that Purpose.

There was another Thing moved in this Case for the Plaintiff, that the Plea ought to be put in upon Oath; for having pleaded that he could not sell without Loss, he ought to swear it. Fitzh. Accompt 47. But no Opinion was delivered herein, only the Chief Justice said, That the Plaintiff ought to have required the Plea upon Oath, for otherwise it was not necessary: But for the Substance of the Plea it was held ill, and Judgment was given for the Plaintiff.

## Harris's Case.

Serjeant Hopkins moved for a Prohibition. The Case was: A Man makes a Will, and appoints his Wife to be Executrix, and devises a Shilling to his Daughter for a Legacy, and dies; the Executrix, before Probate of the Will, dies also Intestate; and whether the Goods shall be distributed by the Act for settling Intestates Estates amongst the next of Kin to the Executrix, or to the next of Kin to the Testator her Husband, was the Question: Since she dying before Probate, her Husband in Judgment of Law died also Intestate.

Husband dies, his Wife Executrix, she dies before Probate: Administration must be to the next of Kin of the Husband.

22 & 23 Car. 2. c. 10.

This Case seems to be out of the Statute, the Husband having made a Will, and the Act intermeddles only where no Will is made.

The Court delivered no Judgment in it, but seemed to incline that the Statute did extend to this very Case, and that Administration must be committed to the next of Kin of the Husband; but if there should be no Distribution, it must then be according to the Will of the Testator.

## Reder *versus* Bradley.

It was moved to reverse a Judgment given in an Inferior Court upon a Writ of false Judgment brought here: The Plaintiff declared in the Action below, that there was a Communication between him and the Defendant concerning the Service of his Son; and it was agreed between them, That in Consideration the Plaintiff would

Judgment reversed in an inferior Court where the Damage was laid to 30 *l.*

would permit his Son to ſerve him, the Defendant promiſed to pay the Plaintiff 30 s. The Plaintiff avers that he did permit his Son to ſerve him, and that the Defendant hath not paid him the 30 s. There was a Verdict for the Plaintiff, and the Exceptions now taken were:

Infra 206. 1. 'Tis not ſaid that the Jurors were electi ad triand', &c.

2. He lays his Damage to 30 l. of which a Court Baron cannot hold Plea; for the Difference taken by my Lord Coke is where Damages are laid under 40 s. Coſts may make it amount to more; but where 'tis laid above, in ſuch Caſe all is coram non Judice; for which Reaſon Judgment was reverſed; but in this Court, the Judge doth not pronounce the Reverſal as 'tis done in the King's-Bench.

## Lane *verſus* Robinſon.

Inferior Court. TReſpaſs for taking of his Cattle; the Defendant juſtifies by Vertue of an Execution in an Action of Treſpaſs brought in a Hundred Court; and the Plaintiff demurred.

Serjeant Pemberton took Two Exceptions to the Plea:

2 Cro. 443, 526. Hob. 180. Sid. 348. 1. Becauſe the Inferior Court not being of Record, cannot hold Plea of a Treſpaſs quare vi & armis & contra pacem, but it was not allowed; for Treſpaſſes are frequently brought there, and the Plaintiff may declare either vi & armis, or contra pacem.

Poſtea. 2. The Defendant reciting the Proceedings below ſaith, taliter proceſſum fuit; whereas he ought particularly to ſet forth all that was done, becauſe not being in a Court of Record, the Proceedings may be denied and tried by Jury.

But the Court incline that it was pleaded well enough, and that it was the ſafeſt Way to prevent Miſtakes; but if the Plaintiff had replied de injuria ſua propria abſque tali cauſa, that had traverſed all the Proceedings. Quære whether ſuch a Replication had been good, becauſe the Plaintiff muſt anſwer particularly that Authority which the Defendant pretended to have from the Court; but no Judgment was given.

## Sherrard *verſus* Smith.

TReſpaſs Quare clauſum fregit, and for taking away his Goods; the Defendant juſtifies the Taking by the Command of the Lord of the Manor, of which the Plaintiff held by Fealty and Rent, and for Non-payment thereof, the Goods were taken nomine Diſtrictionis.

The Plaintiff replies, That the Locus in quo eſt extra, abſque hoc quod eſt infra feodum: The Defendant demurs ſpecially, becauſe the Plaintiff pleading Hors de ſon Fee, ſhould have taken the Tenancy upon him. 9 Co. Bucknal's Caſe, 22 H. 6. 2, 3. Keilway 73. 14 Aſſ. pl. 13. 1 Inſt. 1. b. where this is given as a Rule by my Lord Coke. *Hors de ſon Fee*, when to be pleaded.

Serjeant Pemberton on the other Side agreed, That in all Caſes of Aſſize, Hors de ſon Fee is no Plea, without taking the Tenancy upon him, 2 Aſſ. placito 1. And in 5 E. 4. 2. 'tis ſaid, That in Replevin the Party cannot plead this Plea, becauſe he may diſclaim; but Brook placito 15. tit. Hors the ſon Fee, ſaith this is not Law, and ſo is 2 H. 6. 1. and many Caſes afterwards were againſt that Book of Ed. 4. and that a Man might plead Hors de ſon Fee, as if there be a Lord and Tenant holding by Fealty and Rent; and he makes a Leaſe for Years, and the Lord diſtrains the Cattle of the Leſſee, though the Tenant hath paid the Rent and done Fealty, there if the Leſſee alledge that his Leſſor was ſeiſed of the Tenancy in his Demeſn, as of Fee, and held it of the Lord by Services, &c. of which Services the Lord was ſeiſed by the Hands of his Leſſor, as by his true Tenant, who hath leaſed the Lands to the Plaintiff; and the Lord to charge him hath unjuſtly avowed upon him who hath nothing in the Tenancy, 'tis well enough, 9 Co. Caſe of Avowries; and the Reaſon given in 5 Edw. 4. about Diſclaimer, will not hold now, for that Courſe is quite altered, and is taken away by the Statute of the 21 H. 8. cap. 19. which enacts, That Avowries ſhall be made by the Lord upon the Land, without naming his Tenant. Ex parte Quer. 13 Aſſize 28. 28 Aſſize 41.

But in Caſe of Treſpaſs, there was never any ſuch Thing objected as here; for what Tenancy can the Plaintiff take upon him in this Caſe? He cannot ſay tenen' liberi tenementi, for this is a bare Action of Treſpaſs, in which, though the Pleading is not ſo formal, yet it will do no Hurt; for if it had been only extra feodum, without the

Tre-

Traverſe, it had been good enough, and of that Opinion was the Court in Hillary-Term following, when Judgment was given for the Plaintiff (abſente Scroggs): And the Chief Juſtice ſaid, That the Rule laid down by my Lord Coke in 1 Inſt. 1. b. That there is no pleading Hors de ſon Fee without taking the Tenancy upon him, is to be intended in Caſes of Aſſize; and ſo are all the Caſes he there cites for Proof of that Opinion, and therefore ſo he is to be underſtood: But this is an Action of Treſpaſs brought upon the Poſſeſſion, and not upon the Title. In the Caſe of Avowry, a Stranger may plead generally Hors de ſon Fee, and ſo may Tenant for Years; and this being in the Caſe of Treſpaſs, is much ſtronger, and if the Plaintiff deſtroys the Defendant's Juſtification, 'tis well enough.

## *Sir* William Hickman *verſus* Thorne & *alios*.

Preſcription againſt another Preſcription, not good without a Traverſe. Yelv. 217, 218.

IN a Replevin: The Defendant juſtifies the Taking, for that the Locus in quo was his Freehold, and that he took the Cattle there Damage feaſant.

The Plaintiff in Bar to the Avowry replies, That the Locus in quo, &c. is Parcel of ſuch a Common Field, and preſcribes to have Right of Common there, as appendant to Two Acres which he hath in another Place.

The Defendant rejoins, That there is a Cuſtom, that every Freeholder who hath Lands lying together in the ſaid Common Field, may encloſe againſt him who hath Right of Common there, and that he had Lands there, and did encloſe: The Plaintiff demurs, and Serjeant Newdigate took Exceptions to the Rejoinder.

Ex parte Quer.

1. For that he did not aver, that the Lands which he encloſed did lie together, and therefore had not brought his Caſe within the Cuſtom alledged: Sed non allocatur, becauſe he could not encloſe if the Land had not laid together.

2. He gives no Anſwer to the Plaintiff's Right of Common but by Argument, which he ſhould have confeſſed with a bene & verum eſt, and then ſhould have avoided it, by alledging the Cuſtom of Encloſure; like the Caſe of * Ruſſel and Broker, where in Treſpaſs for cutting Oaks, the Defendant pleads, That he was ſeiſed of Meſſuage in Fee, and preſcribes to have rationabile eſtoverium ad libitum capiend' in boſcis; the Plaintiff replies, That the Locus in quo was within the Foreſt, and that the Defendant and

* 2 Leon. 209.

all

all those, &c. habere consueverunt rationabile estoverium, &c. per liberationem Forestarii; and upon a Demurrer the Replication was held naught, because the Plaintiff ought to have pleaded the Law of the Forest, viz. Lex Foresti talis est; or to have traversed the Defendant's Prescription, and not to have set forth another Prescription in his Replication without a Traverse.

3. The Defendant should have pleaded the Custom, and then have traversed the Prescription of the Right of Common; for he cannot plead a Custom against a Custom. 9 Co. 58. Aldred's Case, where one prescribes to have a Light, the other cannot prescribe to stop it up.

Serjeant Pemberton contra. He said, That which he took to be the only Question in the Case was admitted, viz. That such a Custom as this to enclose was good: and so it has been adjudged in Sir Miles Corbet's Case, 7 Co. But as to the Objections which have been made, the Defendant admits the Prescription for Right of Common, but saith, He may enclose against the Commoners, by reason of a Custom, which is a Bar to his very Right of Common, and therefore need not confess it with a bene & verum est; neither could he traverse the Prescription, because he hath admitted it. 'Tis true, where one prescribes to have Lights in his House, and another prescribes to stop them up; this is not good, because one Prescription is directly contrary to the other, and for that Reason one must be traversed; but here the Defendant hath confessed, that the Plaintiff hath a Right of Common, but 'tis not an absolute but a qualified Right, against which the Defendant may enclose; and here being Two Prescriptions pleaded, and one of them not being confessed, it must from thence necessarily follow, that the other is the Issue to be tried, which in this Case is, Whether the Defendant can enclose or not. Ex parte Def.

The Chief Justice, and the whole Court were of Opinion, That where there are several Freeholders who have Right of a Common in a Common Field, that such a Custom as this of Enclosing is good, because the Remedy is Reciprocal; for as one may enclose, so may another. But Justice Atkyns doubted much of the Case at Bar, because the Defendant had pleaded this Custom to Enclose in Bar to a Freeholder, who had no Land in the Common Field where he claimed Right of Common, but prescribed to have such Right there, as appendant to Two Acres of Land he had alibi, for which Reason he prayed to amend upon Payment of Costs. Curia.

## Attorney General *verſus Sir* Edward Turner, *in Scaccario.*

Expoſition of the King's Grant.

INformation. The Caſe was, viz. The King by Letters Patents granted ſeveral Lands in Lincolnſhire, by expreſs Words; and then this Clauſe is added, upon which the Queſtion did ariſe, Nec non totum illud fundum & ſolum & terras ſuas contigue adjacen' to the Premiſes, quæ ſunt aqua cooperta vel quæ in poſterum de aqua poſſunt recuperari; and afterwards a great Quantity of Land was gained from the Sea; and whether the King or the Patentee was intituled to thoſe Lands, was the Queſtion.

Deviſe of a Poſſibility good by a common Perſon.

Sawyer for the King argued, That he had a good Title, becauſe the Grant was void, he having only a bare Poſſibility in the Thing granted at that Time.

2 Cro. 509. pl. 21. 1 Bulſt. 194.

But Levins on the other Side inſiſted, That the Grant of thoſe Lands was good, becauſe the King may grant what he hath not in Poſſeſſion, but only a Poſſibility to have it. But admitting that he could not make ſuch a Grant; yet in this Caſe there is ſuch a Certainty as the Thing it ſelf is capable to have, and in which the King hath an Intereſt; and it is hard to ſay that he hath an Intereſt in a Thing, and yet cannot by any Means diſpoſe of it.

If it ſhould be objected, That nothing is to paſs but what is contigue adjacen' to the Premiſſes granted, and therefore an Inch or ſome ſuch ſmall Matter muſt paſs and no more; certainly that was not the Intention of the King, whoſe Grants are to be conſtrued favourably, and very bountifully for his Honour, and not to be taken by Inches.

Poſtea. Company of *Ironmongers* and *Naylor.*

If there are Two Marches adjoining, which are the King's, and he grants one of them by a particular Name and Deſcription, and then he grants the other contigue adjacen' ex parte auſtrali, certainly the whole Marſh will paſs; and 'tis very uſual in Pleading to ſay, a Man is ſeiſed of a Houſe or Cloſe, and of another Houſe, &c. contigue adjacen', that is to be intended of the whole Houſe.

In this Caſe the King intended to paſs ſomething when he granted totum fundum, &c. but if ſuch Conſtruction ſhould be made as inſiſted on, then thoſe Words would be of no Signification. 'Tis true, the Word illud is a Relative, and reſtrains the general Words, and implies that which

may be ſhewn, as it were, with a Finger; and therefore in Doddington's Caſe, a Grant of omnia illa Meſſuagia ſituate in Wells, and the Houſes were not in Wells, but elſewhere; the Grant in that Caſe was held void, becauſe it was reſtrained to a certain Village, and the Pronoun illa hath Reference to the Town; but in this Caſe there could be no ſuch Certainty, becauſe the Land at the Time of the Grant made was under Water. 2 Co. 32.

But if the Patent is not good by the very Words of the Grant, the non obſtante makes it good, which in this Caſe is ſo particular, that it ſeems to be deſigned on Purpoſe to anſwer thoſe Objections of any Miſtake or Incertainty in the Value, Quantity, or Quality of the Thing granted, which alſo ſupplies the Defects for want of right Inſtruction given the King, in all Caſes where he may lawfully make a Grant at the Common Law. 4 Co. 34. Bozun's Caſe. Moor pl. 571

And there is another very general Clauſe in the Patent, viz. Damus præmiſſa adeo plene, as they are or could be in the King's Hands, by his Prerogative or otherwiſe. * Adeo plene are operative Words, Whiſtler's Caſe, 10 Co. And there is alſo this Clauſe, Omnes terras noſtras infra fluxum & refluxum Maris. 'Tis true, theſe Words Præmiſſis præd' ſpectan' do follow; from whence it may be objected, That they neither did or could belong to the Premiſſes; and admitting it to be ſo, yet the Law will reject thoſe Words, rather than avoid the Grant in that Part. * Ante. Sid. 149.

In the Caſe of the Abbot of * Strata Marcella, the King granted a Manor, Et bona & catalla felonum dicto Manerio ſpectan'; now though ſuch Things could not be appendant to a Manor, yet it was there adjudged that they did paſs. * 9 Co. 27. b.

Such Things as theſe the King hath by his Prerogative, and ſome Things the Subject may have by Cuſtom or Preſcription; as Wrecks, &c. and in this very Caſe 'tis ſaid, That there is a Cuſtom in Lincolnſhire, that the Lords of the Manors ſhall have Derelict Lands, and 'tis a reaſonable Cuſtom; for if the Sea waſh away the Lands of the Subject, he can have no Recompence, unleſs he ſhould be entituled to what he gains from the Sea; and for this there are ſome Authorities, as Sir Henry Conſtable's Caſe, 5 Co. Land betwæn High-water and Low-water Mark may belong to a Manor: 2 Roll. 168.

But no Judgment was given.

## Moris *verſus* Philpot *in B. R.*

Releaſe by an Executor before Probate.

2 Levin. 214. T. Jones 104.

THE Plaintiff as Executor to T. brings an Action of Debt againſt the Defendant, as Adminiſtrator to S. for a Debt due from the ſaid Inteſtate to the Plaintiff's Teſtator. The Defendant pleads, that the Plaintiff releaſed to him all Brewing Veſſels, &c. and all other the Eſtate of S. lately deceaſed, (this Releaſe was before Probate of the Will) to which Plea the Plaintiff demurred; and whether this Releaſe was a good Bar to the Plaintiff's Action, was the Queſtion.

Ex parte Quer.

It was ſaid for the Plaintiff, that it was not; for if a Conuſee releaſe to the Coguiſor all his Right and Title to the Lands of the Coguiſor, and afterwards ſues out Execution, yet he may extend the very Lands ſo releaſed; ſo if the Debtee releaſe to the Debtor all his Right and Title which he hath to his Lands, and afterwards gets a Judgment againſt him, he may extend a Moiety of the ſame Lands by Elegit; the Reaſon is, becauſe at the Time of theſe Releaſes given, they had no Title to the Land, but only an Inception of a Right, which might happen to take Place in futuro; ſo here a Releaſe by the Executor of the Debtee to the Adminiſtrator of the Debtor, before Probate of the Will, is not good; becauſe by being made Executor, he had only a Poſſibility to be entituled to the Teſtator's Eſtate, and no Intereſt 'till Probate, for he might refuſe to prove the Will, or renounce the Executorſhip. It is true, a Releaſe of all * Actions had been good by the Executor before Probate, becauſe a Right of Action is in him, and a Debt which conſiſts meerly in Action is thereby diſcharged; but in ſuch Caſe a Releaſe of all Right and Title would not be good, for the Reaſons aforeſaid.

* Godol. 345. pl. 4.

Ex parte Def.

But for the Defendant it was inſiſted, That this Releaſe was a good Plea in Bar, for if a Releaſe be made by an Executor of all his Right and Title to the Teſtator's Eſtate, and then the Executor ſues the Party releaſed (as the Adminiſtrator is ſued in this Caſe) for a Debt due to the Teſtator, the Releaſe is good; becauſe if he had recovered, in this Caſe the Judgment muſt be de Bonis Teſtatoris, which is the ſubject Matter, and that being releaſed, no Action can lie againſt the Adminiſtrator. Adjornatur.

# DE

# Term. Sancti Mich.

## Anno 28 Car. II. in Banco Regis.

### Piggot *Leſſee of Sir* Thomas Lee *verſus the Earl of* Salisbury.

Intrat' Paſch. 26 Car. 2. Rot. 609.

IN Ejectment for Fourtæn Houſes and ſome Gardens in the Pariſh of St. Martin in the Fields, the Jury find as to all but one Moiety for the Defendant; as for the other Moiety, they find that theſe were formerly the Houſes of one Nightingale, who was ſeiſed thereof in Fæ, and made a Leaſe of them, which commenced 1 Apr. 7 Jac. yet in Being.

Warranty where by diſplacing of a Right by a Fine *ſur conceſſit*, it ſhall bar the Heir.

That the Reverſion deſcended to Bridget his Daughter and Heir, who married William Mitton, by whom ſhe had a Daughter named Elizabeth.

Jones 68. 2 Lev. 154.

That upon the Marriage of the ſaid Elizabeth with Francis the Son of Sir Oliver Lee, by Fine and other Settlements theſe Houſes were ſettled to the Uſe of the ſaid Bridget for Life, then to the Uſe of Francis Lee and the ſaid Elizabeth, and the Heirs on the Body of the ſaid Elizabeth to be begotten by Francis.

And for want of ſuch Iſſue, to William Morton for Life, and afterwards to the right Heirs of Bridget Mitton for ever.

William Mitton and Bridget his Wife, before the Expiration of the Term, levy a Fine ſur conceſſerunt to two Cogniſæs, wherein the ſaid Husband and Wife conced' tenementa præd' & totum & quicquid habent in tenementis præd' cum pertin' for the Life of the ſaid Husband and Wife, and the Survivor of them, with Proclamations.

They find that the Leſſæ for Years attorned, and that the Fine thus levied was in Truſt for the Earl of Salisbury,

bury, and that before the First Day of February before the Action brought he entred by the Direction of the Two Cognizees, and that he was seised prout Lex postulat.

That 1 Febr. 7 Jac. Sir Oliver Lee, Francis Lee his Son and Heir, and Elizabeth his Wife, William Mitton and Bridget his Wife, by Bargain and Sale convey the Premisses to the Earl and his Heirs, which was enrolled in Chancery, in which Deed there was a Warranty against Sir Oliver and his Heirs.

That in the same Term, viz. Octab. Purificationis, William Mitton and Bridget his Wife, levied a Fine Sur Conusance de Droit come Ceo, &c. to the Earl.

That Francis Lee was Son and Heir of Sir Oliver Lee.

That Sir Oliver and Elizabeth died in the Life-time of Francis, and that Francis died leaving Issue Sir Thomas Lee, the now Lessor of the Plaintiff.

That the Warranty descended upon him being inheritable to the Estate Tail.

That the Estate of the Earl of Salisbury descended to the present Earl, who was the Defendant.

That Sir Thomas Lee entred and made a Lease for the Lessor of the Plaintiff.

Question. The Question upon this Special Verdict was, If by the Fine Sur concesserunt levied, 7 Jac. the Estate which the Husband and Wife had in Possession only passed? Or whether that and the Estate for Life, which the Husband had after the Tail spent, passed likewise?

If the latter, then they passed more than they could lawfully grant, because of the Intervention of the Estate Tail, and then this Fine wrought a * displacing or devesting the Estate of William Mitton for Life in Reversion, and turned it into a Right; and if so, then this collateral Warranty of Sir Oliver Lee will descend on Sir Francis, and from him to the Plaintiff, and will bar his Entry; but if the Estate was not displaced and turned into a Right at the Time of the Warranty, then the Heir is not barred by this collateral Warranty of his Ancestor.

* Co. Lit. 338. b.

This Case was argued by Serjeant Pemberton for the Plaintiff, and by Sir William Jones the Attorney General for the Defendant.

Ex parte Quer. And for the Plaintiff it was said, That this Fine passed only the Estate which William Mitton and his Wife had in Possession, and no other, and therefore worked no Devesting; and his Reasons were:

1. Such a Construction seems most agreeable to the Intention of all the Parties to the Fine.

2. It may well stand with the Nature and the Words of the Fine.

3. It will be most agreeable to the Judgments and Opinions which have formerly been given in the like Cases.

And as to the First of these, it will be necessary to consider what will be the Effect and Consequence of Levying this Fine, both on the one Side and the other. It cannot be denied, but that there was a Purchase intended to be made under this Fine, and that the Parties were willing to pass away their Estate with the least Hazard that might be to themselves; neither can it be imagined that they intended to defeat this Purchase as soon as it was made, which they must do if this Fine works a Forfeiture; for then he in Remainder in Tail is entituled to a present Entry, and so the Estates for Life which the Baron and Feme had are lost, and there was a Possibility also of losing the Reversion in Fee, which the Tenant in Tail after his Entry might have barred by a Common Recovery.

And had not the Parties intended only to pass both the Estates, which they lawfully might pass, why did they levy this Fine sur concessit? They might have levied a Fine sur Conusance de droit come ceo, &c. and that had been a Disseisin.

Besides, what Need was there for them to mention any Estate which they had in these Houses, if they had intended a Disseisin? But this being done, such a Construction is to be made as may support the Intent of the Parties; and it would be very unreasonable, that what was intended to preserve the Estate should now be adjudged to work a Disseisin so as to forfeit it; and such a Disseisin upon which this collateral Warranty shall operate and bar the Estate in Remainder.

And therefore no more shall pass by this Fine than what lawfully may; and rather than it shall be construed to work a Wrong, the Estate shall pass by Fractions; for both the Estates of William Mitton for Life are not so necessarily joined and united by this Fine, that no Room can be left for such a Construction.

2. Such a Construction will not agree with the Nature and Words of this Fine. 'Tis true, a Fine as it is of the most solemn and of the greatest Authority, so 'tis of the greatest Force and Efficacy to convey an Estate, and the most effectual Feoffment of Record where 'tis a Feoffment, and likewise the most effectual Release where 'tis to be a Release.

But

But on a bare Agreement made in Actions between the Demandant and Tenant at the Bar, and drawn up there, the Judges will alter and amend such Fines, if they did
24 Ed. 3. 36. not in all Things answer the Intention of the Parties.

Postea. 'Tis agreed, that Fines can work a Disseisin when they can have no other Interpretation, as if Tenant pur auter vie levy a Fine to a Stranger for his own Life, 'tis more than such a Tenant could do, because his Estate was during the Life of another, and no longer.

So a Fine Sur Conusance de droit, &c. implies a Fee, which being levied by any one who has but a particular Estate will make a Disseisin.

But this Fine Sur concessit, has been always taken to be the most Harmless of all others, and can be compared to nothing else than a Grant of totum statum suum & quicquid habet, &c. by which no more is granted than what the Cognisor had at the Time of the Grant, and so it hath been always construed.

Indeed there is a Fine Sur concessit, which expresses no Estate of the Grantor, and this is properly levied by Tenant in Fee or Tail; but when particular Tenants pass over their several Estates, they generally grant totum & quicquid habent in Tenementis prædictis, being very cautious to express what Estate they had therein.

When this Fine Sur concessit was first invented, the Judges in those Days looked upon the Words quicquid habent, &c. to be insignificant, and for that Reason in Anno 17 Ed. 3. 66. they were refused: The Case was; Two Husbands and their Wives levied such a Fine to the Cognisee, and thereby granted totum & quicquid habent, &c. which Words were rejected, and the Judge would not pass the Fine, because if the Party had nothing in the Land, then nothing passed; and so is 44 Ed. 3. 36. By which it appears, that the Judges in those Times thought these Fines did pass no more than what the Cognisor had; and for this, there are Multitudes of Authorities in the Year-Books.

Now these Words cannot have a Signification to enlarge the Estate granted, they serve only to explain what was intended to pass; for in the Case at the Bar, if the Grant had been totum & quicquid habent in Tenementis prædictis, there would have been no Question of the Estate granted; but the Cognisors having granted Tenementa prædicta, they seem by these subsequent Words to recollect themselves, viz. Totum & quicquid habent in Tenementis prædictis.

Object. But it may be objected, That the Limitation of the Estate, viz. durante vita eorum & alterius eorum diutius viventis, works a Disseisin, because by those Words two Estates for Life pass entire in Possession, whereas in truth there was but one Estate for Life of the Husband in Possession; and therefore this was more than they could grant, because the Estate Tail came between the Estate which the Husband and Wife had for their Lives, and for the Survivor of them, and the Estate which the Husband had for his own Life.

And this is farther enforced by that Rule in Law, That Estates shall not pass by Fractions; for otherwise there can be no Reason why they should not thus pass.

Answ. But this Rule is very fallible, and not so much to be regarded: 'Tis true, the Rule is so far admitted to be true, where without Inconveniency Estates may pass without Fraction; but where there is an Inconveniency it may be dispended withal, it being such an Inconveniency as may appear to the Judges to make the Thing granted to go contrary to the Intent of the Parties.

And that such Interpretations have been made, agrees with the Third Reason proposed in this Case, viz. That it hath received Countenance by Judicial Opinions and Determinations in former Judgments, 14 E. 4. 4. 27 H. 8. 23. 1 Co. 67. Bredon's Case, which was thus: Tenant for Life, Remainder in Tail to A. Remainder in Tail to B. Tenant for Life, and he in the first Remainder levied a Fine Sur Cognisance de Droit come Ceo; 'twas adjudged, that this was no Discontinuance of either of the Remainders, because each of them gave what he might lawfully; viz. The Tenant for Life granted his Estate, and the Remainder-Man passed a Fee-Simple determinable upon his Estate Tail, and yet each of their Estates were still divided. 1 Roll. Abr. Lit. I. Pl. 4. 1 Inst. 45 a. Cro. Car. 406.

On the other Side it was said, That in all Cases where the Person who hath a particular Estate takes upon him either by Feoffment in Pais, or by Fine, which is a Feoffment on Record, to grant a greater Estate than he hath (as in this Case is done), though possibly the Estate of the Grantee may determine before that of the Grantor, yet 'tis a Displacing the Reversion; as if a Man has an Estate for Ten Lives, and makes a Grant for the Life of another; here is a Possibility, that the Estate which he granted may be longer than the Estate he had in the Thing granted, because one Man may survive the Ten, and for that Reason 'tis a Devesting.

1. In this Case, the Estate which the Husband and Wife had, is to be considered. 2. What they granted.

And by comparing of these together, it will appear whether they granted more than they had: The Husband and Wife had an Estate for the Life of the Wife, and (after the Estate-Tail) the Husband had an Estate for his own Life; now they grant an Estate for the Life of the Husband and Wife, and the Survivor: What is this but one entire Estate in Possession? No other Interpretation can be agreeable to the Sense of the Words; for if it had been granted according to the true Estate which each had, then it should have been, first for the Life of the Wife, and, after the Tail spent, then for the Life of the Husband.

The next Thing to be considered is, Whether the Estate shall pass entire, or by Fractions? And as to that, I need say no more than only to quote the Authority of that Judgment given in Garret *and* Blizard's Case, 1 Roll. Abr. 855. which is shortly thus, viz. Tenant for Life, Remainder for Life, Remainder in Tail, Remainder in Fee to the Tenant for Life in Remainder; this Tenant for Life in Remainder levies a Fine come ceo, &c. it was adjudged a Forfeiture of his Estate for Life, so that the Remainder Man in Tail might enter after the Death of the Tenant for Life in Possession; for it shall not be intended that he passed his Estate by Fractions, viz. an Estate in Remainder for Life, and a Remainder in Fee Expectant upon the Estate Tail, but one entire Estate in Possession; and 'tis not like the Authority in Bredon's Case, for there the Estate for Life and the Estate Tail followed one another.

Next it is to be considered, Whether after they granted omnia illa Tenementa, the subsequent Words, & totum statum suum, &c. do not come in by way of Restriction, and qualify what went before.

But those subsequent Words are placed in this Fine, not by way of Restriction, but of Accumulation.

Lit. 345. In Littleton, Sect. 613. 'tis said, That if Tenant in Tail grants all his Estate in the Tenements, Habendum all his Estate, &c. in this Case the Alienee hath but an Estate for the Life of the Tenant in Tail; and 'tis observable, that totum statum in the Case put by Littleton, is both in the Premisses and the Habendum: But if I will grant Tenementa prædicta in the Premisses, and then make another Limitation in the Habendum, there totum statum & quicquid, &c. can make no Restriction; if it should, it will spoil most Conveyances.

It is agreed, That if those Words had been omitted in this Case, then by this Fine the Reversion would be displaced; and therefore much Weight is laid upon these Words to explain the Meaning of the Parties thereby,

and that when they granted Tenementa prædicta, they meant totum ſtatum, &c.

But here is no Ground for ſuch an Interpretation; 'tis an entire Grant of the Houſes by the Words Tenementa prædicta; and the ſubſequent Words ſhall never be allowed to make ſuch a Reſtriction which ſhall overthrow the Frame of the Deed.

If a Man who has no Eſtate in the Land paſſes it by Deed, this ſhall work againſt him by way of Eſtoppel; and theſe Words Totum & quicquid, &c. which are uſual in all Conveyances, ſhall make no Alteration of the Law; for if ſuch Conſtruction ſhould be made of theſe Words, as hath been objected, then in all Deeds where they are inſerted, if it happen that the Party hath no Eſtate, or a void Eſtate, nothing paſſes; and then Covenants, Eſtoppels, and Warranties, would be no Securities in the Law.

2. Theſe Words Totum & quicquid, &c. come in a diſtinct Clauſe of the Grant; the precedent Words are, Tenementa prædicta & totum Statum & quicquid, &c. reddiderunt, which are Two Parts, a Grant and a Releaſe, and have no Dependance upon each other, being diſtinct Clauſes, and therefore theſe Words ſhall not be any Reſtriction of the former; but if one Clauſe be carried on with a Connexion, ſo as 'tis but an entire Sentence, in ſuch Caſe a Man may reſtrain either general or particular Words. Hob. 171. in Stukely *and* Butler's Caſe.

3. Admitting theſe Words are a Reſtriction of the former, yet the Eſtate is ſo limited, that if the firſt Words were out of the Caſe, this later Clauſe he ſaid was enough for his Purpoſe, for the Grant is not the uſual Words by which Eſtates paſs, viz. Eſtate, Right, Title, Intereſt, but Totum & quicquid, &c. for the Lives of the Grantors and the Survivor, which ſhews that they took upon themſelves to grant for a longer Time than they had in Poſſeſſion; if they had only granted it for both their Lives, they might have ſome colourable Pretence.

4. 'Tis apparent from the Clauſe of the Warranty, that the Intent of the Parties was to grant an Eſtate expreſly in Poſſeſſion for the Lives both of the Husband and his Wife; for 'tis that which the Grantæ ſhall hold, &c. during their Lives and the longeſt Liver.

Object. The Caſe of * Euſtace *and* Scaven has been objected: 'Tis reported in 2 Cro. 696. which is, Feme-Covert and are Jointenants for Life, the Husband and Wife levy a Fine to A. the other Jointenant, and grant the Land and Totum & quicquid habent, &c. to him during the Life of the Wife with Warranty, the Wife ſurvives A. her Companion;

* 2 Rol. Abr. A. 36, 403.

nion: Adjudged, that theſe Words Totum & quicquid ſhall not enure by way of Grant and Severance of the Jointure of the Moiety, for then there would be an Occupancy; but they are Reſtrictive only to the Eſtate of the Wife, and ſhall enure by way of Releaſe to A. ſo that after his Death he in Reverſion may enter.

Anſw. It would not be a Queſtion in that Caſe, whether theſe Words were Reſtrictive or not, for nothing was granted but what might lawfully paſs, viz. during the Life of the Wife the other Jointenant; neither was there any Streſs laid on thoſe Words; for Mr. Juſtice Jones, who was a Learned Man, and reported the ſame Caſe, fol. 55. hath made no Mention thereof, but hath wholly omitted thoſe Words, which he would not have done if the Caſe had depended upon them.

2. Object. Next, the Form of this Fine has been objected, and a Precedent was cited, Raſt. Entr. 241. where ſuch a Fine was levied, and nothing paſſed but for the Life of the Conuſor.

Anſw. But no Authority can be produced, where a Man that had an Eſtate for Life in Poſſeſſion, and another in Remainder, and granted by the ſame Words, as in this Caſe, but that it was a Forfeiture.

3. Object. That the Law will not make a Conſtruction to work a Wrong, and therefore if Tenant for Life grant generally for Life, it ſhall be interpreted during the Life of the Grantor.

Anſw. That Caſe is without expreſs Words, or ſhewing any Time for which the Grantee ſhall have the Thing granted; and therefore the Law reſtrains it to the Life of the Grantor, becauſe it will not make Words which are doubtful and of incertain Signification to do any Wrong: But where there are expreſs Words as in this Caſe, no other Conſtruction can be made of them, but that an Eſtate in Poſſeſſion was thereby intended to paſs.

4. Object. That this Fine and Grant muſt be conſtrued to enure according to the Intent of the Parties, ut res magis valeat, and they never intended to make a Forfeiture.

Anſw. Certainly no Man ever intended to make a Forfeiture of his own Eſtate, thoſe are generally the Effects of Ignorance, and not of the Will, as the Caſe of Gimlet *and* Sands, Cro. Car. * 391. where Tenant in Fee makes a Feoffment to Two to the Uſe of himſelf for Life, then to the Uſe of his Wife for Life, Remainder in Tail to his Son and Heir, Remainder to his own right Heirs; and afterwards he made another Feoffment to Smith with Warranty; the Mother and Son join in another Feoffment, adjudged that this was a Forfeiture of her Eſtate for Life, though

* 1 Roll. Abr. 856.

ſhe had no Notice of the Warranty made by her Husband; for the Feoffment made by him was a Publick Act upon the Land, and ſhe ought to have taken Notice of it; and though by her joining in the Feoffment with her Son, ſhe did not intend to forfeit her Eſtate, yet the Law adjudges according to what is done: But in the Caſe at Bar, the Intention of the Parties may be collected by the Act done; and there is great Reaſon to preſume, that the Parties thereby intended to diſplace the Reverſion; for the Huſband joining in the Fine, and in the Warranty, if it was no Deveſting, the Warranty is of no Uſe.

Another Objection has been only mentioned, which is, That admitting this ſhould amount to a Diſplacing, if the Eſtate had been in Poſſeſſion; yet in this Caſe it would not, becauſe it was prevented by the Leaſe for Years in Being.

But that cannot hinder the Execution of this Fine; 'tis a Fine ſur conceſſit, which is Executory in its Nature, and doth not paſs any Eſtate, or take any Effect 'till executed, and ſo is the Book, 415. 3. 14 b.

But in this Caſe the Fine was executed, which may be by Matter in Pais, as well as by Scire facias, and as to this Purpoſe, may be executed by the Entry of the Conuſor, without ſuing out any Execution. 38 Ed. 3. Brook Tit. Scire Facias 199. 1 Rep. 106. Dyer 376. b.

If there had been a Fine executed, there would have been little Doubt left in this Caſe; and by the Attornment of the Leſſee for Years, it muſt be admitted that this Fine was executed, as 8 Ed. 3. fol. 44. For a Fine of a Reverſion may be executed to all Purpoſes by the Attornment of the Leſſee for Years; and if ſo, when a Fine Executory is once executed, 'tis as good as a Fine ſur Conuſance de droit come ceo, to make a Forfeiture of the particular Eſtate.

Where a Feoffment is made, and a Leaſe for Years is in Being, the Feoffment is not good; becauſe in ſuch Caſe there muſt be a preſent Tranſpoſition of the Eſtate, which is hindred by the Leaſe. Poſtea, Moor *and* Pitt.

But in caſe of a Fine, which is a Feoffment upon Record, a Leaſe for Years is no Impediment or Diſplacing of the Reverſion; for if Tenant in Tail, Expectant upon a Leaſe for Years, levy a Fine, 'tis a Diſcontinuance of the Tail, and notwithſtanding this Leaſe, the Fine has ſuch an Operation upon the Freehold, that it diſplaces the Reverſion in Fee. Co. Lit. 332. And therefore if a Leaſe for Years prevents not a Diſcontinuance, it will much leſs hinder a Diſplacing in this Caſe.

But no Judgment was given now in this Caſe; another

Mat-

Matter being debated, whether the Plaintiff could have Judgment, because he was barred by the Statute of Limitations; for it did not appear that he had been in Possession for Twenty Years past, and the Verdict hath found any Claim, or that the Plaintiff was within the Proviso of the Act.

## Waterfield *versus* the Bishop of *Chichester*.

Oath *Ex Officio* not to be administred.

A Prohibition was granted last Easter-Term to the Bishop of Chichester, upon a Suggestion made by Waterfield, that he being chosen Church-warden of the Parish-Church of Arundel, in the County of Sussex, the Bishop tendered him an Oath ex Officio, which was, That he should Present every Parishioner who had done any Offence, or neglected any Duty mentioned in certain Articles contained in a printed Book delivered to him; some of which Articles concern the Church-warden himself, and so in Effect he was to swear against himself in Case of any Default, which is
Sid. 232. expresly against the Statute of 13 Car. 2. cap. 12. which prohibits any Person having Ecclesiastical Jurisdiction to administer the Oath ex Officio, or any other Oath, whereby the Person to whom 'tis administred may be charged to accuse himself of any Criminal Matter, whereby he may be liable to any Censure or Punishment; and because the Bishop had excommunicated him for refusing such Oath, he prayed a Prohibition, which was granted, quoad the Compelling him to make any Answer to the said Articles concerning himself, and the Excommunication was discharged.

But now upon the Motion of Serjeant Brampston, a Consultation was awarded, because it appeared by the Affidavit of the Commissary who tendred this Oath, and likewise by the Act of the Court, that he was excommunicated for refusing to take the Oath of a Church-warden according to Law, which was the only Oath tendred, and therefore the Ground of the Prohibition being false, a Consultation was awarded.

In this Prohibition it was recited, That the Bishop cannot give an Oath but in Two Cases, viz. in Matters Testamentary, and Matrimonial, whereas they have Authority in many Cases more; 'tis true also, that until his Jurisdiction was increased by Act of Parliament, he could hold Plea in none but those Two Causes, but by the Sta-
2 Inst. 487. 537. tute De circumspecte agatis, and of Articuli Cleri, he may now hold Plea in many other Cases.

The Bishop informed the Lord Chief Justice, that the Plaintiff Waterfield had caused 2000 of the Prohibitions to be printed in English, and had dispersed them all over

the Kingdom, intituling them a true tranſlated Copy of a Writ of Prohibition, granted by the Lord Chief Juſtice, and other the Juſtices of the Court of Common Pleas in Eaſter-Term, 1676, againſt the Biſhop of Chicheſter, who had proceeded againſt and excommunicated one Thomas Waterfield, a Church-Warden, for refuſing to take the Oath uſually tendred to Perſons in ſuch Office; by which Writ the Illegality of all ſuch Oaths is delared, and the ſaid Biſhop commanded to take off his Excommunication: And this was declared by the Court to be a moſt Seditious Libel, and gave Order to enquire after the Printer, that he might be proſecuted.

## Eleanor Plummer *verſus Sir* Jeremy Whitchot.

*Intr.* Trin. 27 *or* 28 Car. 2. *Rot.* 301. in *Banco Regis.*

IN an Action of Debt for an Eſcape: Upon Nil debet pleaded, the Jury found a Special Verdict; upon which the Caſe was this, viz. That Sir Jeremy Whitchot was ſeiſed in Fee of the Office of Warden of the Fleet, and of ſeveral Meſſuages thereunto belonging, and being ſo ſeiſed, did make a Grant thereof to one Duckenfield for Life, and for the Lives of Three more, Duckenfield by Rule of Court was admitted into the ſaid Office, being approved by the Court, and eſtæmed a Man of an Eſtate. He ſuffers a Priſoner afterwards to eſcape, and being not able to make the Plaintiff Satisfaction, this Action was brought againſt Sir Jeremy Whitchot, the new Defendant; and whether he was chargeable or not with this Action, was the Queſtion.

Debt for Eſcape lies againſt the Warden of the *Fleet*, as Superior, the Grantee for Life being inſufficient. Jones 60. 1 Vent. 14.

Wallop, who argued for the Plaintiff, ſaid, That he would not take up any of their Time to make a Narrative of Impriſonment for Debt, or what Remedy there was for Eſcapes at Common Law, and what Remedy by the Statute; but ſuppoſing an Action of Debt will lie, whether it be by the Statute of Weſtm. 2. cap. 11. (for at the Common Law, before the making of that Act, an Action of Debt would not lie againſt the Gaoler for an Eſcape, but a Special Action on the Caſe, grounded on a Treſpaſs) or whether this Action lay againſt the Defendant by the Statute of 1 R. 2. cap. 12. which gives it againſt the Warden of the Fleet, who in this Caſe had not the actual Freehold in Poſſeſſion, but the Inheritance, and not the immediate Eſtate, but the Reverſion, is the Queſtion.

Ex parte Quer. Sid. 306, 307. 2 Inſt. 382

The Office of the Warden of the Fleet may be taken in Two Capacities, either as an Eſtate, or common Hereditament,

tament, wherein a Man may have an Inheritance, and which may be transferred from one to another; or as a Publick Office, wherein the King and the People may have a Special Interest.

As 'tis an Inheritance transferable, 'tis subject to the Rules of Law in Point of Descent, and is demisable for Life, in Fee, Tail, Possession or Reversion, and in many Things is common, and runs parallel with other Estates of Inheritance. 'Tis true, he cannot grant this Office for Years, not for any Disability in the Grantor, but in Respect of the Matter and Nature of the Thing granted, it being an Office of Trust and Personal, for otherwise it would not go to the Executor, which is inconvenient. 9 Co. 96. Sir George Reynell's Case.

To enquire what Superiority the Reversioner hath over the particular Estate, is not to the Point in Question; but there is such an Intimacy and Privity between them, that in Judgment of Law they are accounted as one Estate.

And therefore Littleton, Sect. 452, 453. saith, That a Release made to a Reversioner shall aid and benefit him who hath the particular Estate, and likewise a Release made to the Tenant of the Freehold shall enure to him in Reversion, because they are Privies in Estates; so that these Two Estates in the Case of Bar make but one Office,

This is a Publick Office of great Trust, and concerns the Administration of Justice; and therefore 'tis but reasonable to admit the Rule of Respondeat Superior, lest the Party should be without Remedy; and the rather, because Execution is the Life of the Law. 39 H. 6. 33.

He who is in the Office as Superior, whether it be by Droit or Tort, is accountable to the King and his People, and this brings him within the Statute of Westm. 2. cap. 11. or 1 R. 2.

If the Defendant had granted the Office in Fee to Duckenfeild, before any Escape had been, and the Grantee had been admitted, the Defendant then had been discharged; or if he die before or after the Action brought, and before Judgment, Moritur Actio cum Persona, for if he had not reserved something, he could not be charged, and if he had parted with the Inheritance the Privity had been gone, but by reserving that, he hath made himself liable; for now he is Superior, he may exact Homage and Fealty, and the particular Tenant is said to be Attendant upon the Reversion, and these are Marks of Superiority.

And this Rule of Respondeat Superior holds not only between the Principal Officer and his Deputy, and between the Master and his Servant, but in many other Cases one is to be answerable for another; as,

1. Where a Man has Power to elect an Officer, he is chargeable; so the County hath Power to elect Coroners, and if they fail in their Duty, the County shall be charged; for by Reason of the Power they had to elect, they are esteemed Superiors. 2 Inst. 175. 4 Inst. 314.

2. Where one Man recommends another to an Office concerning the King's Revenue, the Person who recommends is liable, if the other prove Insufficient; and for this there is a notable Case, 30 E. 3. 6. 'Tis Porter's Case, cited in the Case of the Earl of Devonshire, 11 Co. 92. b. Where Porter being Master of the Mint, covenanted with the King to deliver him Money within Eight Days, for all the Bullion delivered ad Cambium Regis to coin, which he did not perform, Et quia Walwyn & Picard duxerunt & præsentaverunt the said Porter, ideo consideratum est quod onerentur versus Dominum Regem: And why not the Defendant in this Case, who præsentavit the said Duckenfield to the Court tanquam sufficientem, the Reason being the same? And the King is as much concerned in the ordering this Court of Justice, as in the ordering of his Coffers; for as the Treasure is Nervus Belli, so the Execution of the Law is Nervus Pacis. 4 Inst. 466.

3. In the Case of a dependant Officer, though he is a proper Officer and no Deputy, the Person who hath the Reversion shall answer, as in 32 H. 6. 34. The Duke of Norfolk, who had the Inheritance of the Marshalsea, was charged for an Escape suffered by one Brandon, who was Tenant for Life, in Possession of the said Office; and there is great Reason it should be so; for when a Principal Officer may make an Inferior Officer, who afterwards commits a Forfeiture, the Superior shall take Advantage of this Forfeiture, and 'tis as reasonable he should be answerable for his Miscarriage. Cro. Eliz. 384. The Earl of Pembrook against Sir Henry Berkley. 2 Inst. 382. 9 Rep. 98. Dyer 278, b. Poph. 119.

And therefore admitting the Defendant is out of the Statute, yet he is within the Maxim of Respondeat Superior, which is not grounded upon any Act of Parliament, as appears in the Case of the Coroner, and the Statute of West. 2. And all other Acts which inculcate this Rule, are but in Affirmance of the Common Law: and this is not only a Rule of the Common, but also of the Civil Law, which is served with the Equity of this Maxim in Cases of like Nature; and since 'tis purely Remedial, such a Construction ought to be made as may most advance the Remedy. 2 Inst. 466.

In the Case of Morse and Slue, lately in this Court; the Question was, Whether a Master of a Ship should be 1 Ventr. 191, 238.

charged upon the Common Custom of England, for negligently keeping Merchants Goods? And adjudged that he was, though robbed: Lex Mercatoria makes a Provision for it; for the Remedy against the Master is most direct and immediate; that against the Owner is collateral in favour of the Merchant, to whom datur Electio; and therefore that the Interest of the Merchant might be served, the Law in that Case provides a double Remedy.

And in Linwood, lib. 3. De Clerico non residente, f. 73. verbo Vicarius; 'tis said, That in the same Church there may be a Rector and a Vicar, and the Cure of the Church may be divided between them; the Vicar is not the Deputy of the Rector, but hath a Distinct Office from him; and as the Temporalities of the Vicar are but a Derivation from the Benefice of the Rector, so his Cure is derived from that of the Rector also.

In like Manner, Duckenfield here is not a Deputy to the Defendant, but an immediate and proper Officer, and the habitual Care and Custody is in him, which is enough to bring him within the Rule of Respondeat Superior.

These Instances were given, because this is not only a Maxim in England, but is of Foreign Production, and adapted to the Rules of Common Law. Vide Bracton, Fleta, Selden.

The Statute de Scaccario, 51 H. 3. enacts, That if any Man be received into Office in the *Exchequer* without the Treasurer's Licence, or if he hath such Licence and doth Trespass, he shall be punished according to his Trespass, if he have whereof; and if he have not, then he who put him in the Office shall be charged, and if he be not sufficient, his Superior shall be charged; so that they shall all answer in their several Stations. And this Statute was made in Affirmance of the Common Law: If therefore the Superior of a Superior should answer, why shall not the Defendant in this Case answer for his Substitute? For though the Warden is not sworn to appoint one who is sufficient to satisfy, he is bound to do it; and 'tis no Argument to say that he is discharged, because Duckenfield was appointed by the Court; for that is a Work of Supererrogation, which is left in the Discretion of the Court, and may be done or omitted as they shall think necessary, but is not concludive, 39 H. 6. 34. especially since the Jury have not found that the Court took any Examination whether he was Sufficient or not; but that he had forfeited his Office, having wilfully suffered a Prisoner to escape, and then the Defendant is or may be the actual Officer, and having taken Security, ought to be charged.

Sir William Jones, who argued on the other Side, before he ſpoke to the Caſe, endeavoured to remove a Doubt upon the Special Verdict, which found that the Defendant had taken Security from Duckenfield to indempnify him from Eſcapes. Ex parte Def.

This, ſays he, might be an Argument at a Niſi Prius to induce a Jury to find Damages, but could not make a Man chargeable who was not ſo before.

2. Though the Defendant had a Covenant from Duckenfield to pay 1500 l. per Annum to him, yet that will not make him more liable than if nothing had been to be paid; neither did he lay any Weight upon it, that the Defendant had any Notice of the Inſufficiency of Duckenfield, for if he is chargeable, he is bound to take Notice at his Peril; and no Body can believe that the Court of Common Pleas is chargeable, for that was mentioned in the Argument for the Plaintiff, that the Superior of a Superior ſhall be charged where he is inſufficient; neither did he inſiſt upon the Rule in the Common Pleas, by which Duckenfield was admitted: But he conſidered,

1. Whether the Defendant was chargeable by the Statute of Weſtm. 2. cap. 11.

2. If he could clear him from that Statute, whether he was chargeable at the Common Law, or by any other Statute.

And he ſaid, That he was not chargeable by the Statute of Weſt. 2. which gives an Action of Debt againſt the Gaoler for an Eſcape: Many Authorities might be cited to prove, that where a Man is in Execution of an Action of Debt, that ſuch an Execution is not within that Statute, 7 H. 6. 5 Bro. tit. Eſcape pl. 9. Pl. Com. 35. It was doubtful then, how a Gaoler became chargeable for the Eſcape of a Man who was in Execution for Debt; but were he in Execution for Matter of Accompt, he is chargeable by the expreſs Words of the Statute, which are Caveat ſibi Vicecomes & Cuſtos Gaolæ; and the Parliament in 1 R. 2. did not think the Warden chargeable, for if they did, to what Purpoſe was it to make the Warden of the Fleet liable to an Action of Debt for an Eſcape of a Man in Execution for Debt, if he was chargeable before by that Statute of Weſtm. 2. This was urged, to ſhew that at that Time it was not clear.

But becauſe there are Authorities that ſeem another Way, he did not affirm or deny it after ſuch Varieties of Opinions, but proceeded to argue theſe Two Points:

1. That the Rule of Reſpondeat Superior doth not extend to this Caſe.

2. That a Reverſioner is not a Superior.

Poſtea.

1. The Statute de Donis is by ſome called the Statute of great Men, becauſe the Intent of it was for the Preſervation of their Eſtates; and this Statute being made in the ſame * Year, ſeems alſo to have a particular Regard to the Lord, to give him a quick and more ſevere Remedy againſt his Servant and Bailiff than he had before; for it makes him in Effect his own Judge againſt him in Caſes of Accompt, becauſe it gives him Authority to aſſign Auditors, and ſuch as he appoints muſt ſtand, and the Servant has no Remedy but by Writ * Ex parte talis in the Exchequer; yet no Man ever thought that by the Equity of this Statute the ſame may be done in an Action of Debt, and therefore the Difference in the Proceedings between Actions of Accompt and Debt, ſeems to imply that an Action of Debt is not within the Rule of Reſpondeat Superior.

* 13 Ed. 1.

*F. N. B. 129.

2. There is a great Difference between the Reſtraint of Priſoners in Execution for Debt, and thoſe who are impriſoned by this Act for Arrear of Rent, which directs that they ſhall be arreſted, &c. & carceri mancipentur in ferris; but this the Gaoler could not have done at the Common Law; neither was it ever practiſed or allowed by the Law that a Priſoner ſhould be ſo uſed, who is in Execution for Debt, unleſs he be unruly, and endeavour to eſcape; but 'tis expreſly againſt the Law to do it where there is no ſuch Reaſon, becauſe a Priſon is for the ſafe Cuſtody of Men, and not to puniſh them, 1 Inſt. 260. a. So that it appears by this, That a ſtricter Remedy was provided for Executions in Accompt than for thoſe in Debt.

3. There are certain Perſons alſo, who are made chargeably by this Statute when the Execution is in Accompt, who cannot be charged in Debt; for the Statute enacts, That if the Party eſcape, the Officer in whoſe Cuſtody he is ſhall anſwer, *ſive infra Libertatem ſive extra*; ſo that the Gaoler ſhall be charged, whether he be of a Franchiſe or of the County at large; but if a Man is in Execution for Debt, and then eſcapes, the Gaoler is not liable, but the Sheriff; though the * Gaoler hath the Cuſtody of the Body of One, whom the late Sheriff did not deliver over to the preſent Sheriff: So that in this alſo there is Difference upon this Statute between Actions of Accompt and Actions of Debt, and therefore the Clauſe therein, of Reſpondeat Superior, being made upon a particular Occaſion only in the Caſe of Accompt, ſhall not be extended to other Matters, and can in no wiſe influence this Caſe, which for other Reaſons cannot be governed by that Rule, if extended to all who have Power to depute an Officer, and thereby give him an Intereſt, or to appoint one for a Time.

* 3 Co. 71. Weſtby's Caſe.

2. Point. 1. Becauſe he in Reverſion is not in Property of Speech a Superior; for 'tis not ſaid, that a Reverſioner after an Eſtate for Life is Superior, and of more Accompt in the Law than he who hath the particular Eſtate; but on the Contrary, he who hath the Freehold is of greater Accompt and Regard in the Law, than the Reverſioner after him; and if (as it hath been objected) both make but one Eſtate, then there can be no Superiority, and it would be very hard and difficult for any Man to prove, that any Attendancy is made by the Tenant for Life upon him who hath the Reverſion.

2. Here is Room enough within the Statute to ſatisfy that Word Superior, by a plain and clear Conſtruction, without bringing in the Reverſioner; for if the Sheriff makes a Deputy, or a Lord makes a Bailiff of a Liberty, the Sheriff and the Lord are properly the Superiors.

3. This Word Superior is uſed in the Statute made the ſame Year with this, c. 2. in Signification agreeable with the Caſe in Queſtion; for it recites, That where Lords of Fees diſtrain their Tenants for Rents and Services, and they having replevied their Cattle do alien or ſell them, ſo that a Return cannot be made; then it provides, That the Sheriff or Bailiff ſhall take Pledges to proſecute the Suit before they make Deliverance of the Diſtreſs, and if the Bailiff be not able to reſtore, (that is, if he take inſufficient Pledges) the Superior ſhall anſwer, by which the Parliament could mean no other than the Lord of that Liberty; for if it ſhould be otherwiſe, there would be no End of Superiors: As if there is a Bailiwick in Fee of a Liberty, and the Bailiff thereof grants it for Life, in this Caſe there are Two Superiors, for the Lord of the Bailiff is one, and the Bailiff himſelf is another, which cannot be. 2 Inſt. 382.

There is a Congruity in Law, in ſaying, the Sheriff and Lord are Superiors; but there can be none in making the Reverſioner a Superior.

The Lord may loſe the Liberty, if his Bailiff for Life or in Fee commit a Forfeiture, as by not attending the Juſtices in Eyre; but a Reverſion cannot be loſt by the Forfeiture of the Tenant for Life; if the Bailiff make an ill Execution of a Writ, or ſuffer the Party to eſcape, the Lord ſhall anſwer; ſo if the Marſhal of England appoint a Marſhal, there may be a Forfeiture of his Office, becauſe 'tis but ſtill the ſame Office; and therefore the Caſe in Cro. Eliz. 386. where 'tis ſaid, If an Office be granted for Life, the Forfeiture of Tenant for Life ſhall be the Forfeiture of the whole Office, is miſtaken; for in Moor pl. 987. 'tis held otherwiſe;

wiſe; and upon the true Difference betwæn a Deputy and a Grantæ foꝛ Life; foꝛ in the firſt Caſe there may be a Foꝛfeiture of the Superioꝛ, becauſe 'tis ſtill but the ſame Office; but in the other Caſe the Superioꝛ ſhall not foꝛfeit foꝛ any Miſdemeanour of the Grantæ foꝛ Life, becauſe he hath the Fræhlod of the whole Office, and the other nothing but the Reverſion; and therefoꝛe if the Defendant be liable in this Caſe, 'tis in reſpect,

1. That he hath granted the Eſtate.
2. That he hath the Reverſion oꝛ Reſidue after the Life of the Grantæ.

He cannot be charged in reſpect that he hath granted the Eſtate, becauſe the Fræhold is gone, and in another; neither can he be charged in reſpect of the Reverſion, becauſe then not only his Heir, but the Aſſignæ of the Reverſion will be chargeable alſo, which cannot be.

As to the Second Point of this Argument; if the Defendant is not chargeable by this Statute, he is not to be charged at the Common Law.

Sid. 306, 397. 2. Becauſe the Common Law doth not give an Action of Debt foꝛ an Eſcape, but an Action on the Caſe only; neither doth it give any Remedy but againſt the Party offending.

As to the Caſe that hath bæn objected upon the Statute de Scaccario, where the ſeveral Officers in the Exchequer ſhall anſwer in their Degræs of Superioꝛity, that cannot be applicable to this Caſe, becauſe there can be no Pꝛoꝑoꝛtion betwæn Things which concern the King's Revenue and Pꝛerogative, and thoſe of a common Perſon.

The Caſes of the Coꝛoner and the Sheriff, and of the Recommending of a Receiver to the King, are not like this Caſe, becauſe the King can't infoꝛm himſelf of the Sufficiency of the Party recommended, and therefoꝛe 'tis but reaſonable that he who recommends ſhould be liable; and can it be ſaid, That when the Defendant was about to ſell this Office to one Norwood, (which he hath ſince done) that if a Stranger had recommended Norwood, and he had pꝛoved inſufficient, that the Stranger would have bæn liable?

As foꝛ the Civil Law, and the Authoꝛities therein cited to govern this Caſe, he did not anſwer them, becauſe they judge after their Law, and the Common Lawyers after another Way.

This Office hath bæn granted Time out of Mind foꝛ Life, and no Doubt but many Eſcapes have bæn made, but never was any Action bꝛought againſt him in the Reverſion befoꝛe now.

The Court of Common Pleas always examine the Sufficiency of the Grantæ foꝛ Life, which ſhews that in all Ceſſions

ceſſions of Ages the Opinions of Learned Men were, That no Eſcape could be brought againſt the Reverſioner; for if ſo, what Need is there of ſuch Examination? This was urged, to ſhew that the Proceedings of that Court did not alter, but interpret the Law.

But admitting the Caſe of the Duke of Norfolk to be Law, yet it concerns not this, becauſe the Sub-Marſhal there was taken as a Deputy; but there is no ſuch Officer as a Sub-Warden, for Duckenfield had it for Life.

And then a Deputy being a Perſon removeable at Pleaſure, will not be ſo conſidered in Law, as one who hath a more fixed Eſtate; for having nothing to loſe, it cannot be intended that he will be ſo careful in the Execution of his Office as the other; and therefore 'tis reaſonable in ſuch Caſe that the Superior ſhould anſwer: But he who hath a Freehold for Life, hath an Eſtate of ſome Value in the Law which he cannot be ſuppoſed eaſily to forfeit, and therefore 'tis reaſonable that he alone ſhould be liable for his own Miſcarriages; for if the Defendant ſhould be charged, by the ſame Reaſon the Grantee of the Reverſion may be charged, who is altogether an innocent Perſon, and ſo may be liable to a vaſt Sum for the Fault of another; for which Reaſons he prayed Judgment for the Defendant.

The Court delibered no Opinion this Term, but took Time to adviſe; and afterwards in Eaſter-Term following, Rainsford Chief Juſtice delibered the Opinions of Twiſden, Wild and Jones, Juſtices, who ſaid they were all agreeing in the main Point, but thought the Verdict imperfect, and not to warrant the Plaintiff's Caſe; for he declared that at the Time when the Grant was made to Duckenfield, when the Commitment was, and when the Eſcape was ſuffered, and ever ſince, that Duckenfield was inſufficient and not able to anſwer the Plaintiff; but the Jury in the Special Verdict do not find the Inſufficiency at that Time when this Action was brought. Judgment.

But as to the main Queſtion, they were of Opinion that the Defendant was Superior, and that he is chargeable for this Inſufficiency of Duckenfield; but if he had been ſufficient when the Plaintiff brought this Action, it might have been otherwiſe: But his Inability being fully averred in the Declaration, and the Defendant denying it, and the Jury having found nothing againſt it, but there being ſtrong Suſpicions of the Truth of the Fact, the Court would not make an Intendment to the Contrary.

The Jury have found expreſly, That Duckenfield was inſufficient at the Time of the Eſcape, which was within Six Weeks of the Time when the Action was commenced; ſo that

that having once found him disabled, unless it appear that he was of Ability afterwards, the Court will not intend him so, but rather that he was Insufficient at the Time of the Action brought: for there being strong Surmises of it, and there being no Ground within the Record to intend him Sufficient, a Fact may be collected that is not found in the Verdict. Fulwood's Case, 4 Co.

## The King *versus* Moor.

2 Lev. 179. Difference between a Prohibitory Clause, and a Clause which gives a Penalty in a Statute.

AN Information was brought upon the Statute of the 4th & 5th of Philip and Mary, cap. 8. which enacts, That if any Person, *&c.* above the Age of 14, shall after the First Day of (*April* next after the making the Statute) unlawfully take a Maid or Woman unmarried, being within the Age of 16 Years, *&c.* the Party shall suffer Two Years Imprisonment, or pay such Fine as shall be assessed in the *Star-Chamber*, and that the Defendant existens supra ætatem quatuordecim Annorum did take a young Maid away unmarried, and kept her Three Days contra formam Statuti; upon which he was found Guilty, and now moved in Arrest of Judgment.

1. It was said for the Defendant, That this Court could not fine him upon this Statute, because when the Informer entitles himself by a Statute, he must take the Remedy therein prescribed; and so 'tis not like an Information at the Common Law, for in such Case this Court might fine the Plaintiff.

2. It is not averred, that the Party offending was above the Age of 14 Years at the Time of Taking, but only that he being above the Age of 14, such a Day did take.

Where there are not Negative Words, the Court of *King's Bench* is not restrained. Mod. Rep. 34. Sid. 359. Postea.

Sir William Jones contra. If the first Objection hath any Weight in it, 'tis to bring the Party to an Imprisonment for the Space of Two Years, which is a Punishment directed by that Statute; but the Fine is limited to the Star-Chamber, and those Offences which were punishable there, are likewise to be punished here, because there are no Negative Words in this Statute to abridge the Authority of this Court, which is never restrained, but when the Statute directs, before whom the Offence shall be tried, and not elsewhere. It was the Opinion of my Lord Chief Justice Hales, That where there is a Prohibitory Clause in a Statute, and another Clause which gives a Penalty, if the Party will go upon the Prohibitory Clause, he is not confined to the Manner expressed in the Statute, but if he will go upon the Penalty, he must then pursue what the Statute directs.

The First Part of this Statute is but a Declaration of the Common Law: The Second Clause is introductive of a new Law as to the Court of Star-Chamber, but is not a Restriction as to this Court, which might have punished the Defendant if there had been no such Law. The first Clause is Prohibitory, viz. That it shall not be lawful for any Person to take away a Maid unmarried, and upon this Clause this Information is brought. The Second Clause is distinct, and directs the Punishment, viz. Upon Conviction to suffer Imprisonment for Two Years. Now by taking away the Court of Star-Chamber, this Prohibitory Clause is not repealed, upon which a Man may be indicted without demanding the Penalty; and the Statute having directed, that the Offence shall be heard and determined before the King's Counsel in the Star-Chamber, or before the Judge of Assise, and no Negative Words to restrain this Court; therefore the Chief Justice, who is the Judge of * Assise in the County of Middlesex, may hear and determine this Offence, and by Consequence fine the Party if he be found guilty. * Cro. Car. 465.

As to the Second Objection, That it is not averred, that the Party offending was above the Age of 14 Years at the Time of the Taking, it had been better if it had been said, tunc existen' supra Ætatem quatuordecim Annorum: But notwithstanding 'tis well enough; for 'tis said, That being above the Age of 14 Years, such a Day he did take, &c. so that it cannot be otherwise but that he was of such an Age at the Time when the Maid was taken; and the Jury found him guilty contra formam Statuti; which may likewise be an Answer to the First Objection; for he being found guilty contra formam Statuti, if there be any other Statute which prohibits and punishes a Riot, this Information is as well grounded upon such, as upon this Statute of Philip and Mary, for 'tis expressly said, That the Defendant and others did unlawfully assemble themselves together, and riotose & routose made an Assault upon her, so that it shall be intended to be grounded upon such a Law, as shall be best for punishing the Offence.

The Court were of Opinion, That notwithstanding these Exceptions, the Information was good, and was not like the Case of an Indictment upon the Statute for a forcible Entry, That such a Day by Force and Arms the Defendant did enter into such a House, existen' liberum Tenementum of J. N. and if he doth not say tunc existen' the Indictment is naught, because the Jury may enquire of a Thing before it is done; but here the existen' being added to the Person, carries the Sense to the Time of the Offence committed. Curia. 2 Cro. 14, 610, 639.

The Statute of 1 R. 3. ſaith, That all Grants made by Ceſtui que Uſe being of full Age, ſhall be good againſt him and his Heirs, and 'tis adjudged 16 H. 7. that he need not ſhew when and where, but generally exiſten' of full Age, and upon the Evidence it muſt be ſo proved.

Where a Thing relates to the Condition of a Man, it ſhall be tried in the County where the Action is laid, and 'tis not neceſſary to ſay in what County he is a Knight or an Eſquire; any Citizen and Freeman may deviſe his Land in Mortmain, by the Cuſtom of London; 'tis enough to ſay in Pleading, exiſten' a Citizen and Freeman, without ſetting forth when and where.

If a Man be indicted for not coming to Church, 'tis enough to ſay exiſten' of the Age of Sixteen Years, he did not come to Church.

This is an Offence puniſhable at Common Law, 'tis malum in ſe. But admitting 'twas an Offence created by the Statute, there being no Negative Words to prohibit, this Court hath a Jurisdiction to puniſh this Offence, if the Star-Chamber had not been taken away; for the Party had his Election to proceed in this Court upon the Prohibitory Clauſe, and the Juſtices of Aſſiſe muſt be intended the Juſtices of Oyer and Terminer. Moor 564. Whereupon the Defendant was fined 500 l. and bound to his good Behaviour for a Year.

## Brown *verſus* Waite.

Entailed Lands forfeited for Treaſon. Jones 57. 1 Ventr. 299. 2 Lev. 162. Jones 57.

Upon a Special Verdict in Ejectment, the Caſe was, viz. Sir John Danvers, the Father of the Leſſor of the Plaintiff, was in Anno Domini 1646. Tenant in Tail of the Lands now in Queſtion; and was afterwards inſtrumental in bringing the late King Charles to Death, and ſo was guilty of High Treaſon, and died.

Afterwards the Act of Pains and Penalties, made 13 Car. 2. cap. 15. enacts, That all the Lands, Tenements and Hereditaments, which Sir *John Danvers* had the 25th Day of *March*, in the Year 1646, or at any Time ſince, ſhall be forfeited to the King.

And whether theſe entailed Lands ſhall be forfeited to the King by Force of this Act, was the Queſtion.

Wallop, who argued for the Plaintiff, ſaid, That the entailed Lands were not forfeited; his Reaſons were,

1. These Lands entailed are not expressly named in that Act.

2. Tenant in Tail hath but an Estate for Life in his Lands, and therefore by these Words [All his Lands] those which are entailed cannot be intended; for if he grant Totum statum suum, only an Estate for Life passeth.

3. These Lands are not forfeited by the Statute of 26 H. 8. cap. 13. which gives the Forfeiture of entailed Lands in Case of Treason; because Sir John Danvers was not convicted of it by Process, Presentment, Confession, Verdict, or Outlawry, which that Statute doth require, for he died before any such Conviction.

Sir Francis Winnington the King's Solicitor, argued contra, that entailed Lands are forfeited by the Act of Pains and Penalties; and in speaking to this Matter he considered,

1. The Words of that Act.
2. How Estates Tail were created, and how forfeitable for Treason.

1. This Act recites the Act of general Pardon, which did not intend to discharge the Lands of Sir John Danvers and others from a Forfeiture.

2. It recites that he was guilty of High Treason.

3. Then comes the enacting Clause, Viz. That all the Lands, Tenements, Rights, Interests, Offices, Annuities, and all other Hereditaments, Leases, Chattels, and other Things of what Nature soever of him the said Sir *John Danvers* and others, which they had on the 25th of *March* 1646, or at any Time since, shall be forfeited to the King, his Heirs and Successors.

2. As to the Creation of Intails, there were no such Estates at the Common Law; they were all Fee-Simple Conditional, and post prolem suscitatam the Condition was performed for Three Purposes:

Viz. To alien, Co. Lit. 19. a. 2 Inst. 334.

To forfeit;

Or to charge with a Rent: And thus the Law continued 'till 13 E. 1. and there having been frequent Wars between King John and the Barons, the great Men then obtained the Statute de Donis to preserve their Estates, lest the like Occasion should happen again, in which 'tis only mentioned, That the Tenant in Tail should not have Power to alien; but it was well known, that if he could not alien, he could not forfeit; for before that Statute, as he might alien post prolem suscitatam, so the Judges always construed that he might forfeit, 5 Ed. 3. 14. for For-

feiture and Alienation did always go Hand in Hand. 1 Co. 175. Mildmay's Case.

And from the making of that Statute it always continued a settled and received Opinion, That Tenant in Tail could not alien, until by the 12th of Ed. 4. a Recovery came in, by which the Estate Tail may be docked, and which is now become a Common Assurance.

Then by the Statute of 4 H. 7. cap. 24. Tenant in Tail might bar his Issue by Fine and Proclamation, and all this While it was not thought that such Lands could be forfeited for Treason; which Opinion continued during all the Reign of H. 7. for though by his Marriage the Houses of York and Lancaster were united, yet the great Men in those Days thought there might be some Doubt about the Succession after the Death of H. 7. if he should die without Issue, and thereby those Differences might be again revived, and therefore no Endeavours were used to make any Alteration in the Law, 'till after the Death of H. 7. And after his Son H. 8. had Issue, those Doubts were removed, and being never likely to arise again, then the Act of 26 H. 8. was made, which gives a Forfeiture of entailed Lands in Cases of Treason.

The Inference from this will be, That all the Cases put before the 26th Year of H. 8. and so before entailed Lands, were made forfeitable for Treason, and where by the general Words of Lands, Tenements and Hereditaments, 'twas adjudged entailed Lands did not pass, do not concern this Case; but now since they are made forfeitable by that Statute, such general Words are sufficient to serve the Turn.

By the Statute of 16 R. 2. cap. 5. entailed Lands are not forfeited in a Præmunire, but during the Life of Tenant in Tail; because they were not then to be forfeited for Treason. Co. Lit. 130.

2 Inst. 334.

1 Inst. 3.

If then it appears that the Crime of which Sir John Danvers was guilty, was Treason; and if entailed Lands are forfeited for Treason; then when the Act saith, That he shall forfeit all his Lands, by those general Words his entailed Lands shall be forfeited: And though by the Common Law there can be no Attainder in this Case, the Party being dead; yet by Act of Parliament that may be done, and the Words in this Act amount to an Attainder.

The Intent of it was to forfeit Estates Tail, which may be collected from the general Words; for if a Fee-Simple is forfeited, though not named, why not an Estate Tail? Especially since the Word Hereditaments is very comprehensive, and may take in both those Estates. Spelman's Glossary 227. 2 Roll. Rep. 503.

In the very Act of 26 H. 8. cap. 13. Eſtates Tail are not named, for the Words are, Every Offender convict of Treaſon, &c. ſhall forfeit all ſuch Lands, Tenements and Hereditaments which he ſhall have of any Eſtate of Inheritance, in Uſe, Poſſeſſion, or by any Right, Title or Means, &c. and yet a Conſtruction hath been made thereupon in Favour of the Crown; ſo a Dignity of an Earldom intailed is forfeitable by this Statute by the Word Hereditament. 7 Co. 34.

Afterwards in Hillary-Term, Rainsford, Chief Juſtice, delivered the Opinion of the Court, That upon Conſtruction of the Act of Pains and Penalties, this Eſtate Tail was forfeited to the King. Judgment.

He agreed, the Series and Progreſs of Eſtates Tail to have been as argued by the Solicitor, and that the Queſtion now was, Whether by the Act of Pains, &c. Eſtates Tail can be forfeited, unleſs there are expreſs Words to take away the Force of the Statute de Donis Conditionalibus, for by that Statute there was a ſettled Perpetuity; Tenant in Tail could neither forfeit nor alien his Eſtate, no not in Caſe of Treaſon, and Forfeiture is a Kind of Alienation; but afterwards by the Reſolution in Ed. 4. an Alienation by a Common Recovery was conſtrued to be out of the ſaid Statute: And by the Statute of Fines, 4 H. 7. which is expounded by a ſubſequent Statute of 32 H. 8. cap. 36. Tenant in Tail, notwithſtanding his former Reſtraint, had Power to alien the Eſtate Tail, and bar his Iſſue; but all this While his Eſtate was not to be forfeited for Treaſon, 'till the Statute of 33 H. 8. cap. 20. which gives Uſes, Rights, Entries, Conditions, as well as Poſſeſſions, Reverſions, Remainders, and all other Things of a Perſon attainted of Treaſon by the Common or Statute Law of the Realm, to the King, as if ſuch Attainder had been by Act of Parliament. Preface to 3 Co.

Then by the Statute of 5 & 6 Ed. cap. 11. 'tis enacted, That an Offender being guilty of High Treaſon, and lawfully convict, ſhall forfeit to the King all ſuch Lands, Tenements and Hereditaments which he ſhall have of any Eſtate of Inheritance in his own Right in Uſe or Poſſeſſion; by which Statutes, that de Donis Conditionalibus was taken off in Caſes of Treaſon, as it had been before by the Reſolution in 12 E. 4. and by the Statute of Fines, as to the Alienation of an Eſtate Tail by Fine and Recovery.

If therefore this Act of Pains, &c. will admit of ſuch a Conſtruction as to make Eſtates Tail forfeit; here is a Crime great enough to deſerve ſuch a great Puniſhment;

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a Crime for which the Parliament hath ordered an Anniversary to be kept for ever with Fasting and Humiliation, to implore that the Guilt of that innocent Blood then shed may not be required of our Posterity; this they estæmed as another Kind of Original Sin, which unless thus expiated, might extend not only ad Natos, sed qui nascantur ab illis.

And that this Act will admit of such a Construction, these Reasons were given:

1. From the general comprehensive Words mentioning those Things which are to be forfeited, viz. Messuages, Lands, Tenements, Reversions and Interest, which last Word signifies the Estate in the Land as well as the Land it self, or otherwise the Word must be construed to have no Effect.

2. Estates Tail are not now protected by the Clause in the Statute de Donis * Non habet Potestatem alienandi, but are subject to the Forfeiture by the Act of H. 8. which though it extends to Attainders only, yet 'tis a good Rule for the Judges to make a Construction of an Act of Parliament by, especially in such a Case as this, wherein 'tis plain that the Law did look upon these Offenders, if not attainted, yet in pari gradu with such Persons, and therefore may be a good Warrant to make the like Construction as in Cases of Attainder.

* Inst. 334.

3. Because the Offenders are dead; for had they been living, there might have been better Reason to have construed this Act not to extend to Estates Tail, because then something might be forfeited, viz. an Estate for Life; and therefore the Act would signify very little, if such Construction could not be made of it to reach Estates Tail of such Persons who were dead at the Time of the making the Law, especially since 'tis well known, that when Men engage in such Crimes, they give what Protection they can to their Estates, and place them as far as they can out of Danger.

4. It appears by the Act, that the Law-makers did not intend that the Children of such Offenders should have any Benefit of their Estates, because in the Proviso there is a Saving of all Estates of Purchasers for Money bona Fide paid, and therein also a particular Exception of the Wife and Children and Heirs of the Offenders; and if the Act would not protect the Estate of the Children, though they should be Purchasers for a valuable Consideration, it will never protect their Estate under a voluntary Conveyance made by the Ancestor, especially in this Case, because the Entail carries a Suspicion with it, that it was designed with a Prospect to commit this Crime; for Sir John Danvers

was Tenant in Tail before; and in the Year 1647, levies a Fine to bar that Entail, and then limits a new Estate Tail to himself, in which there is a Proviſion to make Leaſes for any Number of Years upon what Lives ſoever in Poſſeſſion or Reverſion, with Rent or without it, and this was but the Year before the Crime committed.

5. The Proviſo in the Act for ſaving the Eſtates of Purchaſers doth protect all Conveyances and Aſſurances, &c. of Lands, not being the Lands of the late King, Queen, Prince, &c. and not being Land ſold for any pretended Delinquency ſince the Firſt of *June*, 1641, and all Statutes and Judgments ſuffered by the Offenders from being impeached; from which it appears, that the Parliament looked upon entailed Lands as forfeited; for if Eſtates made to others upon a valuable Conſideration had need of a Proviſo to ſave them from Forfeiture, a fortiori, the Eſtates out of which thoſe are derived have need of ſuch a Saving, and therefore muſt be forfeit by the Act; for which Reaſon theſe Lands are forfeited.

As to the great Objection which hath been made and inſiſted on the other Side, and which is Trudgeon's Caſe, 22 Eliz. 1 Inſt. 130. where Tenant in Tail was attainted in a Præmunire, and it was adjudged that he ſhould forfeit his Land but during his Life; for though the Statute of 16 R. 2. cap. 5. enacts, That in ſuch Caſe their Lands, Tenements, Goods and Chattels ſhall be forfeited to the King; yet that muſt be underſtood of ſuch an Eſtate as he may lawfully forfeit, and that is during his own Life, and therefore being general Words, they do not take away the Force of the Statute de Donis, ſo that his Lands in Fæ-Simple, for Life, &c. ſhall be forfeited, but the Land entailed ſhall not, during his Life.

But the Anſwer is plain: For in the Reign of R. 2. when the Statute of Præmunire was made, Eſtates Tail were under a Perpetuity by the ſaid Statute de Donis, which Statute is now much weakened in the Point of Alienation; and the Law is quite altered ſince that Time; and 'tis apparent by Multitude of Precedents, that ſuch ſtrict Conſtructions have not been made ſince that Time to preſerve Eſtates Tail from Forfeitures without ſpecial and particular Words; and therefore in the Caſe of Adams and Lambert, which is a Caſe in Point, the Judges there conſtrued Eſtates Tail to be forfeit for want of ſpecial Words in the Statute of 1 E. 6. cap. 14. to ſave it; and that was only a Law made for ſuppreſſing of Superſtitious Uſes upon a politick Conſideration; but this is a much greater Offence intended to be puniſhed by this Act, in which there are Demonſtra- 4 Co. 164.

monſtrations both from the Words and Intent of the Law-makers to make this Eſtate forfeited to the Crown, than in that Caſe ſo much relied on: And Judgment was given accordingly.

Wyld died before Judgment was given; but Juſtice Twiſden ſaid he was of that Opinion, and Jones Juſtice concurred.

## Baſſet *verſus* Salter.

After an Eſcape the Plaintiff may have a *Ca' Sa'* or *Sci' Fa'* againſt the Sheriff. 1 Ven. 4. 269. T. Jones 21, 22.

IN an Action for an Eſcape; the Queſtion was, Whether the Plaintiff may take out a Ca' Sa', or have a Fi' Fa' againſt the Defendant after the Sheriff or Gaoler voluntarily ſuffer him to eſcape; but the Court would not ſuffer it to be argued, becauſe it had been lately ſettled that it was at the Election of the Plaintiff to do either; and upon a Writ of Error brought in the Exchequer-Chamber, the Judges there were of the ſame Opinion: But in the Lord Chief Juſtice Vaughan's Time the Court of Common-Pleas were divided, but 'tis ſince ſettled. 1 Roll. Abridg. 901, 902.

* If it had been by the Conſent of the Sheriff, he could never take him again, but the Plaintiff might. Sid. 330.

If there be an Eſcape by the Plaintiff's Conſent, though he did not intend it, the Law is hard that the Debt ſhould be thereby diſcharged; as where one was in Execution in the King's-Bench, and ſome Propoſals were made to the Plaintiff in Behalf of the Priſoner, who ſeeing there was ſome Likelihood of an Accommodation, conſented to a Meeting in London, and deſired the Priſoner might be there, who came accordingly; and this was held to be an Eſcape with the *Conſent of the Plaintiff, and he could never after be in Execution at his Suit for the ſame Matter.

## Peck *verſus* Hill.

# In Communi Banco.

1 Mod. 225. Bond good given in Diſcharge of another. Mod. Rep. 221. 3 Lev. 55. contra.

DEBT upon a Bond brought againſt the Defendant as Adminiſtrator, who pleads, That he gave another Bond in his own Name in Diſcharge of the firſt Bond; and upon Iſſue joined, it was found for the Defendant; and it was moved that Judgment might not be entred hereupon, becauſe it was a bad Plea.

But North Chief Juſtice, and Wyndham and Scroggs, Juſtices, were of Opinion, That it was a good Plea, becauſe there was other Security given than what the Plaintiff had before; for upon the firſt Bond he was only liable de Bonis Inteſtatoris, but now he might be charged in his own Right, which may be well ſaid to be in full Satisfaction of the firſt Obligation; for where the Condition is for Payment of Money to the Party himſelf, there if he accept any collateral Thing in Satisfaction, 'tis good. Co. Lit. 122. b.

If a Security be given by a Stranger, it may diſcharge a former Bond, and this in Effect is given by ſuch: And 'tis not like the Caſe in *Hobart, where a Bond was given by the ſame Party upon that very Day a former Bond was payable, and adjudged not a good Diſcharge, for the Obligæ was in no better Condition than he was before. *Hob. 68.

Juſtice Atkins doubted, but inclined, That one Bond cannot be diſcharged by giving another, though the Diſcharge be applied to the Condition of the Bond; and for this, he cited Cro. Eliz. 716, 727, which was a Caſe adjudged ſo in Point; and therefore this Plea upon Demurrer ſhould have been over-ruled; yet ſince Iſſue was taken upon it, and a Verdict for the Defendant, the Plea is helped by the Statute of Jeofails, 32 H. 8. here being a direct Affirmative and Negative. Cro. Car. 85.

But as to that, the Chief Juſtice and Scroggs Juſtice replied, That an immaterial Iſſue, no ways ariſing from the Matter, is not helped; as an Action of Debt upon a Bond laid to be made in London, and the Defendant ſaith that it was made in Middleſex, and this is tried, 'tis not aided by the Statute, but there muſt be a Repleader. Poſtea 139.

But becauſe it was ſworn, That the Obligor (who was the Inteſtate) was alive Four Years after the Time that the Second Bond was given, and for that Reaſon it could not be given upon the Account of the Defendant's being liable as Adminiſtrator, but muſt be intended a Bond to ſecure a Debt of his own, therefore a new Trial was granted.

## Cook *and others verſus* Herle.

Covenant will lie in the Perſonalty, tho' the Grant be executed by the Statute of Uſes, which makes a Diſtreſs the proper Remedy. Mod. Rep. 223.

IN Covenant, the Caſe was this: Charles Cook made a Jointure to Mary his Wife for Life, and died without Iſſue; the Land deſcended to Thomas Cook his Brother and Heir, who grants an Annuity or Rent-Charge of 200 l. per Annum to the Plaintiffs in Truſt for Mary, and this was to be in Diſcharge of the ſaid Jointure, *Habendum* to them, their Heirs, Executors, Adminiſtrators and Aſſigns in Truſt for the ſaid *Mary* for Life, with a Clauſe of Diſtreſs, and a Covenant to pay the 200 l. per Annum to the ſaid Truſtæs for the Uſe of the ſaid Mary; the Breach aſſigned was, that the Defendant had not paid the Rent to them for the Uſe of *Mary*.

The Defendant demurred ſpecially, for that it appears by the Plaintiff's own ſhewing that here is a Grant of a Rent-Charge for Life, which is executed by the Statute of Uſes, and therefore there ought to have bæn a Diſtreſs for Non-payment, which is the proper Remedy given by the Statute, and this Action will not lie in the Perſonalty.

2. 'Tis ſaid, The Defendant did not pay it to the Plaintiffs for the Uſe of Mary, which is a Negative Pregnant, and implies that it was paid to them.

3. 'Tis not averred, that the Money was not paid to Mary, and if 'tis paid to her, then the Breach is not well aſſigned.

Ex parte Quer. But Serjeant Baldwin for the Plaintiff replied, That it was not a Queſtion in this Caſe, whether the Rent-Charge was executed by the Statute or not, for quacunque via data an Action of Covenant will lie; and that the Breach was aſſigned according to the Words of the Covenant, and ſo prima facie 'tis well enough; for if the Defendant did pay the Money to the Plaintiffs he may plead it, and ſo he may likewiſe if he paid it to Mary.

Curia. The Court were all of Opinion, That this Rent-Charge was executed by the Statute of Uſes by the expreſs Words thereof, which executes ſuch Rents granted for Life upon Truſt, as this Caſe is, and transfers all Rights and Remedies incident thereunto, together with the Poſſeſſion to *Ceſtuy que uſe*; ſo that though the Power of Diſtraining be limited to the Truſtæs by this Dæd, yet by the Statute which transfers that Power to Mary, ſhe may diſtrain alſo; but this Covenant being Collateral, cannot be transferred.

5 Co. 18. a.

The Clauſe of Diſtreſs, by the expreſs Words of the Act, is given to the Ceſtuy que Uſe; but here is a double Remedy, by Diſtreſs or Action; for if the Leſſee aſſign his Intereſt, and the Rent is accepted of the Aſſignee, yet the Covenant lies againſt the Leſſee for Non-payment upon the expreſs Covenant to * pay; ſo if a Rent be granted to S. and a Covenant to pay it to N. for his Uſe, 'tis a good Covenant.

* Hayes *and* Bickerſtaff. Hollis *and* Carr, Antea.

And it was agreed, That the Aſſignment of a Breach according to the Words of the Covenant is good enough, and that if any Thing be done which amounts to a Performance, the other Side muſt plead it; as in this Caſe, the Defendant might have pleaded that the Money was paid to Mary, which is a Performance in Subſtance, but it ſhall not be intended without pleading of it: Whereupon Judgment was given for the Plaintiff.

Read *verſus* Dawſon.

DEBT upon Bond againſt the Defendant as Executor: Iſſue was joined, whether the Defendant had Aſſets or not on the Thirtieth Day of November, which was the Day on which he had the firſt Notice of the Plaintiff's original Writ, and it was found for the Defendant, that then he had not Aſſets.

Repleader after an immaterial Iſſue.

It was moved for a Repleader, (becauſe it was ſaid) this was an immaterial Iſſue, for though he had no Aſſets then, yet if he had any afterwards, he is liable to the Plaintiff's Action.

But Barrel, Serjeant, moved for Judgment upon this Verdict, by Reaſon of the Statute of 32 H. 8. which helps in Caſes of Miſpleading or inſufficient Pleading. 'Tis true, there are many Caſes which after Verdict are not aided by this Statute; as if there are Two Affirmatives, which cannot make an Iſſue; or when after a Traverſe Iſſue is joined with an hoc petit quod inquiratur per Patriam; this is no Iſſue. 2 Anderſ. 6 & 7. So if there be no Plea at all, as if an Action is brought againſt Baron and Feme, and ſhe pleads only. 2 Cro. 288. So if the Party puts himſelf ſuper Patriam, where it ſhould be tried by Record; or if the Plea be nothing to the Purpoſe, or lie not in the Mouth of the Parties, ſuch immaterial Iſſues as theſe cannot be good.

Yelv. 210. Hob. 126.

The Difference in Moor 867. is, If the Plea, on which the Iſſue is joined, hath no colourable Pretence in it to bar the Plaintiff; or if it be againſt an expreſs Rule in the Law, there the Iſſue is immaterial, and ſo as if

there was no Iſſue; and therefore 'tis not aided by the Statute; but if it hath the Countenance of a legal Plea, though it want neceſſary Matter to make it ſufficient, there ſhall be no Repleader, becauſe 'tis helped after Verdict.

Here the Parties only doubt, whether there were Aſſets at the Time of the Notice? And 'tis found there were none, and ſo Judgment was to be given accordingly; and of that Opinion was the whole Court.

But Juſtice Atkins was clear of Opinion, That if the Parties join in an immaterial Iſſue, there ſhall be no Repleader, becauſe 'tis helped after Verdict by theſe Words in the Statute, viz. [any Iſſue] 'tis not ſaid an Iſſue joined upon a material Point; and the Intent of the Statute was to prevent Repleaders; and that if any other Conſtruction ſhould be made of that Act, he was of Opinion, That the Judges ſate there not to expound, but make a Law; for by ſuch an Interpretation much of the Benefit intended by the Act to the Party, who had a Verdict, would be reſtrained.

Curia. The other Juſtices were all of Opinion, That ſince the Making of this Statute it had been always allowed, and taken as a Difference, that when the Iſſue was perfectly material there ſhould be no Repleader; but that it was otherwiſe where the Iſſue was not material.

And Juſtice Scroggs aſked merrily, If Debt be brought upon a Bond, and the Defendant pleads Robin Hood dwelt in a Wood, and the Plaintiff joins Iſſue that he did not, this is an immaterial Iſſue: And ſhall there not be a Repleader in ſuch Caſe after Verdict? Ad quod non fuit Reſponſum.

## Beaumont *verſus* .....

Wager of Law. 2 Vent. 171. THE Plaintiff brings an Action of Debt upon a Judgment obtained againſt the Defendant in a Court Baron, having declared there in an Action on the Caſe upon an Aſſumpſit, and recovered.

Sid. 366. The Defendant came to wage his Law, and was ready to ſwear that he owed the Plaintiff nothing; but the Court held that he was not well adviſed, for by the Recovery in the Inferior Court it become now a Debt, and was owing: And being aſked, Whether he had paid the Money? He anſwered, That he owed nothing: Whereupon the Court concluded that he had not paid it, and therefore they would not admit him to wage his Law

without bringing ſufficient Compurgators to ſwear that they believed he ſwore Truth; but ſuch not appearing, the Defendant defecit de Lege, and Judgment had been given againſt him, but he offered to bring the Money recovered and the Coſts into the Court, and to go to a new Trial, it being a very hard Caſe upon him at the former Trial, where the Demand was of a Quit-Rent of 18 d. per Annum; the Defendant promiſed, that if the Plaintiff would ſhew his Title, and ſatisfy him that he had a Right to demand it, he would pay him the Rent; and at the Trial, expreſs Oath was made of a Promiſe to pay, upon which the Verdict was obtained; whereas it was then urged that the Freehold would come in Queſtion upon that Promiſe, and ſo the Inferior Court could have no Juriſdiction.

And afterwards the Chief Juſtice ſaid, That it hath been adjudged in the King's-Bench, that an Inferior Court cannot hold Plea on a quantum meruit for Work done out of the Juriſdiction, though the Promiſe be made within; and that he knew where a Perſon of Quality intending a Marriage with a Lady, preſented her with a Jewel, and the Marriage not taking Effect, he brought an Action of Detinue againſt her, and ſhe taking it to be a Gift, offered to wage her Law; but the Court was of Opinion, That the Property was not changed by this Gift, being to a ſpecial Intent, and therefore would not admit her to do it. Quod nota.

## Styleman *verſus* Patrick.

AN Action on the Caſe was brought by the Plaintiff againſt the Defendant, for eating his Graſs with his Sheep, ſo that he could not in tam amplo modo enjoy his Common; there was a Verdict for the Plaintiff, and it was now moved, that he ſhould have no more Coſts than Damages, becauſe this was a Treſpaſs in its own Nature, and the Judge of Aſſize had not certified that the Title of any Land was in Queſtion. Coſts allowed.

But the Court were all of Opinion, that this Caſe was not within the Statute. Curia.

For it was not a frivolous Action, becauſe a little Damage done to one Commoner, and ſo to Twenty, may in the Whole make it a great Wrong; if the Cauſe were frivolous, the Judge of Aſſize may mark it to be ſuch by Vertue of the Statute of 43 Eliz. cap. 6. and then there ſhall be no more Coſts than Damages; and though in this Caſe the Plaintiff hath in his Declaration ſet out a Title to his

his Common, yet the Title of the Land cannot possibly come in Question, and therefore not to be certified as in Cases of Trespass; neither is there any Need of a Certificate, if it appears by the Pleading that the Title of the Land is in Question.

The Court being against the Defendant as to the Costs, his Counsel then moved in Arrest of Judgment, because the Plaintiff sets forth his Right to the Common only by way of Recital with a cumque etiam, &c. that he had a Right to Common in such a Place, sed non allocatur; for 'tis Affirmative enough, and afterwards he is charged with doing the Plaintiff Damage; and so the Case is not like to an Action of Trespass quare cum he did a Trespass, for there the Sense is imperfect.

Postea.

# DE

# Termino Sancti Hill.

## Anno 28 & 29 Car. II. in Communi Banco.

James *verſus* Johnſon.

IN Treſpaſs, the Defendant juſtified by a Preſcription to have Toll, and Iſſue being joined thereupon, the Jury found a Special Verdict, in which the Caſe upon the Pleadings was, viz. Before the Diſſolutions of Priories, the Manor now in the Poſſeſſion of the Defendant was Parcel of the Priory of B. which came to the Crown by the ſaid Diſſolution; and the King made a Grant thereof to Sir Jervas Clifton in Fæ, together with the ſaid Toll adeo plene, as the Prior had it; and the Defendant having brought down a Title by ſeveral Meſne Aſſignments, claims by Vertue of a Leaſe from Sir Jervas for Seven Years then in Being, alledging, That the ſaid Sir Jervas, and all thoſe whoſe Eſtate he had might take Toll; and whether this Pleading by a Que Eſtate to have Right of Toll was good in Law, the Jury doubted. *Que Eſtate*, where 'tis pleadable. Mod. Rep. 231.

Baldwin, Serjeant, for the Plaintiff, argued, That the Juſtification was not good, becauſe there are Two Sorts of Toll, viz. Toll through, and Toll traverſe; one is in the King's Highway, and the other in a Man's own Soil; and it doth not appear for which the Defendant hath juſtified. If it be for the firſt, then he ought to ſhew that he did make a Cauſeway, or ſome other Thing that might be an Advantage to the Paſſengers, to entitle himſelf to a Preſcription; but if it be for the other, then he muſt alſo ſhew it was for paſſing upon his Soil, which implies a Conſideration. 22 Aſſize, Kelw. 148. Pl. Com. 236. Lord Berkley's Caſe. 1 Cro. 710. Smith *verſus* Sheppard; by which Caſes it appears that the Juſtification ought to be certain. Ex parte Quer.

Then

Then as to the Point in Question, he said, That Toll cannot be Appurtenant to a Manor, and so the Pleading by a Que Estate is not good; but if that should be admitted, yet the Manor being vested in the Crown by the Dissolution, the Toll then became in Gross, and could never after be united to the Manor, or Appurtenant thereunto.

But it was argued for the Defendant by Maynard, Serjeant, and the whole Court were clear of Opinion, That the Issue was upon a particular Point, and the Title was admitted, and that nothing remained in Question but the Point in Pleading. And as to what had been objected, That Toll cannot belong to a Manor, 'tis quite otherwise; for an Advowson, a Rent, a Toll, or any Profit Apprender may be Appurtenant to it. 'Tis true, a Man cannot prescribe by a Que Estate of a Rent, Advowson, Toll, &c. but he may of a Manor, to which these are Appendant; 'tis likewise true, that if the Defendant had said this was Toll for passing the Highway, he must shew some Cause to entitle himself to the Taking of it, as by doing something of Publick Advantage.

But this general Way of Pleading is the most usual, and so are the Precedents, and it ought to come on the other Side, and to be alledged, That the Defendant prescribed for Toll in the Highway; and in this Case, tho' the Manor came to the Crown, the Toll remained Appurtenant still, and so it continued when it was granted out. The Difference is between a Thing which was originally a Flower of the Crown, and other Things which are not, as Catalla Felonum, &c. if such come again to the King, they are merged in the Crown; but 'tis otherwise in Cases of a Leet, Park, Warren, Toll, &c. which were first created by the King. 9 Co. Abbot de Strata Marcella's Case. So that this Toll is not become in Gross by the Dissolution, whereupon Judgment was given for the Defendant.

## *Sir* William Turner's *Case.*

Amendment not after Issue joined.

Debt qui tam, &c. for 100 l. against Sir William Turner, being a Justice of Peace in London, for denying his Warrant to suppress a Seditious Conventicle of one Mr. Turner in New-street. This Cause was to be tried by Nisi prius this Term, before the Chief Justice. And now the Plaintiff moved to amend one Word in the Declaration, wherein he was mistaken, for he had laid the Meeting

ing to be at Turner's Manſion-houſe, and upon Enquiry, he underſtood the Place of Meeting was not at his Manſion-houſe, but at a little Diſtance from it, and ſo prayed the Word Manſion might be ſtruck out.

But the Chief Juſtice ſaid, That after Iſſue joined, and the Cauſe ſet down to be tried, and this being a penal Statute, no Precedent could be ſhewn of an Amendment in ſuch Caſe, and therefore would not make this the firſt, and ſo Leave was given to the Plaintiff to diſcontinue upon Payment of Coſts. Curia.

## Brown *verſus* Johnſon.

IN Accompt: The Plaintiff declares againſt the Defendant, for that upon the Firſt of March, 22 Car. 2. & abinde to the Firſt of May, 27 Car. 2. he was his Bailiff, and Receiver of 80 Pigs of Lead. Time where 'tis made Parcel of the Iſſue, not good.

The Defendant pleads, That from the ſaid Firſt Day of March, 22 Car. 2. to the Firſt Day of May, 27 Car. 2. he was not the Plaintiff's Bailiff, or Receiver of the ſaid 80 Pigs of Lead, & hoc paratus eſt verificare. To this the Plaintiff demurred, and aſſigned ſpecially for Cauſe, that the Times from the Firſt of March to the Firſt of May are made Parcel of the Iſſue, which ought not to be, becauſe the Plaintiff in his Declaration muſt alledge a Time for Form-ſake; but the Defendant ought not to tie him up to ſuch Time alledged, for he might have ſaid he was not Bailiff modo & forma.

And for this the Caſe of Lane and Alexander was cited, where the Defendant in Ejectment makes a Title by Copy of Court-Roll, granted to him 44 Eliz. and the Plaintiff replies his Title by the like Grant, 1 Junii, 43 Eliz. The Defendant maintains his Bar, and traverſeth that the Quæn, 1 Junii, in the 43d Year of her Reign, granted the ſaid Land by Copy, and upon Demurrer it was adjudged, That the traverſing of the Day is Matter of Subſtance, which being made Part of the Iſſue, is naught.

But on the other Side it was objected, That Time is material, and that in Actions of Accompt 'tis proper to make it Parcel of the Iſſue; for a Man may be Bailiff for Two, but not for Three Years, and a Releaſe may be pleaded from ſuch a Time to ſuch a Time. Fitz. Accompt. 30. Raſt. Entry f. 8. 19 pl. 1. f. 20. pl. 6. f. 22. pl. 2.

1. Then Exceptions were taken to the Plea, first, for that the Plaintiff having charged the Defendant as Receiver of 80 Pigs of Lead; the Defendant pleads, and that he was not Receiver thereof, but doth not say of any Part thereof; for which Reason the Court held the Plea ill, because he might retain 79, and yet not 80 Pigs, but to plead generally ne unques Receptor is well enough; though it was urged, That if it had been found against him upon such an Issue that he had received any Parcel of the Lead, he should have accompted. 24 H 4. 21. 2 Roll. 3. 14. 32 H. 6. 33. Fitz. Accompt. 16. Cro. Eliz. 850. Fitz. Accompt 14, Rast. Entry 18, 19, 20.

2. The Defendant concludes & hoc paratus est verificare, whereas it should be & de hoc ponit se super patriam; but the Court doubted of this, because it was not specially assigned.

Postea. 3. The Plaintiff charged the Defendant as his Bailiff upon the First of March, and the Defendant pleads, that he was not his Bailiff from the First of March, so he exclydes that Day; and this the Court held to be incurable, and likewise that the Time ought not to be made Parcel of the Issue, and so Judgment was given quod computet.

2 Sand. 317, 318.

## Abraham *versus* Cunningham.

Administrator sells a Term, afterwards an Executor appears and renounces, yet the Sale was adjudged void. 1 Ven. 303. T. Jones 72. 2 Levinz 182.

6 Co. Packman's Case.

IN a Special Verdict in Ejectment, the Case upon the Pleadings was, viz, Sir David Cunningham being possessed of a Term for Years, made his Will, and therein appointed his Son Sir David Cunningham to be his Executor, and died. Sir David the Executor, in the Year 1663 made his Will also, and therein appointed David Cunningham his Son, and Two others, to be his Executors, and died; those Two Executors die, and B. a Stranger takes Administration, cum Testamento annexo, and continues this Administration from the Year 1665, to the Year 1671, in which Time he made an Assignment of this Term to the Lessor of the Plaintiff, for which he had received a thousand Pounds: And in the Year 1671 the surviving Executor of Sir David the Executor made Oath in the Archbishop's Court, that he never heard of his Testator's Will 'till then, nor ever saw it before, and that he had not meddled with the Estate, nor renounced the Executorship: Then a Citation goes to shew Cause why the Administration should not be repealed, and Sentence was given that it should be revoked; upon which the Executor enters, and the Lessor of the Plaintiff entred upon him.

This Case was argued by Saunders for the Plaintiff, and Levinz for the Defendant. And first it was said in Behalf of the Plaintiff, that the Authorities in the Books were strong on his Side, that the first Administration was well granted: 'Tis true, if a Man make a Will, and Administration is granted, and that Will is afterwards proved, such Administration is void, as in Greysbrook and Foxe's Case. Pl. Com. Ex parte Quer.

But in this Case, after the Death of Sir David Cunningham the Executor, his Testator is dead Intestate; for to make an Executor, there must be first the Naming of him; then there must be some concurring Act of his own to declare his Assent, that he will take Onus Executionis upon him, for no Man can make another Executor against his Will; so that if after the Death of the first Executor, those other Executors appointed by him had made such a Declaration as this surviving Executor hath since done, their Testator had died Intestate. 7 E. 4. 12, 13.

The Executor is made by the Testator, and the Ordinary is empowered by the Statute to make the Administrator where the Person dies Intestate; so that 'tis plain, there cannot be an Executor and Administrator both together: If he who is made so, taketh upon him long after the Will to be Executor, it shall make him such by Relation from the Time of the Death of the Testator; but here is no Executor, nor ever was: 'Tis true, that one was named, but as soon as he heard of the Will, he renounced; and therefore there being no Executor in this Case, nothing now can hinder the Administration to be granted cum Testamento annexo.

If the Testator should die indebted, or have Debts owing to him, and the Executor refuses Probate, and renounces his Executorship, Administration must be granted, for Lex fingit ubi subsistit Æquitas, and the Executor having a Possibility to be such, and by his Refusal becoming no Executor, why should the bare naming of him to be an Executor have Relation to make such Administration void, since 'tis not the Name, but the Doing of the Office, which makes him Executor? Dyer 372.

If all these Executors had died after Administration thus committed, it cannot be said that they ever were Executors.

There can be no Inconvenience that this Administration should be good; for 'tis just that Creditors should have their Debts, and Purchasers should be secure in the Things purchased.

If the Testator was indebted, an Action will lie against an Executor de son Tort for such Debt, which Executor is

altogether as wrongful as the Administrator to whom Administration is committed, and the Will afterwards proved by the rightful Executor; and if such Executor of his own Wrong be possessed of a Term for Years, and a Creditor recovers against him, that Executor shall have the Term in Satisfaction of his Debt; and by the same Reason shall the Administrator here have a good Title to this Term, which he sold for the Payment of a just Debt, and there is no Authority for making such Administration void, unless it be where the Executor proves the Will, but never when he renounceth.

Ex parte Def. But on the other Side it was said, That an Executor of an Executor hath all the Interest which the first Executor had; so that being an Executor, the Administration granted by the Ordinary is void, and the Renunciation afterwards shall never make it good; and this will appear by the different Interests which the Ordinary and the Executor have by Law.

1. The Ordinary originally had nothing to do with the * Godolph. 59. Estate of the Intestate, for * bona Intestati capi solent in manus Regis. Afterwards Two Statutes were made, which establish his Power; the first was West. 1. cap. 19. and the other was 31 E. 3. cap. 11. Yet no Power was thereby given him to dispose of the Goods to his own Use, or to the Use of any other; he had only a Property secundum quid, and not an absolute and uncontroulable Right in the Estate.

2. But the Executor hath a Right and Interest given to him by Law when the Will is made, and may * Release * 5 Co. Middleton's Case before Probate; if he therefore hath an absolute Right, and the Ordinary hath only a qualified Property, how can he grant the Administration of the Goods, which at the same Time are lawfully vested in another? Suppose the Executor sells such Goods to one Man, and the Administrator to another, the Sale of one of them must be void; and for the said Reasons, and by the constant Course of the Law, it must be the latter. 2 Anders. 150. Case 83.

It hath been objected, That here was no Executor at all, only one named; or if it be admitted that there was an Executor, yet his Refusal shall relate to the Time of the Administration committed, and make that good which might not be so before.

But as to that, he said, That here was an Executor appointed by the Will, who had an Interest, and Administration being granted to another, 'tis void ab initio, and what is once void, cannot be made good by any Subsequent Act. 10 Co. 62. a. Mod. Rep. 214.

Here was a Want of Power in him who did this Act; for the Ordinary could not grant Administration where there is an Executor, and therefore no Relation shall be to make that good which was once void; but if it had been only voidable, it might have been otherwise.

A Relation may be to inable the Party to recover the Goods of the Intestate, and to punish Trespasses; as if a Man die possessed of Goods, and a Stranger convert them, and afterwards Administration is granted to S. this Administration shall * relate to the Time of the Death of the Intestate, so that he may maintain Trover before the Ordinary had committed it to him, but it will never aid the Acts of the Parties to avoid them by Relation: As if a Man makes a Feoffment to a Feme-Covert, and afterwards devises the same Land, the Husband disagrees, this shall have Relation between the Parties, so as the Husband shall not be charged in Damages, but it shall not make the void Devise good. 3 Co. 28 b. Butler *and* Baker's Case. * 2 Rol. Abr. 399.

So if a Man makes a Release, and afterwards get Letters of Administration, that shall not relate to make his Release good to bar him; neither shall his Refusal of the Executorship do it, because at the Time of the Release, or the Refusal, there was not any Right of Action in him; for that commences in the one Case after Administration, and in the other after the Probate of the Will.

Notwithstanding such Refusal, this Executor may afterwards administer at his Pleasure, and intermeddle with the Goods of the Testator, and if the Administration should be good also, then they would have a Power over the same Estate by Two Titles at the same Time, which cannot be. Godolph. 141.

The greatest Argument which can be brought against this is ab Inconvenienti, because it cannot be safe to purchase under an Administrator, since a Will may be concealed for a Time, and afterwards the lawful Executor therein appointed may appear; but this is more proper for the Wisdom of a Parliament to redress, than that the Law should be altered by a Judicial Determination of the Court, and therefore he prayed Judgment for the Defendant.

The Court was of Opinion, That the Ordinary cannot grant Administration where there is an Executor named in the Will, and therefore gave Judgment for the Defendant against the Tenor of this Term. Judgment.

*The*

## *The Lord* Townſend *verſus Dr.* Hughes. *In C. B.*

No new Trial in an Action of *Scandalum Magnatum.* Mod. Rep. 232.

THE Plaintiff brought an Action of Scandalum Magnatum for theſe Words ſpoken of him by the Defendant, viz. He is an unworthy Man, and acts againſt Law and Reaſon: Upon Not-Guilty pleaded, the Caſe was tried, and the Jury gave the Plaintiff 4000 l. Damages.

The Defendant before the Trial made all poſſible Submiſſion to my Lord; he denied the ſpeaking the Words, and made Oath that he never ſpoke the ſame: After the Trial he likewiſe addreſſed to my Lord as before, making ſeveral Proteſtations of his Innocency; but having once in a Paſſion ſaid, that he ſcorned to ſubmit, my Lord for that Reaſon would not remit the Damages. It was therefore moved for a new Trial, upon theſe Reaſons:

1. Becauſe the Witneſſes, who proved the Words, were not Perſons of Credit; and that at the Time when they were alledged to be ſpoken, many Clergy-men were in Company with the Defendant, and heard no ſuch Words ſpoken.

2. It was ſworn, That one of the Jury confeſſed, that they gave ſuch great Damages to the Plaintiff (not that he was damnified ſo much, but) that he might have the greater Opportunity to ſhew himſelf Noble in the remitting of them.

3. And which was the principal Reaſon, becauſe the Damages were exceſſive.

Curia. The Court delivered their Opinion ſeriatim; and Firſt:

The Chief Juſtice North ſaid, In Caſes of Fines for Criminal Matters, a Man is to be fined by Magna Charta with a Salvo Contenemento ſuo, and no Fine is to be impoſed greater than he is able to pay; but in Civil Actions, the Plaintiff is to recover by way of Compenſation for the Damages he hath ſuſtained, and the Jury are the proper Judges thereof.

This is a Civil Action brought by the Plaintiff for Words ſpoken of him, which if they are in their own Nature actionable, the Jury ought to conſider the Damage which the Party may ſuſtain; but if a particular Averment of ſpecial Damages makes them actionable, then the Jury are only to conſider ſuch Damages as are already ſuſtained, and not ſuch as may happen in Futuro, becauſe for ſuch the Plaintiff may have a new Action: He ſaid, that as a Judge he could not tell what Value to

ſet upon the Honour of the Plaintiff, the Jury have given 4000 l. and therefore he could neither leſſen the Sum, or grant a new Trial, eſpecially ſince by the Law the Jury are Judges of the Damages; and it would be very inconvenient to examine upon what account they gave their Verdict; they having found the Defendant guilty did believe the Witneſſes, and he could not now make a Doubt of their Credibility.

Wyndham, Juſtice, accorded in omnibus.

Atkins, Juſtice, contra. That a new Trial ſhould be granted, for 'tis every Day's Practice, and he remembred the Caſe of Goulſton *and* Wood in the King's Bench, where the Plaintiff in an Action on the Caſe for Words for calling of him Bankrupt, recovered 1500 l. and that Court granted a new Trial, becauſe the Damages were exceſſive.

The Jury in this Caſe ought to have Reſpect only to the Damage which the Plaintiff ſuſtained, and not to do an unaccountable Thing, that he might have an Opportunity to ſhew himſelf Generous; and as the Court ought with one Eye to look upon the Verdict, ſo with the other they ought to take notice what is contained in the Declaration, and then to conſider whether the Words and Damages bear any Proportion; if not, then the Court ought to lay their Hands upon the Verdict: 'Tis true, they cannot leſſen the Damages; but if they are too great, the Court may grant a new Trial.

Scroggs, Juſtice, accorded with North and Wyndham, that no new Trial can be granted in this Cauſe: He ſaid, That he was of Counſel with the Plaintiff before he was called to the Bench, and might therefore be ſuppoſed to give Judgment in Favour of his former Client, being prepoſſeſſed in the Cauſe, or elſe (to ſhew himſelf more ſignally juſt) might without conſidering the Matter give Judgment againſt him; but that now he had forgot all former Relation thereunto, and therefore delivered his Opinion, That if he had been of the Jury, he ſhould not have given ſuch a Verdict; and if he had been Plaintiff, he would not take Advantage of it, but would overcome with Forgiveneſs ſuch Follies and Indiſcretions of which the Defendant had been guilty; but that he did not ſit there to give Advice, but to do Juſtice to the People. He did agree, That where an unequal Trial was, (as ſuch muſt be where there is any Practice with the Jury) in ſuch Caſe 'tis good Reaſon to grant a new Trial; but no ſuch Thing appearing to him in this Caſe, a new Trial could not be granted.

Suppoſe

Suppoſe the Jury had given a ſcandalous Verdict for the Plaintiff, as a Penny Damages, he could not have obtained a new Trial in Hopes to increaſe them, neither ſhall the Defendant in Hopes to leſſen them; and therefore by the Opinion of theſe Three Juſtices, a new Trial was not granted.

Afterwards in this Term, Serjeant Maynard wobed in Arreſt of Judgment, and ſaid, That this Action was grounded upon the Statute of R. 2. which conſiſts of a Preamble, reciting the Miſchief, and of the enacting Part in giving of a Remedy, and that the Defendant's Caſe was neither within the Miſchief, or the Remedy.

This Statute doth not create any Action by way of particular Deſign, and if the Matter was now Res integra, much might be ſaid that an Action for Damages will not lie upon this Statute; for the Statute of Weſtm. 2. appoints, That the Offender ſhall ſuffer Impriſonment, until he produces the Author of a falſe Report; and the Ca. 33. Statute of 2 R. 2. which recites that of Weſt. 2. gives the ſame Puniſhment, and the Action is brought qui tam, &c. and yet the Plaintiff only recovers for himſelf. It was uſual to puniſh Offenders in this Kind in the Star-Cham- * 12Co.132. ber; as in the * Earl of Northampton's Caſe, where one Goodrick ſaid of him, That he wrote a Book againſt *Garnet*, and a Letter to *Bellarmine*; intimating, that what he wrote in the Book was not his Opinion, but only ad captandum Populum, which was a great Diſgrace to him in thoſe Days, being as much as to ſay, he was a Papiſt. Cro. Eliz.

But the Serjeant would not inſiſt upon that now, ſince it hath been ruled, that where a Statute prohibits the Doing of a Thing, which, if done, might be prejudicial to another; in ſuch Caſe he may have an Action upon that very Statute for his Damages.

But the Ground on which he argued was, That theſe Words as ſpoken, are not within the Meaning of the Act, for they are not actionable.

1. Becauſe they are no Scandal, and Words which are actionable muſt import a great Scandal, which no Circumſtance or Occaſion of Speaking can excuſe; and if they are Scandalous, and capable of any Mitigation by the precedent Diſcourſe, the Pleading of that Matter will * 4 Co. make them not actionable; and for this, the Lord * Cromwell's Caſe is a plain Authority, the Words ſpoken of him were, You like thoſe that maintain Sedition againſt the King's Perſon: The Occaſion of ſpeaking of which was to give an Account of his favouring the Puritan Preachers, which was all that was intended by the former Diſcourſe; for

that Lord had approved a Sermon which was preached by a Parſon againſt the Common-Prayer-Book, and the Defendant having forbid ſuch Preaching, the Lord told him, That he did not like him; upon which he ſpoke thoſe Words, ſo that the ſubject Matter explained the Senſe, for which Reaſon it was adjudged that the Action would not lie.

2. The Scandal for which an Action may be brought within this Statute muſt be falſe, for that Word goes quite through the whole Act, viz. Falſe News, Falſe Lies, &c. and the Words here are ſo general, that it cannot appear whether they are true or falſe, for there can be no Juſtification here; as in caſe where a Man is charged with a particular Crime, my Lord Townſend is not charged with any particular Act of Injuſtice as a Subject, nor with any Misdemeanour as a Peer, nor with any Offence in an Office.

If therefore in all Actions brought upon this Statute the Defendant may juſtify and put the Matter in Iſſue to try whether it be true or falſe; and in this Caſe the Defendant can neither juſtify nor traverſe, for this Reaſon the Action will not lie.

That the Words are general and of a doubtful Signification, it cannot be denied; for to ſay, He is an unworthy Man, imports no particular Crime: Unworthy is a Term of Relation, as he is unworthy of my Friendſhip, Acquaintance or Kindred, and ſo may be applicable to any Thing; and a Lord may in many Things be unworthy of a particular Man's Friendſhip: As if he promiſes to pay a Sum of Money at a Day certain, and faileth in the Payment, (as 'tis often ſeen) ſuch is an unworthy Man, but that will not bear an Action: He is an unworthy Man who invites another to Dinner to affront him; but it will not bear an Action to ſay, That a Lord invited me to Dinner to abuſe me; neither will it be actionable to ſay, He is an unworthy Man, becauſe ſuch Inſtances may be given of his Unworthineſs, which will not bear an Action. If my Lord had been compared to any baſe and unworthy Thing, theſe Words might have been actionable; and that was the Caſe of the Lord Marqueſs of Dorcheſter, it being ſaid of him, That there was no more Value in him than in a Dog.

Then to ſay, A Man acts againſt Law, this is no Scandal, becauſe every Man who breaks a Penal Law, and ſuffers the Penalty, is not guilty of any Crime. The Statute commands the Burying in Woollen, the Party buries one of his Family in Linen; in this he acts againſt the Law, but if the Penalty is ſatisfied, the Law is ſo likewiſe.

A Man who acts againſt Law acts againſt Reaſon, be-

cauſe Lex eſt ſumma Ratio; but no Inſtance is here given wherein he did thus act: 'Tis not ſaid, That he did act againſt Law wilfully, or that he uſed to do any Thing againſt Law; and ſo cannot be like the Caſe of the Duke of Buckingham, who brought an Action for theſe Words, viz. You are uſed to do Things againſt Law, and put Cattle into a Caſtle where they cannot be replevied; for there was not only an Uſage charged upon him, but a particular Inſtance of Oppreſſion.

This Action lies for Words ſpoken of a Judge of either Bench, and of a Biſhop, as well as of a Peer. Now if a Man ſhould ſay, A Judge acted againſt Law, will an Action lie? becauſe a Judge may do a Thing againſt Law, and yet very juſtly and honeſtly, unleſs all the Judges were infallible, and could not be ſubject to any Miſtakes, which none will deny.

So if a Biſhop return the Cauſe of his Refuſal to admit a Clerk quia Criminoſus, this is a Return againſt Law, becauſe 'tis not general; but if J. S. ſhould ſay, A Biſhop acted againſt Law, and ſhew that for Cauſe, an Action would not lie. If the Lord Townſend had commanded his Bailiff to make a Diſtreſs without Cauſe, that had been acting againſt Law and Reaſon.

He agreed the Words to be uncivil, but not actionable; for if ſuch Conſtruction ſhould be made, a Man muſt talk in Print, or otherwiſe not ſpeak any Thing of a Peer for fear of an Action.

There are many Authorities where a Peer ſhall not have an Action for every trivial and ſlight Expreſſion ſpoken of him. As to ſay of a Peer, He keeps none but Rogues and Raſcals about him like himſelf, by the Opinion of two Juſtices, Yelverton and Flemming, the Action would not lie, becauſe they are Words of Scolding; and this was the Caſe of the Earl of Lincoln. Cro. Jac. 196. But the Court was divided; the Defendant died, and ſo the Writ abated.

Actions for Words have been of late too much extended; formerly there were not above Two or Three brought in many Years; and if this Statute ſhould be much inlarged, the Lords themſelves will be prejudiced thereby by maintaining Actions one againſt another.

Upon this Statute of 2 R. 2. c. 5. there was no Action brought 'till 13 H. 7. which was above an Hundred Years after the making of that Law; and the Occaſion of making the Law was, becauſe the Duke of Lancaſter, who was then the firſt Prince of the Blood, took Notice that divers were ſo hardy as to ſpeak of him ſeveral lying Words, 1 R. 2. Num. 26. and therefore this Statute was made to

punish those who devised false News, and horrible and false Lies of any Peer, &c. whereby Discords might arise between the Lords and Commons, and great Peril and Mischief to the Realm and quick Subversion thereof: Now from the natural Intent and Construction of these Words in the Act, can it be supposed that if one should say, Such a Peer is an unworthy Man, that the Kingdom would be presently in a Flame, and turned into a State of Confusion and Civil War; and to say, That he acts against Law, that the Government would thereby be in Danger to be lost, and quick Subversion would follow? This cannot be the common and ordinary Understanding of these Words.

If therefore the Plaintiff by speaking these Words was in no Hazard, nor any wise damnified; if he was not touched in his Loyalty as a Peer, nor in Danger of his Life as a Subject; if he was not thereby subjected to any Corporal or Pecuniary Punishment, nor charged with any Breach of Oath, nor with a particular Miscarriage in any Office; if the Words are so general that they import no Scandal, and are neither capable of any Justification; and lastly, if they are not such horrible Lies as are intended to be punished by the Statute; for these Reasons he concluded the Action would not lie, and therefore prayed, that the Judgment might be arrested.

Serjeant Baldwin and Serjeant Barrel argued on the same Side for the Defendant, but nothing was mentioned by them which is not fully insisted on in the Argument of Serjeant Maynard, for which Reason I have not reported their Arguments.

But Pemberton, Serjeant, who argued for the Plaintiff, said, That it would conduce much to the Understanding of the Statute of 2 R. 2. cap. 5. upon which this Action of Scandalum Magnatum was grounded, to consider the Occasion of the making of it. Ex parte Quer.

In those Days, the English were quite of another Nature and Genius from what they are at this Time; the Constitution of this Kingdom was then Martial, and given to Arms; the very Tenures were Military, and so were the Services, as Knight-Service, Castle-Guard and Escuage. There were many Castles of Defence in those Days in the Hands of private Men; their Sports and Pastimes were such as Tilts and Turnaments, and all their Imployments were tending to breed them up in Chivalry.

Those who had any Dependancy upon Noble-men, were enured to Bows and Arrows, and to signalize themselves in Valour it was the only way to Riches and Honour: Arts and Sciences had not got such Ground in the King-

dom as now; but the Commons had almoſt their Dependance upon the Lords, whoſe Power then was exceeding great, and their Practices were conformable to their Power; and this is the true Reaſon why ſo few Actions were formerly brought for Scandals, becauſe when a Man was injured by Words, he carved out his own Remedy by his Sword.

There are many Statutes made againſt riding privately armed, which Men uſed in thoſe Days, to repair themſelves of any Injury done unto them, for they had immediately Recourſe to their Arms for that Purpoſe, and ſeldom or never uſed to bring any Actions for Damages.

This was their Revenge; and having thus made themſelves Judges in their own Caſes, it was reaſonable that they ſhould do themſelves Juſtice with their own Weapons. But this Revenge did not uſually end in private Quarrels, they took Parties, ingaged their Friends, their Tenants and Servants on their Sides, and by ſuch Means made great Factions in the Commonwealth, by Reaſon whereof the whole Kingdom was often in a Flame, and the Government as often in Danger of being ſubverted; ſo that Laws were then made againſt wearing Liveries or Badges, and againſt riding armed.

This was the Miſchief of thoſe Times; to prevent which, this Statute of R. 2. was made, and therefore all provoking and vilifying Words, which were uſed before to exaſperate the Peers, and to make them betake themſelves to Arms, by the Intent of this Act are clearly forbidden, which was made chiefly to prevent ſuch Conſequences; for it was to no Purpoſe to make a Law, and thereby to give a Peer an Action for ſuch Words, as a common Perſon might have before the making of the Statute, and for which the Peer himſelf had a Remedy alſo at the Common Law, and therefore needed not the Help of this Act.

If then the Deſign of this Statute was to hinder ſuch Practices as aforeſaid, the next Thing to be conſidered is, what was uſual in thoſe Days to raiſe the Paſſions of Peers to that Degree, and that will appear to be not only ſuch Things as imported a great Scandal in themſelves, or ſuch for which an Action lay at the Common Law, but even ſuch Things as ſavoured of any Contempt of their Perſons; and ſuch as brought them into Diſgrace with the Commons, for hereby they took Occaſion of Provocation and Revenge.

'Tis true, that very few Actions were brought upon this Statute in ſome conſiderable Time after it was made, for

though ſuch Practices were thereby prohibited, the Lords did not preſently apply themſelves to the Remedy therein given, but continued the Military Way of Revenge to which they had been accuſtomed.

As to the Firſt Objection that hath been made, he gave no Anſwer to it, becauſe it was not much inſiſted upon on the other Side, whether an Action would lie upon this Statute, for the very Words of it are ſufficient Ground for an Action; and 'tis very well known, that where-ever an Act prohibits an evil Thing, the Perſon againſt whom ſuch Thing is done, may maintain an Action. Maxim.

This Statute conſiſts of Two Parts, the Firſt is prohibitory, viz. That no Man ſhall do ſo, *&c.* Then comes the additional Clauſe, and ſaith, That if he do, he ſhall incur ſuch Penalty. 'Tis on the firſt Part that this Action is grounded; and ſo it was in the Earl of Northampton's Caſe, in that Report which goes under the Name of the Lord Coke's 12th Report, where by the Reſolution of all the Judges in England, except Flemming who was abſent, it was adjudged, that it was not neceſſary that any particular Crime ſhould be fixed on the Plaintiff, or any Offence for which he might be indicted. Vide Ante.

So are the Authorities in all the Caſes relating to this Action. In the Lord *Cromwel's Caſe for theſe Words, You like thoſe who maintain Sedition. In the Lord of Lincoln's Caſe, My Lord is a baſe Earl, and a paultry Lord, and keepeth none but Rogues and Raſcals like himſelf. In the Duke of Buckingham's Caſe, He has no more Chriſtianity than a Dog. In the Lord *Marquels of Dorcheſter's Caſe, He is no more to be valued than the Black Dog which lies there. All which Words were held Actionable, yet they touch not the Perſons in any Thing concerning the Government, or charge them with any Crime, but in Point of Dignity or Honour; and they were all villifying Words, and might give Occaſion of Revenge. * 4 Co. 13 b. 2 Cro. 196. * Hill. 16. Car. 2. Rot. 1269. Affirmed in Writ of Error in *B. R.*

And ſo are the Words for which this Action is brought, they are Rude, Uncivil, and Ill-natured; Unworthy, is as much as to ſay, Baſe and Ignoble, a contemptible Perſon, and a Man of neither Honour or Merit. And thus to ſpeak of a Nobleman, is a Reflection upon the King, who is the Fountain of Honour, that gives it to ſuch Perſons who are (in his Judgment) deſerving, by which they are made capable of adviſing him in Parliament, and it would be very diſhonourable to call unworthy Men thither.

'Tis likewiſe a Diſhonour to the Nobility to have ſuch a Perſon to ſit among them as a Companion, and to the Commons to have their Proceedings in Parliament tranſmitted to ſuch Peers; ſo that it tends to the Diſhonour of all

all Dignities, both of King, Lords and Commons, and thereby Diſcords may ariſe betwæn the Two Houſes, which is the Miſchief intended to be remedied by this Act.

Then the following Words are as ſcandalous; for to ſay, A Man acts againſt Law and Reaſon, impoſts ſeveral ſuch Acts done; a Man is not denominated to be unworthy by doing of one ſingle Act; for in theſe Words more is implied, than to ſay, He hath done an unworthy Thing; for the Words ſæm to relate to the Office which the Plaintiff had in the Country, as Lord Lieutenant, which is an Office of great Honour, and can any Thing tend to cauſe more Diſcord and Diſturbance in the Kingdom, than to ſay of a great Officer, That he acts according to the Dictates of his Will and Pleaſure? The Conſequence of which is, that he will be rather ſcorned than obeyed.

It hath bæn objected, That the Words are general, and charge him not with any Act.

Anſw. The Scandal is the greater; for 'tis not ſo bad to ſay, A Man did ſuch a particular Thing againſt Law and Reaſon, as to ſay, he acts againſt Law; which is as much as to ſay, His conſtant Courſe and Practice is ſuch: And to ſay, that the Words might be meant of breaking a Penal Law, that is a foreign Conſtruction; for the plain Senſe is, he acts againſt the known Laws of the Kingdom, and his Practice and Deſigns are ſo to do, for he will be guided neither by Law or Reaſon.

Object. It has bæn objected, that the Scandal muſt be falſe; but whether true or not, there can be no Juſtification here, becauſe they are ſo general that they cannot be put in Iſſue.

Anſw. He agreed, that no Action would lie upon this Statute if the Words were true; but in ſome Caſes, the Divulging of a Scandal was an Offence at the Common Law: Now to argue (as on the other Side) that the Defendant cannot juſtify, and therefore an Action will not lie, is a falſe Conſequence, becauſe Words may be Scandalous and Derogatory to the Dignity of a Peer, and yet the ſubject Matter may not be put in Iſſue.

He agræd alſo, that Occaſional Circumſtances may extenuate and excuſe the Words, tho' ill in themſelves; but this cannot be applied to the Caſe in Queſtion, becauſe the Words were not mitigated: The Defendant pleaded Not Guilty, and inſiſted on his Innocence; the Jury have found him guilty, which is an Aggravation of his Crime; if he would have extenuated them by any Occaſion upon which they were ſpoken, he ſhould have pleaded it ſpecially, or offered it in Evidence, neither of which was done.

This Act is to be taken favourably for him against whom the Words are spoken, because 'tis to prevent great Mischiefs which may fall out in the Kingdom, by rude and uncivil Discourses; and in such Cases 'tis usual for Courts rather to enlarge the Remedy, than to admit of any Extenuation; for which Reasons, he prayed that the Plaintiff might have his Judgment.

It was argued by Serjeant Calthorp on the same Side, and to the same Effect.

Afterwards this Term, all the Judges argued this Case seriatim at the Bench. And first, Justice Scroggs said, That the Greatness of the Damages given should not prevail with him, either on the one Side or the other; at the Common Law, no Action will lie for such Words, though spoken of a Peer, for such Actions were not formerly much countenanced: But now since a Remedy is given by the Statute, Words should not be construed either in a rigid or mild Sense, but according to the genuine and natural Meaning, and agreeable to the common Understanding of all Men. Argument at the Bench.

At the Bar the strained Sense for the Plaintiff is, That these Words import, He is no Man of Honour; and for the Defendant, that they import no Scandal, and that no more was meant by them but what may be said of every Man.

'Tis true, in respect of God Almighty, we are all Unworthy, but the subsequent Clause explains what Unworthiness the Defendant intended, for he infers him to be Unworthy, because he acts against Law and Reason.

Now whether the Words thus explained fix any Crime on the Plaintiff, is next to be considered; and he was of Opinion, that they did fix a Crime upon him; for to say, He is an unworthy Man, is as much as to say, He is a vitious Person, and is the same as to call him a corrupt Man, which in the Case of a Peer is Actionable; for general Words are sufficient to support such an Action, though not for a common Person.

To say, A Man acts against Law and Reason, is no Crime, if he do it ignorantly; and therefore if he had said, My Lord was a weak Man, for he acts against Law and Reason, such Words had not been Actionable; but these Words as spoken do not relate to his Understanding, but to his Morals: They relate to him also as a Peer (though the Contrary has been objected) that they relate to him only as a Man, which is too nice a Distinction; for to distinguish between a Man and his Peerage, is like the Distinction between the Person of the King and his Authority, which hath been often exploded; the Words affect him in all Qualities and all Relations.

It

It has been also objected, that the Words are too general; and the like Case of the Bishop's Return, that a Man is Criminosus, which is not good: But though they are general in the Case of a Peer, they are actionable; for to say of a Bishop, That he is a wicked Man, these are as general Words, and yet an Action will lie.

It has been also objected, That general Words cannot be justified; but he was of another Opinion, as if the Plaintiff, who was Lord Lieutenant of the County, had laid an unequal Charge upon a Man, who upon Complaint made to him, ordered such Charge to stand, and that his Will in such Case should be a Law: If the Person should thereupon say, That the Lord had done Unworthily, and both against Law and Reason, those Words might have been justified, by shewing the special Matter, either in Pleading or Evidence.

'Tis too late now to examine whether an Action will lie upon this Statute; that must be taken for granted, and therefore was not much insisted on by those who argued for the Defendant, for the Authorities are very plain, that such Actions have been allowed upon this Statute.

The Words, as here laid to be spoken, are not so bad as the Defendant might speak, but they are so bad that an Action will lie for them; and though they are general, yet many Cases might be put of general Words which import a Crime, and were adjudged actionable.

The Earl of Leicester's Case, He is an Oppressor: The Lord of Winchester's Case, He kept me in Prison 'till I gave him a Release; these Words were held actionable, because the plain Inference from them is, That they were Oppressors. The Lord Abergavenny's Case, He sent for me and put me into Little Ease. It might be presumed, that that Lord was a Justice of Peace, as most Peers are in their Counties, and that what he did was by Colour of his Authority; so are all the Cases cited by those who argued for the Plaintiff, in some of which the Words were strained to import a Crime, and yet adjudged actionable; especially in the Case of the Lord Marquess of Dorchester, He is to be valued no more than a Dog; which are less slanderous Words than those at the Bar, because the Slander is more direct and positive.

It appears by all these Cases, that the Judges have always construed in Favour of these Actions, and this has been done in all Probability to prevent those Dangers that otherwise might ensue if the Lords should take Revenge themselves; for which Reasons he held the Action will lie.

Atkins, Juſtice, contra. This is not a common Action upon the Caſe, but an Action founded upon the Statute of the 2d of R. 2. upon the Conſtruction whereof the Reſolution of this Caſe will depend, whether the Action will lie or not. And as to that, he conſidered,

1. The Occaſion.
2. The Scope.
3. The Parts of the Statute.

1. The Occaſion of it is mentioned in Cotton's Abridgment of the Records of the Tower, f. 173. nu. 9 and 10. At the ſummoning of this Parliament, the Biſhop of St. David's declared the Cauſes of their Meeting, and told both the Houſes of the Miſchiefs that had happen'd by divers ſlanderous Perſons, and Sowers of Diſcord, which he ſaid were Dogs that eat raw Flesh; the Meaning of which was, that they devoured and eat one another: To prevent which, the Biſhop deſired a Remedy, and his Requeſt ſeemed to be the Occaſion of making this Law, for ex malis Moribus bonæ naſcuntur Leges.

2. The Scope of the Act was to reſtrain unruly Tongues from raiſing falſe Reports, and telling Stories and Lies of the Peers and Great Officers of the Kingdom; ſo that the Deſign of the Act was to prevent thoſe imminent Dangers which might ariſe and be occaſioned by ſuch falſe Slanders.

3. Then the Parts of the Act are Three, viz. Reciting the Offence and the Miſchief, then mentioning the ill Effects, and appointing of a Penalty.

From whence he obſerved,

1. That here was no new Offence made or declared; for nothing was prohibited by this Statute, but what was ſo at the Common Law before.

The Offences to be puniſhed by this Act, are mala in ſe, and thoſe are Offences againſt the Moral Law; they muſt be ſuch in their Nature, as bearing of falſe Witneſs; and theſe are Offences againſt a common Perſon, which he admitted to be aggravated by the Eminency of the Perſon againſt whom they were ſpoke; but every uncivil Word, or rude Expreſſion ſpoken, even of a Great Man, will not bear an Action; and therefore an Action will not lie upon this Statute for every falſe Lie, but it muſt be horrible as well as falſe, and ſuch as were puniſhable in the High Commiſſion Court, which were enormous Crimes. 12 Cro. 14.

By this Deſcription of the Offences, and the Conſequences and Effects thereof, he ſaid he could better judge

whether the Words were actionable or not; and he was of Opinion, That the Statute did not extend to Words of a ſmall and trivial Nature, nor to all Words which were actionable, but only to ſuch which were of a greater Magnitude, ſuch by which Diſcord might ariſe between the Lords and Commons, to the great Peril of the Realm, and ſuch which were great Slanders, and horrible Lies, which are Words purpoſely put into this Statute for the Aggravation and Diſtinction of the Crime; and therefore ſuch Words which are actionable at the Common Law, may not be ſo within this Statute, becauſe not horrible great Scandals.

He did not deny, but that theſe were undecent and uncivil Words, and very ill applied to that honourable Perſon of whom they were ſpoken; but no Body could think that they were horrible great Slanders, or that any Debate might ariſe between the Lords and Commons, by Reaſon ſuch Words were ſpoken of this Peer, or that it ſhould tend to the great Peril of the Kingdom, and the quick Deſtruction thereof: Such as theſe were not likely to be the Effects and Conſequences of theſe Words, and therefore could not be within the Meaning of the Act, becauſe they do not agree with the Deſcription given in it.

2. Here is no new Puniſhment inflicted on the Offender; for at the Common Law, any Perſon for ſuch Offences as herein are deſcribed might have been fined and impriſoned, either upon Indictment or Information brought againſt him, and no other Puniſhment is given here but Impriſonment.

Even at the Common Law, Scandal of a Peer might be puniſhable by Pillory and Loſs of Ears. 5 Co. 125. De Libellis Famoſis. 12 Co. 37. 9 Co. 59. Lamb's Caſe; ſo that it appears this was an Offence at the Common Law, but aggravated now, becauſe againſt an Act of Parliament, which is a poſitive Law, much like a Proclamation which is ſet forth to enforce the Execution of a Law, by which the Offence is afterwards greater.

He did agree, That an Action would lie upon this Statute, tho' there were no expreſs Words to give it to a Peer, becauſe where there is a Prohibition, and a Wrong and Damage ariſes to the Party by doing the Thing prohibited, in ſuch Caſe the Common Law doth intitle the Party to an Action. 10 Co. 75. 12 Co. 100, 103. And ſuch was the Reſolution in the Earl of Northampton's Caſe, upon Conſtruction of the Law as incident to the Statute; and as the Offence is greater, becauſe of the Act, and as the Action will lie upon the Statute, ſo the Party injured may ſue in a qui tam, which he could not have done before the making this Law.

3. But

3. But that ſuch Words as theſe were not actionable at the Common Law, much leſs by the Statute; for the Defendant ſpoke only his Judgment and Opinion, and doth not directly charge the Plaintiff with any Thing, and might well be reſembled to ſuch Caſes as are in Roll's Abridgment, 1 Part. 57. pl. 30. which is a little more ſolemn, becauſe adjudged upon a ſpecial Verdict; the Words were ſpoken of a Juſtice of Peace, Thou art a Blood-Sucker, and not fit to live in a Commonwealth. Theſe were not held actionable, becauſe they neither relate to his Office, or fix any Crime upon him. Fol. 43. in the ſame Book, Thou deſerveſt to be hanged, not actionable, becauſe it was only his Opinion.

So where the Words are general, without any particular Circumſtances, they make no Impreſſion, and gain no Credit; and therefore in Cro. Car. 111. 1 Roll. Abridgm. 107. pl. 43. You are no true Subject to the King; the Action would not lie.

In this Caſe 'tis ſaid, the Plaintiff acts againſt Law, which doth not imply a Habit in him ſo to do; and when Words may as well be taken in a mild as in a ſevere Senſe, the Rule is, quod in mitiori ſenſu accipienda ſunt. Now theſe Words are capable of ſuch a favourable Conſtruction, for no more was ſaid of the Plaintiff, than what in ſome Senſe may be ſaid of every Perſon whatſoever; for who can boaſt of his Innocency? Who keeps cloſe in all his Actions to Law and Reaſon? And to ſay, A Man acts againſt both, may imply that he departed from thoſe Rules in ſome particular Caſes, where it was the Error of his Judgment only.

In the Duke of Buckingham's Caſe, Sheppard's Abridgment, 1 Part, f. 28. viz. You are uſed to do Things againſt Law; and mentions a particular Fact there indeed, becauſe of Uſage: Of the ill Practice, it was held that an Action lies; but if he had been charged for doing a Thing againſt Law but once, an Action would not lie.

He then obſerved, how the Caſes which have been adjudged upon this Statute agree with the Rules he had inſiſted on in his Argument, which Caſes have not been many, and thoſe too of late Times, in reſpect of the Antiquity of the Act, which was made almoſt 300 Years ſince, Anno 1379, and for 120 Years after no Action was brought; the Firſt that is Reported was 13 H. 7. Keilway 26. So that we have no contemporanea expoſitio of the Statute to guide an Opinion, which would be a great Help in this Caſe, becauſe they who make an Act beſt underſtand the Meaning; but now the Meaning muſt be collected from the

Statute it ſelf, which is the beſt Expoſition, as the Rule is given in Bonham's Caſe. 8 Co. Vide the Caſe in 13 H. 7.

The next Caſe in Time, is the Duke of Buckingham's Caſe. 4 H. 8. Cromp. Jur. of Courts, f. 13. You have no more Conſcience than a Dog. Lord Abergavenny againſt Cartwright, in the ſame Book, You care not how you come by Goods; in both which Caſes, the Words charge the Plaintiff with particular Matter, and give a Narrative of ſomething of a falſe Story, and do not barely reſt upon an Opinion. In the Biſhop of *Norwich* his Caſe. Cro. Eliz. 1. viz. You have writ to me that which is againſt the Word of God, and to the Maintainance of Superſtition. Theſe were held actionable, becauſe they refer to his Function, and greatly defame him, and yet he had but 500 Marks Damages. 29 & 30 Eliz. 1 Cro. 67. The Lord *Mordant* againſt *Bridges*; My Lord *Mordant* did know that *Prude* robbed *Shotbolt*, and bid me compound with *Shotbolt* for the ſame, and ſaid, He would ſee me ſatisfied for the ſame, though it coſt him an Hundred Pounds; which I did for him being my Maſter, otherwiſe the Evidence I could have given would have hanged *Prude*: Theſe Words were held actionable, and 1000 l. Damages given; and in all the other Caſes which have been mentioned upon this Statute, and where Judgment was given for the Plaintiff, the Words always charge him with ſome particular Fact, and are poſitive and certain, but where they are doubtful and general, and ſignify only the Opinion of the Defendant, they are not actionable.

The Words in the Caſe at Bar, neither relate to the Plaintiff as a Peer, or a Lord Lieutenant, and charge him with no particular Crime; ſo that from the Authority of all theſe Caſes, he grounded his Opinion that the Action would not lie; and he ſaid, If Laws ſhould be expounded to wrack People for Words, inſtead of remedying one Miſchief, many would be introduced; for in ſuch Caſe they would be made Snares for Men.

The Law doth bear with the Infirmities of Men, as Religion, Honour and Vertue doth in other Caſes; and amongſt all the excellent Qualities which adorn the Nobility of this Nation, none doth ſo much as forgiving of Injuries: Solomon ſaith, That 'tis the Honour of a Man to paſs by an Infirmity; which if the Plaintiff ſhould refuſe, yet the Defendant (if he thinks the Damages exceſſive) is not without his Remedy by Attaint, for he ſaid, he could ſhew where an Attaint was brought againſt a Jury for giving 60 l. Damages.

He farther said, That he could not find that any Judgment had been either reserved or arrested upon this Statute, and therefore it was fit that the Law should be settled by some Rule, because 'tis a wretched Condition for People to live under such Circumstances, as not to know how to demean themselves towards a Peer; and since no Limits have been hitherto prescribed, 'tis fit there should be some now, and that the Court should go by the same Rules in the Case of a Peer, as in that of a common Person; that is, not to construe the Words actionable without some particular Crime charged upon the Plaintiff, or unless he alledge special Damages; for which Reasons he held that this Action would not lie.

Wyndham, Justice, accorded with Scroggs; and the Chief Justice North agreed with them in the same Opinion; his Argument was, viz.

First, He said that he did not wonder that the Defendant made his Case so solemn, being loaded with so great Damages; but that his Opinion should not be guided with that or with any Rules but those of Law, because this did not concern the Plaintiff alone, but was the Case of all the Nobility of England; but let it be never so general, and the Conveniences or Inconveniences never so great, he would not upon any such Considerations alter the Law.

He said, that no Action would lie upon this Statute, which would not lie at the Common Law; for where a Statute prohibits a Thing generally, and no particular Man is concerned, an Offence against such a Law is punishable by Indictment; but where there is a particular Damage to any Person by doing the Thing prohibited, there an Action will lie upon the Statute, and so it will at the Common Law.

The Words therefore which are actionable upon this Statute, are so at the Common Law.

This Statute extends only to Peers or other great Officers; now every Peer, as such, is a great Officer, he has an Office of great Dignity, he is to support the King by his Advice, of which he is made capable by the great Eminency of his Reputation, and therefore all Words which reflect upon him as he is the King's Counsellor, or as he is a Man of Honour and Dignity, are actionable at the Common Law.

In the ordinary Cases of Officers, 'tis not necessary to say that the Words were spoken relating to his Office, as to say of a Lawyer that He is a Sot or an Ignoramus; or of a Trades-

Tradeſman, He is a Bankrupt, the Action lies, though the Words were not ſpoken of either as a Lawyer or a Tradeſman.

He did not think that Judges were to teach Men by what Rules to walk, other than what did relate to the particular Matter before them, all other Things are gratis dicta: Neither would he allow that Diſtinction, that an Action would not lie where a Man ſpoke only his Opinion; for if that ſhould be admitted, it would be very eaſy to ſcandalize any Man, as, I think ſuch a Judge is corrupt, or, I am of Opinion that ſuch a Privy Councellor is a Traitor: And can any Man doubt whether theſe or ſuch like Words are actionable or not, becauſe ſpoken only in the Senſe of the Perſon? 'Tis true, in ſome Caſes where a Man ſpeaks his own particular Diſeſtæm, an Action will not lie; as if I ſay, I care not for ſuch a Lord; but that differs much where a Man ſpeaks his Opinion with Reference to a Crime; for Opinions will be ſpread, and will have an implicit Faith, and becauſe one Man believes it, another will; and 'tis upon this Ground that all the Caſes which have been ſince the Statute are juſtified; and ſo was the late Caſe of * the Marqueſs of Dorcheſter, He is no more to be valued than the Black Dog which lies there, which were Words of Diſeſtæm, and only the Opinion of the Defendant; in which Caſe Judgment was affirmed in a Writ of Error.

* Sid. 233.

Object. If it be objected, to what Purpoſe this Statute was made if no Action lies upon it, but what lay at the Common Law.

Anſw. The Plaintiff now upon the Statute muſt proſecute tam pro Domino Rege quam pro ſeipſo, which he could not do at the Common Law. And it has been held in the Star-Chamber, That if a Scandalum Magnatum be brought upon this Statute, the Defendant cannot juſtify, becauſe 'tis brought qui tam, &c. and the King is concerned; but the Defendant may explain the Words, and tell the Occaſion of ſpeaking of them; if they are true, they muſt not be publiſhed, becauſe the Statute was to prevent Diſcords.

Object. Theſe Words carry in them no Diſeſtæm.

Anſw. According to a common Underſtanding, they are Words of Diſreſpect and of great Diſeſtæm; for 'tis as much as to ſay, That the Plaintiff is a Man of no Honour, he is one who lives after his own Will, and ſo is not fit to be employed under the King: If any precedent Diſcourſe had qualified the ſpeaking of theſe Words, it ought to have been ſhewn by the Defendant, which is not done; and

therefore he concluded that the Words, notwithstanding what was objected were actionable; and so by the Opinion of him, Wyndam and Scroggs, Justices, Judgment was given for the Plaintiff.

Atkins, Justice, of a contrary Opinion.

## Anonymus.

AN Action of Assault, Battery, Wounding and false Imprisonment for an Hour was brought against the Defendant, who pleads, quoad venire vi & armis Not-Guilty; and as to the Imprisonment, he justified as a Servant to the Sheriff attending upon him at the Time of the Assize, from whom he received a Command to bring the Plaintiff (being another of the Sheriff's Servants) from the Conventicle, where finding of him, he (to wit, the Defendant) did molliter manus imponere upon the Plaintiff, and brought him before his Master, quæ est eadem transgressio: To this the Plaintiff demurred, and shewed for Cause. Amendment after a Demurrer joined and before Judgment given, good.

1. That the Substance of the Justification is not good, because the Servant could not thus justify, tho' his Master might; for the Lord may beat his Villain without a Cause, but if he command another to do it, an Action of Battery lies against him. 2 H. 4. 4. But though this might have been good if well pleaded, yet 'tis not good as pleaded here; for, 2 Cro. 360.

2. The Defendant saith, quoad venire vi & armis Not-Guilty, but saith nothing of the Wounding which cannot be justified, and therefore this Plea is not good; for which Reason it was clearly resolved that the Plea was ill, but the Court inclined that the Substance of the Plea was well enough. Harding *and* Ferne, Postea.

The Chief Justice and Justice Scroggs were of Opinion, That a Man may as well send for his Servant from a Conventicle as from an Ale-house, and may keep him from going to either of those Places: And the Chief Justice said, That he once knew it to be Part of a Marriage-Agreement that the Wife should have Leave to go to a Conventicle.

But in this Case, Leave was given to amend the Plea, and put in quoad vulnerationem Not-Guilty; and it was held, That though the Parties had joined in Demurrer, yet the Defendant might have Liberty to amend before Judgment given. Sid. 107.

## Singleton *verſus* Bawtree *Executor.*

Traverſe muſt be where the Charge in the Declaration is not fully anſwered.

ASſumpſit againſt the Defendant as Executor, who pleads the Teſtator made one J. S. Executor, who proved the Will and took upon him the Execution thereof, and adminiſtred the Goods and Chattels of the Teſtator, and ſo concludes in Abatement, Et petit Judicium de Brevi, with an Averment that J. S. Superſtes & in plena vita exiſtit.

To this Plea the Plaintiff demurred, becauſe the Defendant ought to have traverſed abſq; hoc that he was Executor, or adminiſtred as Executor, and ſo are all the Pleadings. 9 H. 6, 7. 4 H 7. 13. 7 H. 6. 13.

But Serjeant Pemberton for the Defendant ſaid, That there is a Difference when Letters of Adminiſtration are granted in Caſe the Party die Inteſtate, and when a Man makes a Will, and therein appoints an Executor, for in that Caſe the Executor comes in immediately from the Death of the Teſtator; but when a Man dies Inteſtate, the Ordinary hath an Intereſt in the Goods, and therefore he who takes them, is Executor de ſon Tort, and may be charged as ſuch; but 'tis otherwiſe where there is a Will and a rightful Executor, who proveth the ſame; for he may bring a Trover againſt the Party for taking of the Teſtator's Goods, though he never had the actual Poſſeſſion of them; and therefore the Taking in ſuch Caſe will not make a Man Executor de ſon Tort, becauſe there is another lawful Executor: But 'tis true, that if there be a ſpecial Adminiſtration, 'tis otherwiſe; as if a Stranger doth take upon him to pay Debts or Legacies, or to uſe the Inteſtate's Goods, ſuch an expreſs Adminiſtration will make him Executor de ſon Tort, and liable; and in Read's Caſe. 5 Co.

So in this Caſe the Defendant pleads, that J. S. was Executor, which prima facie diſcharges him; for to make him chargeable, the Plaintiff ought in his Replication to ſet forth the ſpecial Adminiſtration, that though there was an Executor, yet before he aſſumed the Execution or proved the Will, the Defendant firſt took the Goods, by which he became Executor of his own Wrong, and ſo hath brought himſelf within this Diſtinction, (which was the Truth of this Caſe) and that would have put the Matter out of Diſpute; which not being done, he held the Plea to be good, and ſo prayed Judgment for the Defendant.

The Court were of Opinion, that prima facie this was a good Plea; for where a Man * confeſſes and avoids, he need not traverſe, and here the Defendant had avoided his being chargeable as Executor de ſon Tort, by ſaying, That there was a rightful Executor who had adminiſtred the Teſtator's whole Eſtate; but the Surmiſe of the Plaintiff and the Plea of the Defendant being both in the * Affirmative, no Iſſue can be joined thereon; and therefore the Defendant ought to have traverſed that he was Executor, or ever adminiſtred as Executor, the rather becauſe his Plea gives no full Anſwer to the Charge in the Declaration, being charged as Executor, who pleads that another was Executor, and both theſe Matters might be true, and yet the Defendant liable as Executor de ſon Tort, which (notwithſtanding Iniquum non eſt præſumendum) may be well intended here; and ſo Judgment was given againſt the Defendant that this was no good Plea.

* 2 Sand. 28.

* 2 Cro. 579. pl. 9. Sid. 341. 1 Sand. 338.

## Adams *verſus* Adams.

DEBT upon Bond to perform an Award, ſo that it be made before or upon the 22d Day of December, or to chooſe an Umpire.

Award, Exceptions thereunto overruled.

The Defendant pleads no Award made: The Plaintiff replies and ſets forth an Award, and aſſigns a Breach: The Defendant demurs.

1. That here is no good Award, becauſe the Arbitrators were to make it before or upon the 22d Day of December, and if they could not agree, to chooſe an Umpire: Now the Award ſet forth in the Replication was made by an Umpire choſen after the 22d Day of December, which the Arbitrators had not Power by the Submiſſion to chooſe, Sed non allocatur, becauſe they might have made their Award upon the 22d Day of December, and therefore could not chooſe an Umpire 'till afterwards; for their Power was only determined as to the making an Award.

Mod. Rep. 274. 2 Sand. 133.

2. Becauſe the Umpire recites, that the Parties ſubmitting had bound themſelves to ſtand to his Award which is not true, Sed non allocatur, becauſe 'tis but Recital.

Antea.

3. The Award is, That the Defendant ſhould pay the Plaintiff Two Sums at ſeveral times, and that ſeveral Releaſes ſhall be given preſently, and ſo the Bond and the Money would be diſcharged; and for that Reaſon the Awarding the Releaſe was void againſt the Plaintiff, and by Conſequence there is nothing on his Side to be done;

3 Mod. 264. Infra, 309.

and the Court were all of Opinion, that for this last Reason the Award was not good.

Serjeant Baldwyn, who was of Counsel for the Plaintiff, said, That it was an Exception which he could not answer if true, but said, that the Award was not that Releases should be given presently, but that the Money should be paid and Releases given: By which it appears by the very Method and Order of the Award, that the general Releases were not to be given 'till after the Money paid; and that being the Case, the Court were clear of Opinion, that it was well enough; and so Judgment was given for the Plaintiff.

## Brook *versus Sir* William Turner.

Feme Covert made a Will and disposed of her Estate, and good.

IN a Prohibition to the Spiritual Court to prove the Will of Philippa Brooks by Sir William Turner her Executor:

A Trial at the Bar was had, in which the Case was, viz. That James Phillips, by Will in Writing dated 24 Aprilis, 1671. inter alia gave to Philippa for Life, in lieu and full of her Dower, all his Houses in Three-Crown-Court in Southwark, purchased by him of one Mr. Keeling; another House in Southwark purchased of one Mr. Bows, and all his Houses in New Fish-Street, Pudding-Lane, Buttolph-Lane, Beer-Lane, Duxfield-Lane, and Dowgate, London; and died.

That afterwards there being a Treaty of Marriage between the Plaintiff Mr. Brooks and Philippa Phillips, it was agreed, that all the said Houses and Rents, and Profits thereof, and all Debts, ready Money, Jewels, and other real and personal Estate whatsoever, or wherein Philippa, or any in Trust for her, were interested or possessed, should at any Time as well before as after the Marriage be disposed in such manner as should be agreed on between them.

And thereupon by Indenture Tripartite between Mr. Brook of the first Part, the said Philippa Phillips of the second Part, and William Williams and Francis Gillow of the third Part, reciting the said Will of James Phillips and the said Agreement; the said Philippa in Consideration of a Shilling paid to her by Williams and Gillow, did with the full and free Consent of the said Edward Brook the now Plaintiff, grant, bargain and sell to the said Williams and Gillow all the said Houses devised by the last Will of the said James Phillips, in Trust that the said Trustees should permit her to receive and enjoy the whole Rents and Profits

of all the Houſes purchaſed of Mr. Kneeling, and of all the Houſes in Beer-Lane, and of Two of the Houſes in Broad-ſtreet in the Poſſeſſion of James and Worſley, and the Quarter's Rent only due at Chriſtmas then laſt paſt, and no more, ſaving to Philippa all former Rents and Arrears thereof to be received by her, and not by Mr. Brook, and to be imployed as therein after was mentioned.

And upon this farther Truſt, that after Mr. Brook's Death, in caſe the ſaid Philippa ſurvived, that then the Truſtæs ſhould permit Philippa and her Aſſigns from Time to Time to grant, ſell and diſpoſe of the reſt of the Premiſſes, and all others whereof ſhe was ſeiſed or poſſeſſed, as ſhe ſhould think fit; and alſo to receive, diſpoſe of and enjoy all the Rents and Profits of the Premiſſes (not thereby appointed to be received by the Plaintiff) for her only particular and ſeparate Uſe, and not for the Uſe of the Plaintiff, without any Account to be given for the ſame, and not to be accounted any Part of Mr. Brook's Eſtate; and that the Acquittances of the ſaid Philippa be good Diſcharges againſt the Plaintiff; and the ſaid Truſtæs to join with Philippa in the Sale and Diſpoſition of the Premiſſes.

And Philippa in farther Conſideration of the ſaid Marriage, agreed to pay to Mr. Brook on the Day of Marriage 150 l. and to deliver him ſeveral Bonds and Securities for Money in the ſaid Indenture particularly named.

And the ſaid Philippa in farther Purſuance of the ſaid Agræment, and in Conſideration of a Shilling paid to her by the ſaid Truſtæs, did with the like Aſſent aſſign to them all her Jewels, Rings, Money, &c. and other her real and perſonal Eſtate, upon Truſt that they ſhould permit her to enjoy the ſame to her own ſeparate and diſtinct Uſe, and to diſpoſe thereof from Time to Time as well before the ſaid Marriage as afterwards, as ſhe ſhould think fit without any Accompt, and for want of ſuch Limitation or Appointment, in Truſt for her, her Executors, Adminiſtrators or Aſſigns; and the Plaintiff not to hinder or impeach the ſame, and not to be taken as any Part of his Eſtate, or be ſubject to his Debts, Legacies or Engagements.

And the Plaintiff covenanted, That if the Marriage took effect, the Truſtæs ſhould quietly enjoy the Premiſſes, and Philippa to diſpoſe thereof without Trouble or Moleſtation by him, his Executors, &c. and that Philippa (notwithſtanding the Marriage) ſhould at any Time, either before or after, have Liberty by Deed or Will in Writing by her publiſhed in the Preſence of two or more credible Witneſ-

ſes, or otherwiſe howſoever, at her Pleaſure to give and diſpoſe of all her real and perſonal Eſtate, Goods, Chattels, &c. whereof ſhe was poſſeſſed before the ſaid intended Marriage, or at any Time after, or any other Perſon in Truſt for her (except ſuch Part thereof as was thereby agreed to be paid to, and received by the Plaintiff) to ſuch Perſon or Perſons, and to ſuch Uſe and Uſes, Intents and Purpoſes as ſhe ſhould think fit, and that the Plaintiff ſhould aſſent thereunto, and not impeach the ſame in Law or Equity.

The Marriage ſhortly afterwards took Effect, and Philippa by Will in Writing gave all her Eſtate away in Legacies and Charitable Uſes, and ſhe deviſed to the Plaintiff 20 l. to buy him Mourning, and gave to Sir William Turner the Defendant 100 l. and made him Executor; and ſhe deviſed to Mr. Hays and to Mr. Grace 20 l. a-piece, whom ſhe made Overſeers of her Will, and died. There was neither Date or Witneſſes to this Will, ſave only the Month and Year of our Lord therein mentioned; and that this Will not being proved in the Spiritual Court, the Plaintiff moved for a Prohibition, and the Defendant took Iſſue upon the Suggeſtion.

In which Caſe, theſe Points were reſolved by the Court:

Mod. Rep. 211. 1. If there be an Agreement before Marriage that the Wife may make a Will, if ſhe do ſo, 'tis a good Will, unleſs the Husband diſagrees; and his Conſent ſhall be implied 'till the Contrary appear. And the Law is the ſame though he knew not when ſhe made the Will, which when made, 'tis in this Caſe as in others, Ambulatory 'till the Death of the Wife, and his Diſſent thereunto; but if after her Death he doth conſent, he can never afterwards diſſent, for then he might do it backwards and forwards in infinitum.

2. If the Husband would not have ſuch Will to ſtand, he ought preſently after the Death of the Wife to ſhew his Diſſent.

3. If the Husband conſent that his Wife ſhall make a Will, and accordingly ſhe doth make ſuch a Will, and dieth, and if after her Death he comes to the Executor named in the Will, and ſeems to approve her Choice, by ſaying, He is glad that ſhe had appointed ſo worthy a Perſon, and ſeemed to be ſatisfied in the main with the Will, and recommended a Coffin-maker to the Executor, and a Goldſmith for making the Rings, and a Herald-Painter for making the Eſcutcheons; this is a good Aſſent, and makes it a good Will, tho' the Husband when he ſees and reads the Will being thereat diſpleaſed) oppoſes the Probate in the Spi-

ritual Court by entring Caveats, and the like; and such Diſagræment after the former Aſſent will not hurt the Will, becauſe ſuch Aſſent is good in Law, though he know not the particular Bequeſts in the Will.

4. When there is an expreſs Agræment or Conſent that a Woman may make a Will, a little Proof will be ſufficient to make out the Continuance of that Conſent after her Death; and it will be needful on the other Side to prove a Diſagræment made in a ſolemn Manner, and thoſe Things which prove a Diſſatisfaction on the Husband's Part may not prove a Diſagræment, becauſe the one is to be more formal than the other; for if the Husband ſhould ſay, that he hoped to ſet aſide the Will, or by a Suit or otherwiſe to bring the Executor to Terms, this is not a Diſſent.

## *Sir* Robert Howard *verſus* the Queens Truſtees and the Attorney General. *In the Dutchy.*

UPon a Bill exhibited in the Dutchy Court; the Queſtion was, Whether the Stewardſhip of a Manor was grantable in Reverſion or not? Jones 126.

The Attorney General and the Quæn's Counſel, Butler and Hanmore, held that it was not: But Serjeant Pemberton and Mr. Thursby would have argued to the contrary; for they ſaid it might be granted in Fæ, or for any leſs Eſtate, and ſo in Reverſion, for it may be executed by Deputy.

But this Queſtion ariſing upon a Plea and Demurrer, the Debate thereof was reſpited 'till the Hearing the Cauſe, which was the uſual Practice in Chancery, as North, Chief Juſtice, who aſſiſted the Chancellor of the Dutchy, informed the Court.

And he ſaid, that in all Courts of Equity the uſual Courſe was, When a Bill is exhibited to have Money decræd due on a Bond, upon a Suggeſtion that the Bond is loſt, there muſt be Oath made of it, for otherwiſe the Cauſe is properly triable at the Common Law; and ſuch Courſe is to be obſerved in all the like Caſes, where the Plaintiff by Surmiſe of the Loſs of a Dæd draws the Defendant into Equity; but if the Caſe be proper in its own Nature for a Court of Conſcience, and in Caſe where the Dæd is not loſt, the Remedy deſired in Chancery could not be obtained upon a Trial at Law; there, though it be alledged that the Deed is loſt, Oath need not be made of it: As if there be a Deed in which there is a Covenant for farther Aſſurance, and the Party comes in Equity, and prays the Thing to be done in Specie, there is no næd of an Oath of the Loſs of ſuch Dæd, becauſe if it is not loſt

loſt the Party could not at Law have the Thing for which he prayed Relief, for he could only recover Damages.

Note alſo, That he ſaid in the Caſe of one Oldfield, That it was the conſtant Practice where a Bill is exhibited in Equity to forecloſe the Right of Redemption, if the Mortgagor be forecloſed he pays no Coſts; and though it was urged for him that he ſhould pay no Coſts in this Caſe, becauſe the Mortgagee was dead, and the Heir within Age, and the Money could not ſafely be paid without a Decree; yet it being neceſſary for him to come into Equity, he muſt pay for that Neceſſity.

Note alſo the Difference between a Mortgage in Fee, and for Years; for if 'tis in Fee, the Mortgagor cannot have a Reconveyance upon Payment of the Money, 'till the Heir comes of Age.

It was agreed in this Caſe by the Court, That if there be Tenant for Life, Remainder in Fee, and they join in a Deed purporting an abſolute Sale, if it be proved to be but a Mortgage he ſhall have his Eſtate for Life again, paying pro Rata, and according to his Eſtate; and ſo it ſhall be in the Caſe between Tenant in Dower and the Heir.

## Lloyd *verſus* Langford.

Leſſee for Years makes an Aſſignment of his Term where Debt lies upon the Contract, and where not.

1 Ven. 242, 272.

IN a Special Verdict, the Caſe was, viz. A. being Tenant in Fee of Lands, demiſed the ſame to B. for Seven Years, B. re-demiſes the ſame Lands to A. for the ſaid Term of Seven Years, reſerving 20 l. Rent per Annum. A. dies, his Wife enters as Guardian to the Heir of A. her Son, and receives the Profits. B. brings Debt againſt her as Executrix de ſon Tort, in the Debet and Detinet; and whether this Action would lie or not, was the Queſtion.

Serjeant Baldwyn, who argued for the Plaintiff, held, that it did lie, for though the Rent in this Caſe reſerved did not attend the Reverſion, becauſe the Leſſee had aſſigned over all his Term, yet an Action of Debt will lie for that Rent upon the Contract. Cro. Jac. 487. Witton *verſus* Bye, 45 Ed. 3. 8. 20 E. 4. 13. Covenant will lie upon the Words Yielding and Paying.

If then here is a good Rent reſerved, the Wife who receives the Profits, becomes Executrix de ſon Tort, and ſo is liable to the Payment.

It hath been held there cannot be an Executor de ſon Tort of a Term, but the Modern Opinions are otherwiſe; and it was held in the Caſe of Porter and Sweetman. Trin. 1653.

in B. R. And that an Action of Debt will lie against him. Indeed such an Executor cannot be of a Term in futuro, and that is the Resolution in Kenrick and Burgess's Case, Moor Rep. Where in Ejectment upon Not Guilty pleaded, it appeared that one Okeham had a Lease for Years of the Lands in question, who died Intestate, which Lease his Wife assigned by Parol to Burgess; and then she takes out Letters of Administration, and assigns it again to Kenrick, who by the Opinion of the Court had the best Title.

But if one enter as Executor de son Tort, and sell Goods, the Sale is good; which was not so in this Case, because there was a Term in Reversion, whereof no Entry could be made, for which Reason there could be no Executor de son Tort to that, and therefore the Sale to Burgess before the Administration was held void.

And that there may be an Executor de son Tort of a Term, there was a late Case adjudged in Trin. 22 Car. 2. betwæn Stevens and Car, which was, Lessæ for Years rendring Rent dies Intestate, his Wife takes out Letters of Administration, and afterwards marries a second Husband, the Wife dies, and the Husband continues in Possession and receives the Profits: It was agræd, that for the Profits received he was answerable as Executor de son Tort, and the Book of 10 H. 11. was cited as an Authority to prove it.

Pemberton, Serjeant, for the Defendant, would not undertake to answer these Points which are argued on the other Side, but admitted them to be plain against him, for he did not doubt but that Debt would lie upon the Contract, where the whole Term was assigned, and that there may be an Executor de son Tort of a Term; but he said, that which was the principal Point in the Case was not stirred: The Question was, Whether an Action of Debt will lie against the Defendant as Executor de son Tort, where there is no Term at all; for 'tis plain there was none in Being in this Case, because when the Lessæ re-demised his whole Term to the Lessor, that was a Surrender in Law, and as fully as if it had bæn actually surrendred; and therefore this was quite different from the Case, where Lessæ for Years makes an Assignment of his whole Term to a Stranger, Debt will lie upon the Contract there, because an Interest passes to him in Reversion, and as to this Purpose a Term is in esse by the Contract of the Parties, and so it would here against the first Lessor, who was Lessæ upon the Re-demise; but now because of the Surrender, the Heir is intituled to enter, and the Mother Ex parte Def.

ther, who is the Defendant, enters in his Right as Guardian, which she may lawfully do.

If therefore Debt only lies upon the Contract of the Testator, as in truth it doth where the whole Term is gone, the Plaintiff cannot charge any one as Executor de ſon Tort in the Debet and Detinet.

And the whole Term is gone here by the Re-demiſe, which is an abſolute Surrender, and not upon Condition, for in ſuch Caſe the Surrenderor might have entred for Non-performance, and ſo it might have been revived: And of this Opinion was the whole Court in both Points, and would not hear any farther Argument in the Caſe; the Plaintiff having no Remedy at Law, the Court told him that he might ſeek for Relief in Chancery, if he thought fit.

## Harman's *Caſe*.

IN Covenant the Breach aſſigned was, That the Defendant did not repair: He pleads generally quod reparavit & de hoc ponit ſe ſuper Patriam, this was held good after a Verdict.

## Quadring *verſus* Downs & *al'*.

Wardſhip cannot be where there is no Deſcent.

IN a Writ of Right of Ward, the Caſe was, viz. Sir William Quadring being ſeiſed of Lands in Fæ, by Deed and Fine, ſettles them upon his Son William and his Wife for their Lives, the Remainder to the ſecond Son in Tail, with divers Remainders over. The Grandfather dies, the Father and Mother dies, the eldeſt Son dies without Iſſue, and ſo the Land came to the ſecond Son.

The Plaintiff intitles himſelf as Guardian in Soccage to the Wardſhip both of the Perſon and Lands of the Infant, whom the Defendant detained, and Serjeant Newdigate for him demurred, becauſe where there is no Deſcent there can be no Wardſhip, for the ſecond Son is in by Purchaſe and not by Deſcent, for here is no Mention of the Reverſion in Fæ, and therefore it may be intended that it was conveyed away; and beſides, if it ſhould be intended to continue to Sir William Quadring the Grandfather after this Settlement, yet it cannot be thought

to deſcend to the Ward, becauſe 'tis not ſaid who was Heir; for though it be ſaid, that the Father of the Ward was Son to Sir William, yet 'tis not ſaid Son and Heir, and of that Opinion was the whole Court in both Points; for there muſt be a Deſcent, or elſe there can be no Wardſhip; and it doth not appear that any Deſcent was here, becauſe 'tis not ſaid that the Reverſion did deſcend, nor who was Heir to Sir William; which the Plaintiff perceiving, prayed Leave to amend, and it was granted.

In this Caſe it was ſaid at the Bar, that one might be a Ward in Soccage, though he be in by Purchaſe, for the Guardian is to have no Profit, but is only a Curator, to do all for the Benefit of the Ward; and ſo there need be no Deſcent, as is neceſſary in the Caſe of a Ward in Chivalry; for that being in reſpect of the Tenure, the Guardian is to have Profit.

The Lord Chief Juſtice North ſaid, He knew where there was ſome Doubt of the Sufficiency of the Guardian in Socage, that the Court of Chancery made him give good Security. Nota.

## Harding *verſus* Ferne.

IN an Action of Aſſault, Battery and Impriſonment, 'till the Plaintiff had paid 11 l. 10 s. The Defendant pleads and juſtifies by Reaſon of an Execution, and a Warrant thereupon for 11 l. and doth not mention the 10 s. And upon Demurrer for this Cauſe, Judgment was given for the Plaintiff upon the firſt Opening, becauſe it appeared the Defendant took more than was warranted by the Execution. Antea Anonymus.

## Ellis *verſus* Yarborough *Sheriff of* Yorkſhire.

IN an Action of Eſcape, the Plaintiff ſets forth, That the Defendant arreſted a Man upon a Latitat directed to him at the Suit of the Plaintiff, and afterwards ſuffered him to go at large.

The Defendant pleads the Statute of 23 H. 6. cap. 10. that he took good and ſufficient Bail within the County according to the Statute.

The Plaintiff replies, That he let him go at large, abſq; hoc that he took good and ſufficient Bail within the County. To this the Defendant demurred. Caſe lies not againſt the Sheriff though he take inſufficient Bail, but muſt be amerced if the Defendants do not appear. Mod. Rep. 227. 239. Antea 83. 2 Sand. 52.

This Caſe was argued this Term by Serjeant Skipwith and Baldwyn for the Defendant, and by Serjeant Barrel and George Strode for the Plaintiff; and in their Arguments for the Defendant it was ſaid, That the Plaintiff in this Caſe cannot maintain an Action of Eſcape, for where the Sheriff takes Bail, no Eſcape will lie againſt him.

Ex parte Def.

Sid. 23. 2 San. 60. Cro. Eliz. 624.

1. Becauſe he is compellable by the Statute to let the Defendant to Bail.

2. If he have not the Defendant ready at the Return of the Writ, he may be amerced, which is the proper Remedy.

3. This Precept of letting the Defendant to Bail, being by Act of Parliament, is intended by the Direction of the Plaintiff himſelf, becauſe all People are Parties to the making of an Act of Parliament.

Antea, Page and Tulſe.

Many Actions have been brought againſt Sheriffs, upon Suggeſtions that no Bail have been taken, and for which an Action on the Caſe will lie; but where there is Bail taken, the Sheriff hath done his Duty which he is commanded to do by the Statute; and if the Defendant doth not appear, the Sheriff is to be amerced, and he is the proper Judge of the Bail; the Plaintiff is no ways concerned therein whether good or bad.

At the Common Law, the Defendant was to continue in Priſon till he had ſatisfied the Plaintiff, to whom no Benefit was intended by this Statute, but rather an Eaſe to the Defendant, that he ſhould be from thence diſcharged, giving good Bail; and the Reaſon why the Statute mentions ſuch Bail, is in Favour of the Sheriff alſo, to ſecure him from Amerciaments; the Bail being then for his Indempnity, he is the ſole Judge both of their Perſons, Number, and Ability; for the Statute requires two Sureties, and that they ſhall be Men within the County; yet if there is but one, and he not of the County, and if the Bond taken by the Sheriff for the Appearance of the Defendant be but 40 l. and the Debt due to the Plaintiff be 400 l. 'tis well enough, becauſe the Statute doth not reſtrain him to any Sum or Sureties, for he may take what Sum he pleaſes to force the Defendant to appear.

Cro. Eliz. 672.

2 Cro. 286.

And when this Security is taken, the Sheriff is neither compellable to aſſign it to the Plaintiff, or he to take it. 'Tis true, he doth uſually aſſign it, but that is to diſcharge himſelf of the Amerciaments, which is the Way that the Plaintiff ſhould purſue where he doth imagine the Bail to be inſufficient.

If therefore this Statute was made for the Benefit and Eaſe of the Defendant, the Security therein directed is for the Indempnity of the Sheriff; and therefore if no Action will lie againſt him for taking of inſufficient Bail, 'tis as reaſonable that no Action ſhould lie againſt him when he hath taken Bail, which he is compelled to do, and ſo the Traverſe in this Caſe is immaterial, and Judgment ought to be given for the Defendant.

On the other Side it was argued, That an Action of Eſcape would lie againſt the Sheriff, if he did not take good Bail, which Matter may be traverſed; and though here if the Defendant had rejoined, the Iſſue had been, whether ſufficient Bail within the County or not, yet that Part of the Iſſue had not been material, for the only Matter had reſted upon the Sufficiency or Inſufficiency of the Bail in general. Like a Caſe adjudged in Mich. 14 Car. 2. in B. R. where a Woman had Power given her by her Husband to make a Will in the Preſence of two credible Witneſſes: It was pleaded that ſhe made a Will in the Preſence of A. and B. credible Witneſſes, and Iſſue was thereupon joined, and it was found to be made in the Preſence of C. and E. who were credible Witneſſes, and this was held to be good, becauſe the Subſtance was found, viz. That it was made in the Preſence of two credible Witneſſes. Ex parte Quer. Antea.

The Defendant therefore here ought to have taken good and ſufficient Bail to bring himſelf within the Statute, and that is traverſable, and the Pleadings are well enough; for if there be good Bail, 'tis not material in what County they live.

Upon the firſt Argument of this Caſe, the Lord Chief Juſtice inclined that an Action of Eſcape did lie at the Common Law againſt the Sheriff; for it was clear that he was to keep the Party arreſted in Priſon 'till the Debt was ſatisfied, and that if he had gone at large, it had been an Eſcape; the Sheriff then had no Excuſe but by this Statute, and to entitle himſelf to any Benefit thereby, he muſt purſue the very Directions therein preſcribed, and therefore ought to take good and ſufficient Bail; for otherwiſe the Statute would be eluded, if it be left in his Power to take what Bail he pleaſes; and he was of Opinion, that the Plaintiff had an Intereſt in the Security, and therefore the Sheriff was liable, if it was not good when firſt taken, but not if by any Accident afterwards the Bail miſcarry or become inſolvent.

And Juſtice Wyndham was of the ſame Opinion, That the Sheriff was liable; he differed only as to the Manner

of the Action, which he held should be a special Action on the Case, setting forth the whole Matter, and alledging that the Defendant did not take sufficient Bail.

Justice Atkyns said, The Case depends upon the Construction of that *Statute, which is very obscure, and the Opinions various which have been upon it: 'Tis plain, the Sheriff is compellable to take Bail, and that an Action lies against him if he refuses such as are sufficient when tendred; but the Question was now, Whether it will lie against him for taking those who are Insufficient; and as to that he said, that many Authorities were in our Books, That the taking of Bail is left to the Sheriff's Discretion, and he is thereby to provide for his own Indempnity; for he must return a Cepi Corpus upon the Writ, he cannot return that he let him to Bail according to the Statute, and therefore inclined that the Action did not lie.

* 23 H. 6. cap. 10.

Scroggs, Justice, contra. He said, That this Statute designed the Benefit of the Creditor, that he might either get the Sheriff amerced, or have an Action; in both which Cases he might indempnify himself by the Security he had taken. 'Tis true, he may let the Party to Bail, but 'tis sub modo, it must be upon good Bail; and if the Sheriff be Judge of the Security, 'tis an Argument that he is liable; for if he was not in Danger, he need not take Security.

But afterwards upon the Second Argument, the Chief Justice and the whole Court were of Opinion, that Judgment should be given for Defendant.

North, Chief Justice. The Common Law was very rigorous as to the Execution of Process; the Capias was, ita quod habeas the Body at the Day of the Return, and if the Sheriff had arrested one, it had been an Escape to let him go. Before the making of this Statute, the Sheriff usually took Sureties for the Appearance of the Prisoner, and by this Means used great Extortion, and took great Sums of Money; to prevent which Mischiefs this Statute was made, and so designed.

1. For the Ease of the Prisoner, the Sheriff being now compellable to take Security, which he was not obliged to do before.

2. To prevent Extortion, and therefore directs that a Bond shall be taken in such Manner, and with such Conditions, as is therein mentioned.

But the Sheriff, ſince the Statute, is much in the ſame Condition as before, for he is to make the ſame Return of Cepi Corpus: 'Tis true, he may now let him go upon Bail, but as to the Creditor, he is to have him in Court to anſwer his Suit as before, and ſhall be amerced if he doth not appear at the Return of the Writ: So that tho' this Statute be an Eaſe to the Defendant, yet 'tis a Burthen to the Sheriff, who runs a greater Hazard ſince the making of this Act than before, becauſe then he might keep him in Priſon till the Debt was ſatisfied; but now he is obliged to let him at large upon Bail, from whom he is directed to take a Bond, which he may keep in his own Hands to indempnify himſelf: The Court can only amerce him, if the Defendant do not appear at the Return of the Proceſs, and 'tis not material to the Party, whether the Sheriff take one or more Security, that being in his Diſcretion; ſome he muſt take, for otherwiſe it is directly in Oppoſition to the Statute: Neither is it material to the Party, whether they are ſuch as are Sufficient; for if they are not, and the Defendant is thereupon diſcharged, this will not amount to an Eſcape; becauſe nothing is done but what is purſuant to the Statute, and therefore he is no otherwiſe chargeable than by Amerciaments.

The Statute was made and intended for the Benefit of the Debtor, not of the Creditor, and there might be ſome Colour for the Action if the Sheriff might Return that he let him to Bail, for then it might have been neceſſary to have alledged the Sufficiency of them, which might have been traverſed, but now he muſt purſue the Subſtance of the Statute ſo far as to take Bail; he is the proper Judge of the Sufficiency, and when the Bail is taken he muſt return a Cepi Corpus, ſo that he is only to be amerced till he bring in the Body, but an Eſcape will not lie againſt him.

## Long's *Caſe*.

ONE Long was arreſted in the Pallace-Yard, not far diſtant from the Hall-Gate, the Court being then ſitting; and being an Attorney of this Court, he, together with the Officer, was brought into Court, and the Officer was committed to the Fleet, that he might learn to know his Diſtance; and becauſe the Plaintiff was an Attorney of the Court of King's-Bench, who informed this Court, that his Cauſe of Action was for 200 l. therefore the Court ordered that another of the Sheriff's Bailiffs ſhould take

Privilege of an Attorney.

take Charge of the Priſoner, and that Mr. Robinſon the Chief Prothonotary ſhould go along with him to the Court of King's-Bench, which was done, and that Court being informed how the Caſe was, diſcharged the Defendant upon filing of Common Bail.

The Writ upon which this Long was arreſted, was an Attachment of Privilege, which the Court ſuppoſed to be made on Purpoſe to ouſt him of his Privilege; for there was another Writ againſt him at the Sheriff's Office, at the Suit of another Perſon.

*The Counteſs of* Northumberland's *Caſe.*

Knights muſt be of the Jury where a Peer is concerned. 1 Mod. 226.

ADjudged, that where a Peer is Party, either Plaintiff or Defendant, two or more Knights muſt be returned of the Jury; and it was ſaid that in Cumberland there was but one Freholder who was a Knight, beſides Sir Richard Stote, a Serjeant at Law; and the Court were of Opinion, that rather than there ſhould be a Failure of Juſtice, a Serjeant at Law ought to be returned a Juryman; for his Privilege would not extend to a Caſe of Neceſſity.

Bell *verſus* Knight. *In Banco Regis.*

Smiths Forges are chargeable with the Duty of Fire-hearth.

IN an Action of Trover; Upon Not-Guilty pleaded, the Jury found a Special Verdict, in which the Point was upon the Conſtruction of the Statute of 14 Car. 2. c. 10. for the eſtabliſhing of an Additional Revenue upon the King, his Heirs and Succeſſors, for the better Support of his and their Crown and Dignity, by which it is enacted, That for every Fire-hearth and Stove in every Houſe, the Yearly Sum of 2 s. ſhall be paid to the King, other than ſuch as in the ſaid Act are exempted: Then comes a Proviſo, which ſaith, That this Act ſhall not extend to charge any Blowing-houſe, Stamp, Furnace or Kiln, *&c.* And the Queſtion was now, Whether a Smith's Forge ſhall be charged with this Duty?

Winnington, Solicitor General, conceived that all Fire-Hearths are liable within the Body of the Act, and there is nothing to exempt them but what is in the Exception; and that a Smith's Forge cannot be called a Blowing-houſe within the Intent of the Act, notwithſtanding the Jury have found that Smiths uſe Bellows to blow their Forges: For by Blowing-houſes, ſuch Houſes are meant as are in Staffordſhire and Suffolk for the making of Iron, theſe were the Blowing-houſes intended by the Parliament to be excepted, and no other; for if Smiths Forges had been meant thereby, thoſe would have been inſerted in the Proviſo as well as the other Things therein mentioned.

Words are to be taken in a Common Understanding; for if a Traveller should enquire for a Blowing-house, no Body would send him to a Smith's Forge.

By the Opinion of the whole Court, it was adjudged upon the first Argument, That Smiths Forges are liable to this Duty; and so the Solicitor said it had been lately adjudged in this Court by the Opinion of Twisden, Wyld and Rainsford, and that my Lord Chief Justice Hale was of the same Opinion; but Twisden said, That neither the Chief Justice or himself gave any Judgment upon the Merits, but upon a Point in Pleading. Curia.

## Stroud *versus the Bishop of* Bath *and* Wells, *and Sir* George Horner. *In Communi Banco.*

IN a Quare Impedit, the Plaintiff alledges, That Sir George Horner was seised in Fee of the Manor of Dowling, to which the Advowson was appendant, and that being so seised he presented one Harding, and then granted the next Avoidance to the Plaintiff. Traverse shall not be upon a Traverse, &c. Mod. Rep. 230.

That the Church became void by the Death of the said Harding, and that now it belonged to him to present.

The Bishop pleads, that he claimed nothing, but as Ordinary; and the Incumbent pleads, that at the Time of the bringing of this Writ, the Church was full by the Collation of the Bishop upon a Lapse.

The Plaintiff replies, That Sir George Horner being seised in Fee of the said Manor of Dowling, to which the Advowson of the Church was appendant, did tali die & anno apud, &c. present him as Clerk, absque hoc that the Church was full by Collation.

The Defendant rejoins, Protestando that the Church was full tali die; and for Plea saith, that it was full upon the Collation of the Bishop, absque hoc that Sir George Horner did tali die & anno, &c. present the Plaintiff as his Clerk, and so traverseth the Inducement which the Plaintiff had made to his Traverse; and to this; the Plaintiff demurred.

And Serjeant George Strode took Three Exceptions to this Rejoinder. Ex parte Quer.

1. That when the Defendant pleads a Matter in Bar, and the Plaintiff hath taken a Traverse upon that, the Defendant should then take Issue upon that Traverse, and so

Vaugh. 62. 1 Sand. 21, 22. so have maintained his Bar, from which he had departed here by traversing another Matter.

In a Quare Impedit the Plaintiff declares, that Sir Thomas Chicheley granted an Advowson to one East, and another in Fee, to the Use of the Wife of the Plaintiff for her Jointure, and that she ought to present.

The Defendant pleads, that he is Parson imparsonee ex præsentatione Regis, for that Sir Thomas Chicheley died seised as aforesaid of the Manor and Advowson held in Capite by Knights Service, which descended to his Son an Infant, and by Office found of the Tenure and Descent the King was seised, and presented him absque hoc that Sir Thomas granted to East.

The Plaintiff replies, Non habetur tale Recordum de inquisitione; and upon Demurrer it was held, that this Traverse of the Inquisition was not good; for there shall not be a Traverse upon a Traverse, but where the Traverse in the Bar is material to the Title of the Plaintiff; and in such Case he is bound up to it. Cro. Car. 104, 105.

Hob. 104. 1 Inst. 282. b. Vaugh. 62.

Antea. Yelv. 122.

2. In his Traverse he hath made the Time Parcel of the Issue, viz. absque hoc that tali die & anno præsentavit, whereas it should have been modo & forma only, and so is the Case of Lane *and* Alexander, where the Defendant intituled himself by Copy of Court Roll. 44 Eliz. The Plaintiff replies, that a Copy was granted to him 1 Junii, 43 Eliz. The Defendant maintained his Bar, and traverseth the Grant 1 Junii modo & forma; and upon a Demurrer it was said, that the Rejoinder was not good, because the Day and Year of granting of the Copy was not material, if it was granted before the Defendant had his Copy; and so the Traverse ought to have been, absque hoc that the Queen granted modo & forma.

2 Cro. 202.

1 Sand. 14. 2 Sand. 295. Cr. Car. 501.

But it was adjudged, That the Day ought not to be made Parcel of the Issue, and the Traversing of it when it ought not so to be, makes it Substance and not Form, so as to be aided by the Statute of 27 Eliz.

3. As the Defendant hath joined, they can never come to an Issue; for he concludes his Traverse, Et hoc paratus est verificare, unde petit Judicium; whereas he should have concluded to the Country.

Ex parte Def.

Barton, Serjeant; admitting the Pleadings are not good, yet if the Plaintiff's Count is so likewise, he cannot have Judgment; and that it was so, he said, appears in that the Plaintiff had not set forth a sufficient Title; for he hath alledged that Sir George Horner was seised in Fee, and presented the Plaintiff, who was instituted and inducted,

but doth not ſay that the Preſentation was tempore Pacis, and therefore it ſhall be preſumed moſt ſtrongly againſt himſelf to be tempore Belli, and a Preſentation muſt be laid tempore Pacis, and ſo is the Writ of Aſſize of Darrein Preſentment. F. N. B. 31. Old Nat.Br. 25. 1 Inſt. 249.

The Court held that the Pleadings were not good, and that the Count was good; for 'tis true, if a Man count that he and his Anceſtors were ſeiſed in Fee of an Advowſon, but declares of no Preſentation made by him or them; or if he declare of a Preſentation without an Eſtate, in both Caſes it is naught, and good Cauſe of Demurrer; but here the Count is both of an Eſtate and a Preſentation. And this Difference was taken, if a Man gets a Fee by Preſentation, which is his Title, he muſt alledge it to be tempore Pacis; but if it be in Purſuance of a Right, as if an Advowſon be appendant to a Manor, and he who hath Right to the Manor preſents, ſuch Preſentation is good in Time of War; and ſo Judgment was given for the Plaintiff. Vaugh. 57. Hob. 101.

Stevens *verſus* Auſtin.

ADjudged, That if a Man hath Common for a certain Number of Cattle belonging to a Yard-Land, he need not ſay Levant upon the Yard-Land; ſed aliter, if it were for a Common ſans Number.

The Maſter, Warden and Company of Ironmongers, *verſus* Naylor *and others*, Defendants. *In B. R.*

IN Treſpaſs, the Jury found a ſpecial Verdict; they find ſeveral Acts of Parliament, viz. 14 Car. 2. c. 10. 15 Car. 2. cap. 13. and another Act, for the better Direction of the collecting of the Duty ariſing by Hearth-money by Officers to be appointed by the King; and this was the Act of 16 Car. 2. cap. 3. which provides, That if the Party refuſes to pay the Duty by the Space of an Hour, that then the Officers with the Conſtable may diſtrain. Jones 85. 1 Ventris 311.

They find that the Company was ſeiſed in Fee of five Meſſuages, in which were 35 Fire-hearths in the Month of April, 1673. and that the Company did never finiſh theſe Meſſuages, and that from the Time of the Building they ſtood all void and unoccupied by any Tenant or Tenants whatſoever.

Then they find that the Collectors were lawfully authorised, and that such a Day they demanded the Duty for the Fire-hearths in each of the said Messuages, which they also demanded of the Company, and which they refused to pay, and thereupon they took the Distress, and kept it till the Company paid the said Duty, and so make a general Conclusion, &c.

The Question was, Whether the Owner of a new House uninhabited from the Time of the Building thereof ought to pay this Duty during all that Time?

Mr. Pollexfen and Mr. Simpson argued, that they shall not be chargeable with this Duty; their general Reason was, because no Duty should arise to the King without some Benefit to the Subject.

And as to that it was said, that in this Case both the Revenue of the Crown and the Property of the Subject are concerned; from which, as from a Root, all these Impositions arise to sustain the publick Charge. And therefore,

It hath been the Way of Judges in the Interpretations of Statutes, not only to consider the Benefit of the Crown, but to regard what is convenient for the Subject.

There are Two Reasons for Impositions:

1. Such as are Customs, viz. Tunnage and Poundage, and private Tolls, which come in lieu of other Things, and so are quid pro quo.

2. Subsidies or Grants from the People, which naturally arise in some Proportion from a Benefit to the Subject.

And under the last of these Reasons falls the present Duty given by the Act of 14 Car. only to proportion the Revenue to the publick Charge of the Crown; and therefore 'tis not to be thought that the Parliament ever intended a Duty to the King where the Subject had no Benefit, for ex nihilo nihil fit; and how can it be thought that a Duty should be paid before the Subject hath any Rent, which is the Mother of the Duty; for if a Man expends 1000 l. in Building, which is all he is worth, and the Houses should happen not to be let, how can he then raise such a Sum as must be paid to the King? And 'tis an Objection of no Weight to say, if this Duty must not be paid 'till the Houses are let, then the Revenue of the King depends upon a Contingency, because all Duties which come to the Crown do depend upon such.

The next Thing to be considered is the Act it self, and as to that,

1. It

1. It must be taken as an Act which gives a new Duty to the Crown, and thereupon such Construction ought to be made, that the Subject's Estate be not charged further than the Words will bear; and for that Reason it is to be taken in an ordinary Sense, and not to be strained, though it had been in the Case of an old Duty; and for that, the * Lord Anderson's Case is a good Authority, viz. The Statute of 33 H. 8. cap. 30. makes all Manors (which descend to any Heir whose Ancestor was indebted to the King by Judgment, Recognisance, Obligation or other Specialty) chargeable for Payment of the Debt. Tenant in Tail is bound in a Recognizance to S. who is attainted; then Tenant in Tail dies, and his Issue aliens bona fide, the King cannot extend the Lands so sold, because the Act shall not be construed to mean all Recognizances for the King's Debts, though the Words are general enough; and though 'tis not said which way the Debt shall come to the King, either by Forfeiture, Attainder, &c. yet they shall be taken in an ordinary Sense, viz. such Debts as were due to the King originally; for which Reason it has been always held, where an Act gives any Thing to the King, and lays a Charge upon the Subject, in such Case it ought to have a moderate Construction. * 7 Co. 21.

And that this Duty is a Gift, cannot be denied, for 'tis called so in the very Act, therefore such ought the Construction to be, and the rather because it is more for the King's Honour it should be so; and both in this Case, as well as in Constructions of his Grants, the Law hath more Regard for his Honour than for his Profit.

2. This being so called, a Duty or Tax by the very Words of the Act, doth in the natural Sense import a Proportion out of that in which the Subject hath a Benefit; and it will be scarce found that there hath been a general Tax given to the King, where the Subject has rather received a Loss than any Profit out of the Thing taxed, because it would be very hard to pay where a Man cannot receive.

In the Case of Tonnage and Poundage, Provision is made that the Party shall have Allowance if the Goods be lost by Piracy; which was mentioned, to shew how unlikely it was that the Parliament should intend a Duty where the Subject had a Loss.

Ever since the making the Statute of 43 Eliz. cap. 2. Houses that lay void and untenanted have neither paid to Church or Poor, which also shews how the Usage hath been in Cases almost of the like Nature.

The next Thing considered were the Clauses in this Act of 14 Car. 2. cap. 10.

1. **The first Clause gives a Duty,** viz. That every Chimney and Stove shall pay 2 s.

2. **The next Clause is to bring this Duty into a Way of Charge,** viz. That every Owner or Occupier shall give unto the Constable an Accompt of the Number of Hearths in Writing, and the Constables to transmit such Accompts to the Sessions, there to be enrolled by the Clerk of the Peace, and a Duplicate to be sent into the Exchequer.

**From which it is to be observed, that where Mention is made of bringing this Duty into a Charge, both** Owners **and** Occupiers **are named, but the** Owner **is not named in any Place where the Payment of the Duty is mentioned, but the** Occupier **only; so that from the very Intent and Reason of the Act he cannot be chargeable.**

**The Accompt thus transmitted is to charge the Inheritance, and therefore it concerns the Owner to look after the Charge; but for empty Houses he cannot be charged, because the Act takes no Notice of them in the Clause of Payment, but are purposely omitted, that being laid on the Occupier, and this appears by the Proviso which is strongely penned for the Subject;** viz. Provided that the Payments and Duties hereby charged, shall be charged only upon the Occupier for the Time being, *&c.* and not on the Landlord who lett and demised the same; **so that by the Body of the Act every House is charged, which being general, might have given some Colour to charge the Owner, but by the Proviso the Payment is restrained to the Occupier, and if there be no such, there shall be no Payment.**

**It was said, that it cannot be insisted upon, that an Owner is an Occupier, because the legal Acceptance of the Word** Occupation **doth only intend an actual Possession, and not a Possession in Law; and such is the Meaning of the Statute, by charging the Occupier for the Time being.**

**If therefore the Proviso extends to Cases where Tenants run away and pay no Rent,** (as it certainly doth) **because there is no Occupier then in Being; what Difference can there be betwæn that and this Case, where the Landlord in both hath no Rent? for if he shall not pay where he cannot receive Rent, why should he pay where he hath none to receive?**

**And that this was the Meaning of the Parliament, may further appear by a Clause in the Act of** 16 Car. 2. c. 3. **made for collecting this Duty by Officers appointed by the King, which doth not inlarge the former Statutes, and by which 'tis enacted,** That if any Occupier shall leave his House before any of the half-yearly Feasts, whereon this Duty is appointed to be paid, that the next Occupier shall be chargeable with the same for the said Half Year. **Which**

Which Clauſe had been altogether vain and of no uſe, if empty Houſes had been chargeable with this Duty; for to what Purpoſe was it to charge a ſucceeding Occupier, when the Houſe it ſelf, though untenanted, was chargeable before.

In this Act alſo, which ſupplies the Defects of the former, this Duty is made payable unto the Officer upon Demand at the Houſe where the ſame ſhall ariſe and grow due, and that in Caſe of Refuſal by the Space of an Hour, the Officer may diſtrain; which ſhews a Demand muſt be where there may be a Refuſal, and no Refuſal can be where there is no Occupier.

There is alſo another Clauſe which mentions both Owner and Occupier in this Act, and which ſaith, That no Proprietor, Owner, or Occupier, ſhall be moleſted or charged, unleſs within Two Years after the Duty accrewed; ſo that whereever a Charge is laid, or an Eaſe is given to the Subject, the Word Occupier, and ſometimes both Occupier and Owner, promiſcuouſly are uſed; but where a Payment is to be made, the Owner is never mentioned, and if ſo, nothing ſhall be intended within either of the Statutes to enlarge this Duty upon the Subject, beyond the Words and plain Meaning thereof.

2. There is another Point in this Caſe, which concerns the King and all the People of England; that is, Whether the Defendant here can be charged with the Diſtreſs (ſuppoſing this Duty is to be paid to the King) before any Account of theſe Hearths is tranſmitted into the Exchequer, which firſt ought to be done; or otherwiſe the Conſequence will be, that the Officer may demand and take as much as he will at his Pleaſure, and the King may be likewiſe prejudiced in his Revenue; for as the Collector may have from the Subject more than he ought, and more than he is empowered to take by the Law, ſo he may pay the King leſs.

The Act directs, That an Account ſhall be taken by the Officers, and examined by the Conſtables, then to be tranſmitted to the Seſſions, there to be enrolled, and from thence ſent into the Exchequer; now what Occaſion was there of all this Solemnity, if that the King was entituled to a Diſtreſs upon a bare Refuſal?

This being a Rent-Charge upon a Man's Inheritance, the King ſhall not be entituled to it but by Matter of Record; for he cannot take or part with any Thing, neither can he have any Eſtate or Profit rendered him out of another Man's Eſtate, but by Matter of Record; ſo that it ſeems by the Act, that this Accompt is neceſſary to be

transmitted into the Exchequer; and that the King is not intituled to a Diſtreſs for this Duty until that be actually done, which is not only Matter of Information to the Crown, but in ſome Meaſure intitles him to it, becauſe there is a Penalty of five Pounds laid upon the Officer, who ſhall neglect to bring in ſuch Accompt, which ſhews that the Subject ought not to be charged before; for which Reaſons Judgment was prayed for the Plaintiff.

Ex parte Def. But on the other Side it was argued by Mr. Holt and the Attorney General, that empty Houſes ſhould pay this Duty: For the Attorney General ſaid, that the Words in the Act were ſo expreſs, that he was of Opinion that the very Reading of them would clear the Point in Queſtion.

In their Arguments, Two Things were conſidered upon the Statute of 14 Car. 2.

1. Firſt, the General Clauſe, which gives the Duty in the Body of the Act.
2. The Diſcharge in the Proviſo.

And if this be in the Body of the Act, and not excepted in the Proviſo, then the Duty is to be paid; and as to that, it was ſaid that this Duty was given in general Words, by which it appears, that there was a Deſign and Intent to charge empty Houſes, for every Dwelling-houſe, Edifice or Houſe whatſoever, is to pay this Duty; and that if every Houſe, why not an empty Houſe?

'Tis true, a Dwelling-houſe is not a Houſe wherein there hath not been an Inhabitant, but wherein ſome body doth actually live; and if a Man furniſhes a Houſe very well, if 'tis not inhabited, it is notwithſtanding an empty Houſe, and ſuch a Houſe as to ſome Purpoſes in the Law is not a Dwelling-houſe; for 'tis not a Manſion-houſe, ſo as to make it Burglary for the Breaking of it open.

By the Second Clauſe, Every Owner or Occupier is to ſubſcribe the Account to be ſent into the *Exchequer*; by which it appears, that thoſe Words, Owner and Occupier, are not there uſed in a different Senſe, for if the Occupier were only liable, the Owner need not look after the Signing the Accompt of every Hearth.

The Third Clauſe takes Notice, That if it ſhould happen there be no Occupier, then the Officer may go into the empty Houſe to examine if the Account given him be true; now if an Account is to be taken of ſuch Houſes as are charged by this Act, and an Account is directed to be taken of empty Houſes, then ſuch empty Houſes muſt be charged; and this ſeemed to them to be the Intent and

Meaning of the Parliament, for there being a Return to be made of empty Houſes, if ſuch had not been intended to be charged, they would have directed a Return alſo to have been made of the Non-inhabitancy.

And therefore they thought that ſomething more than an Occupier was here meant, for otherwiſe the Word Owner had not been put in; the Meaning of which muſt be, That Dwelling-houſes come within the Charge of Occupiers, and empty Houſes within the Charge of the Owners.

Then as to the Proviſo, That the Duty hereby ariſing ſhall be charged only upon the Occupiers and Dwellers of ſuch Houſes, their Executors and Adminiſtrators, that can in no Sort extend to diſcharge an empty Houſe, becauſe 'tis not the ſubject Matter of the Proviſo; for the Deſign and Purpoſe of it was not to diſcharge the Duty, but to transfer the Charge upon the Tenant where the Houſe was inhabited; for if a contrary Conſtruction ſhould be made, then no Duty ſhould be paid at all by the Owner himſelf, if he ſhould live in his own Houſe.

In the Caſe of a Modus decimandi, 'tis payable by the Occupier and Poſſeſſor of the Houſe, and the Landlord is never charged but where there is no Occupier.

As to the Objection, That 'tis hard to pay a Duty where a Man has no Profit, it was anſwered, That the Act took Care that Men ſhould not ſtop up their Chimnies when once made, and that this Duty was paid for many Chimnies which were never uſed; and what Profit can a Man have of a Chimney he never uſeth? If there had been an Act, that ſo much ſhould be paid for every Window, 'tis all one whether it had been for Profit or Pleaſure, or whether the Window had been uſed or not; and there is as much Reaſon that a Man ſhould pay for Houſes never inhabited, as for ſuch as have been inhabited and are afterwards without Tenants.

This Act ought therefore to receive a favourable Conſtruction; the Preamble whereof mentions, that it was for the encreaſing of the King's Revenue, which is pro bono publico, and which is for the Peace and Proſperity of the Nation, and the Protection of every ſingle Perſon therein; and though a particular Inconvenience may follow, the Party ought to ſubmit. When a Man builds a Houſe, he propoſes a Profit; and 'tis not fit the King's Duty ſhould be contingent and depend, till he has provided himſelf of a Tenant.

Object. As to the other Objection that was much relied on, viz. where the Act ſpeaks of an Accompt to be given, it mentions both Owner and Occupier; but where it directs

the Payment of the Duty the Occupier only is named, by which it was inferred that he alone was chargeable.

Anſw. In 16 Car. 2. cap. 3. Owner, Proprietor and Occupier, are uſed promiſcuouſly, wherein it is provided, that they ſhall not be charged unleſs within two Years after the Duty accrued; now if the Owner was not chargeable, why is he mentioned there?

As to the ſecond Point, they conceived that the Duty being payable to the King, he had a Remedy by Diſtreſs before the Accompt was certified into the Exchequer; for the Return was to inform the King what Advantage he maketh of his Revenue, and no Proceſs iſſued upon it; beſides the Act veſts the Duty in him from Lady-day, 1662. And by Reaſon of that he may diſtrain. The King hath no Benefit by returning of the Account, that being only intended to prevent his being cheated, ſo that 'tis not to entitle but to inform him; 'tis only to return a juſt and true Account; not but that it may be levied, and the King entituled before: And 'tis no Inconvenience to the Subject, if there be no ſuch Account returned, for if the Officer diſtrain for more Hearths than in Truth there are, the Subject has a proper Remedy againſt him.

The King ſuffers, when Returns are not made of ſuch Duties as he ought to have for the Support of his Dignity; and becauſe he is liable to be defrauded in the Managing of his Duty, is it reaſonable that he ſhould loſe all?

As to what was ſaid of the King's taking by Matter of Record: 'Tis true, if he deveſt an Inheritance, as in caſe of Attainder, it muſt be by Record; but here the very Duty is given to him by the Act it ſelf, which makes a different Caſe.

If the King ſhould be ſeiſed in Fæ of a great Waſte, which happens to be improved by his Tenants, and thereby Tythes become due, it may be as well ſaid, that he ſhall have no Tythes without Record, as to ſay he ſhall have no Hearth-money for Houſes newly erected, whereby his Revenue is increaſed. For which Reaſons Judgment was
Curia. prayed for the Defendant, and upon the Second Argument Judgment was given accordingly for him, That empty Houſes are ſubject and liable to this Duty.

## Aſtry *verſus* Ballard.

IN an Action of Trover and Converſion for the taking of Coals, upon Not-Guilty pleaded, the Jury found a ſpecial Verdict. The Caſe was thus; viz.

That one J. R. was ſeiſed in Fee of the Manor of Weſterly, and being ſo ſeiſed, did demiſe all the Meſſuages, Lands, Tenements and Hereditaments that he had in the ſaid Manor for a Term of Years to N. R. in which Demiſe there was a Recital of a Grant of the ſaid Manor, Meſſuages, Lands, Tenements, Commons and Mines, but in the Leaſe it ſelf to R. the Word Mines was left out. Afterwards the Reverſion was ſold to the Plaintiff Aſtry, and his Heirs by Deed enrolled; and at the Time of this Demiſe there were certain Mines of Coals open, and others which were not then open; and the Coals for which this Action of Trover was brought, were digged by the Leſſee in thoſe Mines which were not open at the Time of the Leaſe; and whether he had Power ſo to do, was the Queſtion.

Grants muſt be taken according to common Intendment. Jones 71. 2 Levinz 185.

It was ſaid, That when a Man is ſeiſed of Lands wherein there are Mines open, and others not open, and a Leaſe is made of theſe Lands in which the Mines are mentioned; 'tis no new Doctrine to ſay, that the cloſe Mines ſhall not paſs. Men's Grants muſt be taken according to uſual and common Intendment, and when Words may be ſatisfied, they ſhall not be ſtrained farther than they are generally uſed, for no violent Conſtruction ſhall be made to prejudice a Man's Inheritance contrary to the plain Meaning of the Words.

Antea.

A Mine is not properly ſo called 'till it is opened, 'tis but a Vein of Coals before; and this was the Opinion of my Lord Coke in Point, in his Firſt Inſt. 54 b. where he tells us, that if a Man demiſes Lands and Mines, ſome being opened and others not, the Leſſee may uſe the Mines opened, but hath no Power to dig the unopened Mines; and of this Opinion was the whole Court: And Juſtice Twiſden ſaid, That he knew no Reaſon why my Lord Coke's ſingle Opinion ſhould not be as good an Authority as Fitzherbert in his Nat. Br. or the Doctor and Student.

5 Co. 12. Sander's Caſe. Roll. Abr. 2. Part 816.

## Ipſley *verſus* Turk.

IN a Writ of Error upon a Judgment in an inferior Court, the Error aſſigned was, That the Mayor, who was Judge of the Court, did not receive the Sacrament at

T. Jones 81. 2 Lev. 184. What is admitted in Pleading.

Shall not be assigned for Error. Jones 81. 2 Levinz 184.

at any Parish Church, nor file any Certificate, so that he was not Mayor; and Judgment being given against the Defendant before him, it was therefore Coram non Judice, like the Case of Hatch and Nichols, Roll. Abr. 1 Part tit. Error 761. Where, upon a Writ of Error brought upon a Judgment in an Inferior Court, the Error assigned was, that the Stile of the Court was Curia tent' coram J. S. Seneschallo, who was not Steward, and that was held to be an Error in Fact.

But on the other Side it was insisted, that this was not Error, because the Acts of the Mayor should not be void as to Strangers. The Statute of 25 Car. 2. cap. 2. for preventing of Dangers which may happen from Popish Recusants, disables the Party who is not qualified according to the Act to hold an Office, and if he execute the same afterwards, upon Complaint made, and Conviction, he shall forfeit 500 l. so that as to himself, whatever he doth in his Office is void; but it was never the Intent of the Act to work a Mischief or Wrong to Strangers, for the Law favours what is done by one in reputed Authority: As if a Bishop be created, who upon a Presentation made admits a Parson to a Benefice, or collates by Lapse, the former Bishop not being deprived or removed; such Acts are good, and not to be avoided. Cro. Eliz. 699.

Cro. Car. 97. 2 Cro. 260. 2 Lev. 242. T. Jones 137

But admitting it to be an Error, it cannot now be assigned for such, because the Parties in Pleading have allowed the Procædings to be good upon Record, and there is Judgment against the Defendant; but if he had been taken upon that Judgment, he might have brought an Action of false Imprisonment. 2 Cro. 359. Cro. Eliz. 320.

Wild, Justice: You shall not assign that for Error which you might have pleaded, especially having admitted it by Pleading; and one Musgrave's Case was cited, which was, That there is an Act of Parliament which lays a Tax upon all Law-Procædings, and makes them void, if the King's Duty be not paid; and it was adjudged, That if the Duty was not paid, but admitted in Pleading, you shall not afterwards alledge what before was admitted, viz. That the Duty was not paid.

Upon a Writ of Error in Parliament it cannot be assigned for Error, that the Chief Justice of the King's-Bench had not taken this Oath; the same might be also of a Writ of Error in the Exchequer-Chamber, for an Error in Fact cannot be there assigned; but at the last the Judgment was reversed: See the Reasons thereof by the Chief Justice Jones in his Reports, folio 81.

Sid. 253.

## Higginſon *verſus* Martin. *In C. B.*

IN an Action of Treſpaſs and falſe Impriſonment, the Defendant juſtifies by Proceſs iſſuing out of the Court of Warwick, upon a Judgment obtained there, and ſets forth, that there was a Plaint there entered in placito tranſgreſſionis, to which the Defendant appeared, ſuper quo taliter proceſſum fuit, that Judgment was given againſt him, upon which he was taken and impriſoned.

If Cauſe of Action doth not ariſe within the Juriſdiction, tho' Judgment is given below, an Action will lie here.

The Plaintiff replies, That the Cauſe of Action did not ariſe within the Juriſdiction of that Court.

The Defendant rejoins, That the Plaintiff is now eſtopped to ſay ſo, for that the Declaration in the Inferior Court againſt the now Plaintiff, did alledge the Cauſe of Action to be infra Juriſdictionem of the Court, to which he pleaded, and Judgment was given againſt him: The Plaintiff demurs.

And Newdigate, Serjeant, took Exceptions to the Plea.

1. 'Tis ſaid, a Plaint was entered in placito tranſgreſſionis, but 'tis not ſaid what Kind of Treſpaſs it was, whether a clauſum fregit, or other Treſpaſs. Ex parte Quer.

2. 'Tis ſaid, that the Defendant appeared ſuper quo taliter proceſſum fuit, that Judgment was given for the Plaintiff, and no Mention was made of any Declaration; and the Pleading taliter proceſſum eſt in an Inferior Court, is not good. Antea.

3. The Juſtification is ill, becauſe the Inferior Court had no Juriſdiction, and ſo the Proceedings are coram non Judice; for the Plaintiff in his Replication ſaith, That the Treſpaſs for which the Recovery was had in the Court of Warwick, was done at a Place out of the Juriſdiction of the Court, which the Defendant hath admitted, by relying on his Plea by way of Eſtoppel. Moor 422. Latch. 180. Cro. Jac. 184.

4. It did not appear by what Authority the Court at Warwick was held, whether by Grant or Preſcription.

Theſe Exceptions were anſwered by Serjeant Hopkins; Ex parte Def.

and Firſt, he ſaid, that the Plaintiff there ſets forth, that levavit quandam querelam in placito tranſgreſſionis, which was well enough.

Secondly, taliter proceſſum fuit is the ſhorter and better Way of Pleading, and therefore in a Scire facias nothing is recited but the Judgment: 'Tis true, in a Writ of Error the whole Record muſt be ſet out, but that is not neceſſary here.

Thirdly, 'tis too late now to question the Jurisdiction of the Inferior Court, after the Party hath admitted it below; he ought first to have pleaded to the Jurisdiction, but now is stopped by his own Admittance there; and since Judgment is given upon it, 'tis not now to be questioned; but however, this being in the Case of an Officer, if it was out of the Jurisdiction, he is bound to execute the Process of the Court, and so this is a good Excuse for him. Dyer 61. 10 Co. 77.

But let the Pleadings be good or bad, if the Declaration here be ill, the Plaintiff cannot have Judgment; and that it was so, he said that the Writ alledged an Imprisonment generally, but the Count an Imprisonment donec he paid 5 l. 10 s. which is variant; and the Prothonotaries said, that the Writ used always to mention donec, &c.

Curia. But the Court were all of Opinion, that the Count was well enough, for there was no Matter therein contained which was not in the Writ; the Imprisonment was the Gist of the Action, and the donec, &c. might have been given in Evidence, because 'tis only an Aggravation and a Consequence of the Imprisonment, so that the Count is not larger, but more particular than the Writ: And as to to Two first Exceptions, the Court was also of Opinion, that there was no Difficulty in them, or in the last Exception, but thought the Plea was well enough as to those. And they also agreed, that the Officer in this Case was to be discharged; for though the Process be erroneous, yet he is to obey, and not to examine, 2 Cro. 3. Weaver *versus* Clifford: The great Doubt in this Case was upon the Third Exception, as to the Point of Jurisdiction, and whether the other Defendant, who was the Plaintiff below, should be likewise discharged, was the Question.

Sid. 151. Latch. 181.

Con. Lut. 935, 938, 1568, 1569, 1571. 2. And as to that, the Chief Justice, and Wyndham, Justice, were of Opinion, that this was no good Justification as to the Plaintiff below; for if the Cause of Action did arise without the Jurisdiction, of which he is bound to take Notice, the Procedings quoad him, are all coram non Judice, and he cannot justify the serving of any Process; so that if the Trespass was done out of the Jurisdiction of the Court, the Defendant below may bring an Action against the Plaintiff, and is not concluded here by the Procedings there, but may alledge the Cause of Action to arise out of the Jurisdiction; and as to his being estopped by admitting of the Jurisdiction below, that cannot be, because an Admittance cannot give the Court a Jurisdiction where it had none originally, and so he said it was resolved in one Squib's Case, in a special Verdict.

1 Ven. 369.

He who ſues in an Inferior Court, is bound at his Peril to take Notice of the Bonds and Limits of that Juriſdiction; and if the Party after a Verdict below prays a Prohibition, and alledges that the Court had no Juriſdiction, a Prohibition ſhall be granted; and 'tis no Eſtoppel that he did not take Advantage of it before. 5 Roll. Abr. 145. 1 Ven. 88. Con. Lut. 1567.

But Juſtice Atkins and Scroggs were of another Opinion; they agreed, that if an Action be brought in an inferior Court, if it be not ſaid to be infra Juriſdictionem Curiæ, they would never preſume it to be ſo, but rather to be without, if not alledged to be within the Juriſdiction, and here in the Plea 'tis not ſhewn at all; ſo that as the Caſe ſtands upon the Plea, the Procædings are coram non Judice, and there is no legal Authority to warrant them, and by Conſequence the Officer is no more to be excuſed than the Party, becauſe alſo 'tis in the Caſe of a particular Juriſdiction: And ſo it hath been adjudged upon an Eſcape brought againſt an Officer of an Inferior Court, wherein the Plaintiff declared, That he had brought an Action upon a Bond againſt S. in the Court of Kingſton, and that he had Judgment and Execution, and the Defendant ſuffered him to eſcape; this Declaration did not charge the Defendant, becauſe the Bond was not alledged to be made infra Juriſdictionem Curiæ; for though ſuch an Action is tranſitory in its Nature, yet the Procædings in an inferior Court upon it are coram non Judice, if it doth not appear to be infra Juriſdictionem. 1 Roll. Abr. 809. tho' in the Caſe of a general Juriſdiction it might be otherwiſe.

But here the Rejoinder doth help the Plea; for the Plaintiff having replied that the Treſpaſs was committed out of the Juriſdiction, and the Defendant having rejoined that he had alledged in his Declaration below that the Treſpaſs was done within the Juriſdiction, 'tis now all one Plea, and the Plaintiff hath confeſſed it by his Demurrer; ſo that in Regard it was alledged below and admitted there, 'tis a good Plea both for Officer and Party, and the Plaintiff cannot now take Advantage of it, but is concluded by his former Admittance, and it ſhall not be enquired now whether true or falſe. Lut. 935, 938, 1568.

And as to the taliter proceſſum fuit, they all held it well enough, and that there was no Neceſſity of ſetting out all the Procædings here as in a Writ of Error. 2 Vent. 100. con. T. Jones 129, 185. Ante 102.

And as to the laſt Exception, 'tis ſaid that the Borough of Warwick is antiquus Burgus, and that the Court is held there ſecundum Conſuetudinem, which is well enough.

Jones's

## Jones's *Case.*

*Common-Pleas* cannot grant *Habeas Corpus* in Criminal Cases.

IT was moved for a Habeas Corpus for one Jones, who was committed to New-Prison by Warrant from a Justice of Peace, for refusing to discover who intrusted him with the keeping of the Keys of a Conventicle, and for that he had been instrumental to the Escape of the Preacher; he was asked by the Justice to give Security for his good Behaviour, which he also refused, and thereupon was committed.

The Chief Justice doubted that a Habeas Corpus could not be granted in this Case, because it was a criminal Cause of which the Court of Common-Pleas hath no Jurisdiction, and that seemed to be the Opinion of my Lord Coke, 2 Inst. 55. where he saith, it lies for any Officer or Privileged Person of the Court.

Vaugh. 157. 2 Inst. 53.

Mod. Rep. 235.

There are Three Sorts of Habeas Corpus's in this Court one is ad respondendum, which is for the Plaintiff who is a Suitor here against any Man in Prison, who is to be brought thereupon to the Bar, and remanded if he cannot give Sureties.

There is another Habeas Corpus for the Defendant ad faciend' & recipiend'; as to this, the same Jurisdiction is here as in the Court of King's-Bench; if a Person be near the Town, by the Course of the Court he may be brought hither to be charged, and then the Habeas Corpus is returnable immediate; but if he be remote, it must then be returnable in the Court of a certain Day. These are the Habeas Corpus's which concern the Jurisdiction of this Court, and are incident thereunto.

There is another which concerns Privilege, when the Party comes and subjects himself to the Court to be either bailed or discharged, as the Crime is for which he stands charged; and if he be privileged, this Court may examine the Case, and do him Right; if a private Man be committed for a criminal Cause, we can examine the Matter, and send him back again. Before King James's Reign there was no Habeas Corpus, but recited a Privilege, as in the Case of Privilege for an Attorney; so that if this Court cannot remedy what the Party complains, 'tis in vain for the Subject to be put to the Trouble when he must be sent back again; neither can there be any Failure of Justice, because he may apply himself to a proper Court: And of the same Opinion was Wyndham and Scroggs.

But Justice Atkins was of another Opinion, for he could see no Reason why there should not be a Right to come to this Court as well as to the King's-Bench.

And that Vaughan, Wild, and Archer, Justices, were of Opinion, that this Court may grant a Habeas Corpus in other Cases besides those of Privilege.

Afterwards the Prisoner was brought to the Court upon this Habeas Corpus, but was remanded, because this Court would not take Sureties for his Good Behaviour. The Chief Justice said, That when he was not on the Bench, he would take Sureties as a Justice of Peace: And Monday, late Secondary, informed him, that Justice Wild, when he sat in this Court, did once take such Sureties as a Justice of Peace.

## Anonymus.

In *Replevin* both are Actors.

IT was the Opinion of the Chief Justice North, that in a Replevin both Parties are Actors, for the one sues for Damages, and the other to have the Cattle, and there the Place is material; for if the Plaintiff alledges the Taking at A. and they were taken at B. the Defendant may plead Non cepit modo & forma, but then he can have no Return; for if he would have a Retorn' habend', he must deny the Taking where the Plaintiff hath laid it, and alledge another Place in his Avowry.

## *Sir* Osborn Rands *versus* Tripp.

New Trial granted.

THE Plaintiff was a Tobacconist, and lived near Guild-Hall, London; he married the Daughter of the Defendant, who was an Alderman in Hull, and had 400 l. Portion with her; after the Marriage, the Defendant spoke merrily before Three Witnesses, That if his Son-in-Law would procure himself to be Knighted, so that his Daughter might be a Lady, he would then give him 2000 l. more, and would pay 1000 l. Part thereof presently upon such Knighthood, and the other 1000 l. within a Year after; (it being intended when the Plaintiff should by his Trade get an Estate sufficient to qualify him for the Dignity of a Knight.)

The Son-in-Law, without acquainting the Defendant, did about nine Months afterwards procure himself to be Knighted, and brought an Assumpsit for the 2000 l. which was

was tried before the Chief Justice North at Guildhall, and the Jury gave 1500 l. Damages.

And now Serjeant Maynard moved for a new Trial upon the Affidavit of the Defendant, that he had found out material Witnesses since the Trial, and that such Witnesses as he had ready at the Trial could not get into Court, because of the great Tumult and Disorder there with a Multitude of People, by Reason whereof his Counsel could not be heard from the Noise, and when they offered to speak, were as often hissed.

The Chief Justice thought it was a hard Verdict, for he was not clearly satisfied that the Agreement was good, it being only for Words which were spoken by the old Man when he had but a weak Memory; and thereupon a new Trial was granted, because the Chief Justice thought it was fit so to be.

## Basket *versus* Basket.

Disjunctive Condition, one Part is discharged by the Obligee, the other Part shall not be performed by the Obligor. Mod. Rep. 264.

DEBT upon a Bond, with a Condition to make an Assurance of an Annuity of 20 l. per Annum to the Plaintiff within six Months after the Death of M. B. and if he refuse when requested by the Plaintiff, then to pay 300 l. and if he fail in Payment thereof, the Bond to be forfeited.

The Defendant pleads, that all the Six Months he was a Prisoner at Morocco in Barbary, and that after his Return he requested the Plaintiff; and to this Plea the Defendant demurred.

And Serjeant George Strode maintained the Demurrer.

The Question was, Whether the Plaintiff, by neglecting to tender a Grant of the Annuity to the Defendant, hath not dispensed with the whole Condition? And he held that it was dispensed withal, and that no Request being made, the Bond could not be sued at the Common Law, and therefore the Replication was ill.

'Tis not so much a disjunctive Condition to do one Thing or another, but the last Clause is a Penalty to inforce the first; for seeing the Annuity to be but 20 l. per Annum for a Life, and yet that 300 l. is to be paid in case that be not granted, this proves it to be only a Penalty, because Annuities at the highest Value are but at Eight Years Purchase, whereas this is Fifteen Years Purchase, so that the 300 l. could never be intended as a Recompence for the

nuity; neither could the Defendant possibly save the Condition, because the same Time is limited both for the Payment of the 300 l. and granting of the Annuity, viz. within Six Months; and the Plaintiff hath to the utmost Time to request the Executing the Grant, and therefore the other cannot pay the Money before. 1 Sand. 987.

But taking the Case to be, that this is a Disjunctive Condition; yet since Conditions are always made in favour of the Obligor, the Power of Election, even in such Cases, is left wholly in him; but according to such Constructions as would be made for the Plaintiff, the Election is gone from the Defendant, and left in the Obligæ; for if he do not request the Annuity, then the 300 l. is to be paid, and this is directly against the Rules of Disjunctive Conditions; and the Case of * Greeningham and Ewre is express in Point where the Condition of a Bond was, That if the Obligor delivered to the Plaintiff Three Bonds by such a Day, or gave him such a Release of them, as the Plaintiff's Counsel should advise before the said Day, that then, &c. Wright *and* Bull, Postea. * Cro. Eliz. 396, 539. 1 Roll. Abr. 447. Poph. 98. Goldsb. 142.

The Defendant pleads nothing as to the Delivery of the Bonds, but saith, that the Plaintiff's Counsel advised no Release; and upon a Demurrer this was adjudged for the Defendant, because in all Obligations with a Penalty the Election is always in the Obligor; and this being a Disjunctive Condition, each Part is likewise in his Election; for if the Obligæ should not tender the Release, the other is not bound to deliver the Bonds; and if he should tender it, then the Obligor may either deliver the Bonds or execute the Release, which he pleaseth. 4 H. 7. 4.

If a Man enter into Bond with Condition to marry Jane by such a Day, and the Obligæ marry her before the Day, the Condition is saved; but it is otherwise if a Stranger had married her before that Day: The Act of God, and the Act of the Obligæ, in many Cases dispense with Conditions, as 5 Co. 21. b. if a Parson be bound in a Bond conditioned to resign his Church to A. in Consideration of a certain Pension agreed on, and the Parson refuses; the Court was of Opinion, That he need not resign till he was sure of his Pension by Deed, which they held ought to be first tendred unto him. 1 Roll. Abr. 455.

So a Man covenants to grant such an Estate to his Wife, or to leave her worth so much Money if she survive him; if she dies before him the Condition is not broken, tho' he did not make such Grant: In the Case of Warren *and* White it was lately adjudged in the King's-Bench, T. Jones 95. 3 Lev. 137.

Bench, that where Warren was indebted to Warner, and White became bound with him to pay the Money before the 25th Day of December then next following; but if he did not pay it, that then Warren should appear the next Hillary-Term following to Warner's Action: Warren dies after the 25th of December, but before the Term; and it was held, that the Bond was not forfeited, because the Obligor had Election to do either the one or the other, and the Performance of the one becoming impossible by the Act of God, the Obligation was saved.

1 Rol. Abr. 451.

Moor 645. If the Case of Moor *and* Moorcomb, Cro. Eliz. 864. should be objected, where the Condition of the Bond was, That the Defendant should deliver to the Plaintiff a Ship before such a Feast, or in Default thereof pay at the same Feast such a Sum as a Third Person therein named should adjudge; which Third Person appointed no Sum to be paid, and yet there it was adjudged for the Plaintiff that it did not dispense with the whole Condition.

Which Case he agreed to be Law, because there the Valuation and Worth of the Ship and the Money to be paid was by the Appointment of a Stranger; and the Condition being for the Benefit of the Defendant, he is to procure the Stranger to make an Appointment what Sum should be paid, or to deliver the Goods, otherwise the Bond is forfeited, and he hath expressly agreed to do the one or the other.

But this is not like the Case at the Bar, where 'tis not a Stranger, but the Obligee himself that must procure the Conveyance; for 'tis to be advised by his Counsel, and to be done at his Costs; and therefore in * Lamb's Case it was held, That if a Man be bound to give such a Release before such a Day as the Judge of the Admiralty shall direct; there 'tis no Plea to say that he appointed none, for the Judge being a Stranger to the Condition, the Defendant is to apply himself to him, having undertaken to perform it at his Peril, which is the same Resolution with Moor's Case in Croke.

* 5 Co. 23.

1 Roll. Abr. 452. lit. L. placito 6.

So that he took it for a Rule in all Cases, that where the Act of God, or of the Obligee, discharges the Obligor from one Part of a Disjunctive Obligation, that the Law discharges him of the other; and therefore prayed Judgment for the Defendant. Dyer 361.

Ex parte Quer. Serjeant Pemberton contra. It appears that one Thing or the other was to be done in this Case; for if the Plaintiff demanded and tendred an Annuity, the Defendant was to seal it; and if he did not tender it, then likewise the Defendant was to do something, viz. to pay 300 l. So that the Plaintiff was either to have the Annuity or the Money.

He agreed, That where the Obligor hath the Election, if in such Case the Obligee shall wilfully determine it, that the Bond is thereby discharged.

But if a Stranger take away the Election, 'tis no Discharge, for in such Case the other Part is to be performed.

In this Case the Plaintiff hath done no wilful Act to determine the Defendant's Election; but all which is pretended is, that he hath not done something necessary to be performed, which is, that he hath not made a Request.

But by his Omission thereof, the Defendant's Election is not taken away; for though no Request was made within the Six Months, yet the Defendant might have prepared a Grant of the Annuity himself, and have offered it to the Plaintiff within the Six Months, upon the last Part of the Day; and if he had thus set forth his Case, and alledged, That the Plaintiff made no Request, nor tendered him a Grant of the Annuity to seal; this had been a good Performance of the Condition, for he had done that which was the Substance, which though it was to be done at the Plaintiff's Charge, yet the Defendant might have brought an Action for so much Money by him laid to the Use of the other; and the Cases put in the principal Case in Moor 645. are expressly for the Plaintiff in this Case, where the Judgment was, That if there be a Statute with a Defeazance, to make such Conveyance as the Counsel of the Conusee shall direct, the Cognisor must prepare the Conveyance, if the other doth not; and there is a Case put, where a Thing was to be done at the Costs of the Plaintiff, yet the Defendant did it at his own Charge, which he recovered of the other.

North, Chief Justice, and the whole Court were of Opinion, that the Plea was good, because the Defendant had the Benefit of Election, and the Plaintiff not making the Request within the Six Months, had dispensed with one Part of the Condition, and the Law hath discharged the Defendant of the other Part; and they relied upon the Case of Grenningham and Ewre, which they held to be good Law, and an Authority express in the very Point. Judgment.

In this Case the Obligee was to do the first Act, viz. To make the Request. Where the Condition is single, Concilium non dedit advisamentum is a good Plea to discharge the Defendant; so here the Condition is but single, as to the Defendant; for though it be Disjunctive, yet the Plaintiff hath taken away the Benefit of Election from the Obligor of doing the one, and therefore he shall be excused from doing the other.

The Pleading as alledged by the Counsel of the Plaintiff,

tiff, would not have been a good Performance of the Condition; for if one be bound to convey as the Counsel of the other shall advise, and he makes the Conveyance himself, this is not such a Deed as was intended by the Parties, and so no Performance of the Condition.

But however the Defendant need not plead it, for he is not bound so to do.

Here if the Plaintiff had requested the Sealing of such a Grant of an Annuity, even the Defendant had Liberty either to execute it, or to pay the 300 l. and where the Election is on the Obligor's Part, neither the Act or Neglect of the Obligee shall take it away from him; for it would be unreasonable that the Obligee should have his Choice, either to accept of the Annuity or the 300 l. when 'tis a known Rule, that all Conditions where there is a Penalty in the Bond, are made in favour, and for the Benefit of the Obligor, and the 300 l. in this Case to be paid upon the Refusal of the Defendant to make such Grant, is in the Nature of a Penalty to enforce him to do it.

The principal Case in Moor 645. was agreed to be Law, but the Rule there put was denied, as not adequate to the present Case; which was, that if by the Act of God, or of the Party, or through Default of a Stranger, it becomes impossible for the Obligor to do one Thing in a Disjunctive Condition, he is notwithstanding bound to do the other.

This is true only as to the last Case, but not to the Two
* 5 Co. first; and for an Authority, * Laughter's Case was full in the Point, which is, That when a Condition consists of Two Parts in the Disjunctive, and both are possible at the Time of the Bond made, and afterwards one becomes impossible by the Act of God, or of the Party, the Obligor is not bound to perform the other Part.

And Judgment was given for the Defendant.

## Smith *versus* Tracy. *In Banco Regis.*

Distribution shall be equally made amongst the Children of the Whole and Half Blood. Mod. Rep. 299. Jones 93. 1 Vent. 316. 2 Lev. 173.

In a Prohibition, the Case was: A Man dies Intestate, having Three Brothers of the Whole Blood, and a Brother and Sister of the Half Blood; and the Question was, Whether they shall be admitted to a Distribution in an equal Degree?

Mr. Holt argued, That they were all in æquali Gradu, because before the Act of Distribution the Ordinary had Power to compel the Administrator to give and allot Filial Portions to the Children of the Deceased out of his Estate. And by the Civil Law, such Provision is made for the Children of the Intestate, that the Goods, which

either the Father or Mother brought to each other at the Marriage, shall not remain to the Survivor, but the Use and Occupation of them only during Life, for the Property did belong to the Children.

By the Statute of 21 H. 8. c. 5. the Ordinary is to grant Administration to the Widow of the Intestate, or to the next of his Kin, or to both, as by his Discretion he shall think good; and in case where divers Persons claim the Administration as next of Kin, which be in equal Degree, the Ordinary may commit Administration to which he pleaseth; and his Power was not abridged, but rather revived by this late Act, by which 'tis enacted, That just and equal Distribution shall be made amongst Wife and Children, or next of Kin in equal Degree, or legally representing their Stocks *pro suo cuique jure*; and the Children of the Half Blood do in the Civil Law legally represent the Father, and to some Purposes are estæmed before the Uncles of the Whole Blood. 22 & 23 Car. 2.

'Tis no Objection to say, That because the Law rejects the Half Blood as to Inheritances, therefore it will do the same as to Personal Estates, because such Estates are not to be determined by the Common, but by the Canon or Civil Law, and if so, the Half Blood shall come in for Distribution, for this Act of Parliament confirms that Law.

Winnington, Solicitor General, contra. He agreed, That before this Act the Half Blood was to have equal Share of the Intestate's Estate; but that now the Ordinary was compelled to make such Distribution, and to such Persons as by the Act is directed, for he had not an Original Power to grant Administration in any Case that did belong to the Temporal Courts, but it was given to him by the Indulgence of Princes, not quatenus a Spiritual Person. Sid. 370, 371. Hensloe's Case, 9 Co. Bendl. 133.

And if he had not Power in any Case, he could not grant to whom he pleased. But admitting he could, his Power is now abridged by this Statute, and he cannot grant but to the Wife and Children, or next of Kin in equal Degree, or legally representing their Stocks.

Now such legal Representation must be according to the Rules of the Common, and not of the Civil Law; for if there be Two lawful Brothers and a Bastard eigne, and a Question should arise concerning the Distribution of an Intestate's Estate, the subsequent Marriage according to the Law in the Spiritual Court would make the latter Legitimate, and if so, a legal Representative amongst them; but this Court will never allow him so to be.

But

But the Court were all of Opinion, that in respect of the Father the Half-Blood is as near as those of the Whole, and therefore they are all alike, and shall have an equal Distribution; and that such Construction should be made of the Statute as would be most agreeable to the Will of the dead Person, if he had devised his Estate by Will; and it was not to be imagined if such Will had been made, but something would have been given to the Children of the Half-blood: And thereupon a Consultation was granted.

## Anonymus. *In C. B.*

Ant. 102. FAux Judgment, viz. Serjeant Turner took this Exception, that the Plaintiff in the Court below had declared ad damnum 20 l. whereas it not being a Court of Record, and being sine Brevi, the Court could not hold Plea of any Sum above 40 s. and for this Cause the Judgment was reversed.

# DE

# Termino Paſchæ,

## Anno 29 Car. II. in Communi Banco.

### Southcot *verſus* Stowel.

Intrat' Hill' 25 & 26 Car. II. Regis Rot. 1303.

IN a Special Verdict in Ejectment, the Caſe was, Thomas Southcot having Iſſue Two Sons, Sir Popham and William, and being ſeiſed in Fæ of a Farm called Indyo, (the Lands now in Queſtion) did, upon the Marriage of his eldeſt Son Sir Popham, covenant to ſtand ſeiſed of the ſaid Farm to the Uſe of the ſaid Sir Popham Southcot, and the Heirs Males of his Body on Margaret his Wife to be begotten; and for want of ſuch Iſſue, to the Heirs Males of the Covenantor; and for want of ſuch Iſſue, to his own right Heirs for ever. Covenant to ſtand ſeiſed, how it differs from a Conveyance at the Common Law. Mod. Rep. 226.

Sir Popham had Iſſue begotten on his Wife Margaret, Edward his Son, and Five Daughters, and dies.

Thomas, the Covenantor, dies.

Edward dies without Iſſue.

And whether the Five Daughters, as Heirs general of Thomas, or William their Uncle, as Special Heir Male of Thomas per formam Doni, ſhall inherit this Land, was the Queſtion.

Two Objections were made againſt the Title of William, the Uncle:

1. Becauſe here is no expreſs Eſtate to Thomas the Covenantor, for 'tis limited to his Heirs Males, the Remainder to his own right Heirs; ſo that he having no Eſtate for Life, the Eſtate Tail could not be executed in him, and for that Reaſon William cannot take by Deſcent. Vaugh 49.

2. He cannot take by Purchaſe, for he is to be Heir of Thomas, and Heir Male, the Limitation is ſo; but he cannot be Heir, for his Five Neeces are Heirs.

In

In Anſwer to which, theſe Aſſertions were laid down:

1. That in this Caſe, Thomas the Covenantor hath an Eſtate for Life by Implication, and ſo the Eſtate Tail being executed in him, comes to William by Deſcent, and not by Purchaſe; for though the Covenantor had departed with his whole Eſtate, and limited no Uſe to himſelf, yet he hath a Reverſion, becauſe he can have no right Heir
Hob. 30. while he is living: And therefore the Statute of 27 H. 8. creates an Uſe in him till the future Uſe cometh in eſſe, and by Conſequence the right Heirs cannot take by Purchaſe; for wherever the Heir takes by Purchaſe, the Anceſtor muſt depart with his whole Fee, for which Reaſon a Fee cannot be raiſed by Way of Purchaſe to a Man's right Heirs, by the Name of Heirs, either by Conveyance of Land, or by Uſe or Deviſe, but it worke by Deſcent. 1 Inſt. 22 b.

And that Uſes may ariſe by Implication by Covenants to ſtand ſeized, the Authorities are very plentiful. Moor 284. 1 Co. 154. Lord Paget's Caſe cited in the Rector of Cheddington's Caſe. Cro. Eliz. 321. 1 Roll. Rep. 239, 240, 317, 438. Lane *verſus* Pannel.

Cro. Car. And in the Caſe of Hodgkinſon and Wood, in a Deviſe there was the ſame Limitation as this. The Caſe was, Thomas being ſeiſed in Fee, had Iſſue, Francis and William, by ſeveral Venters, and deviſed Land to Francis his eldeſt Son for Life, then to the Heirs Males of his Body; and for Default of ſuch Iſſue, to the Heirs Males of William, and the Heirs Males of their Bodies for ever; and for Default of ſuch Iſſue, to the Uſe of the right Heirs of the Deviſor; then he made a Leaſe to William for 30 Years, to to commence after his Death, and dies: William enters, and Surrenders this Leaſe to Francis, who enters and makes a Leaſe to the Defendant, and dies without Iſſue, and William enters and makes a Leaſe to the Plaintiff; it was adjudged for William, becauſe he being Heir Male of the Body of the Deviſor, had by this Limitation an Eſtate-Tail, as by Purchaſe, and that the Inheritance in Fee-Simple did not veſt in Francis.

2. If Thomas the Covenantor had no Eſtate executed in him, yet William his Son in this Caſe may take by way of future Springing Uſe, becauſe the Limitation of an Eſtate upon a Covenant to ſtand ſeiſed may be made to commence after the Anceſtor's Death, for the old Seiſin of the Covenantor is enough to ſupport it.

There is a great Difference between a Feoffment to Uſes, and a Covenant to ſtand ſeiſed, for by the Feoffment the Eſtate is executed preſently. 1 Co. 154. Rector of Chedding-

ton's Caſe: So if there be a Feoffment to A. for Life, Remainder to B. in Fæ, if A. refuſe, B. ſhall enter preſently, becauſe the Feoffor parted with his whole Eſtate; but if this had bæn in the Caſe of a Covenant to ſtand ſeiſed, if A. had refuſed, the Covenantor ſhould have enjoyed it again till after the Death of A. by way of ſpringing Uſe, like the Caſe of Parſons and Willis. 2 Roll. Abr. 794. Where a Man covenants with B. that if he doth not marry, he will ſtand ſeiſed to the Uſe of B. and his Heirs, B. dies, the Covenantor doth not marry; this Uſe ariſes as well to the Heir of B. as to B. himſelf, if he had bæn living, and he ſhall have the Land in the Nature of a Deſcent.

But if William cannot take it either by Purchaſe or by Deſcent, he ſhall take it.

3. Per formam Doni as ſpecial Heir to Thomas: This Caſe was compared to that in Littleton, Sect. 23. If Lands are giv n to a Man, and the Heirs Females of his Body, if there be a Son, the Daughter is not Heir; but yet ſhe ſhall take it for Voluntas Donatoris, &c.

So if Lands are given to a Man, and the Heirs Males of his Body, the youngeſt Son ſhall have it after the Death of the eldeſt, leaving Iſſue only Daughters, for theſe are Deſcents ſecundum formam Doni.

So in this Caſe the Eſtate Tail veſted in Edward, and when he died without Iſſue, it comes to William per formam Doni.

Object. The Caſe of Greſwold in 4 & 5 Ph. & Mariæ, Dyer, 156. ſæms to be expreſs againſt this Opinion, which was, That Greſwold was ſeiſed in Fæ, and made a Grant for Life, the Remainder to the Heirs Males of his Body, the Remainder to his own Right Heirs; he had Iſſue Two Sons, and died; the eldeſt Son had Iſſue a Daughter, and died; and if the Daughter or her Uncle ſhould have the Land, was the Queſtion in that Caſe: And it was adjudged, that the Limitation of the Remainder was void, becauſe Greſwold could not make his right Heir a Purchaſer, without departing with the whole Fæ; and therefore Judgment was given againſt the ſpecial Heir in Tail for the Heir General, which was the Daughter. Poſtea. Brittain *and* Charnock.

Anſw. Admit that Caſe to be Law, (yet the Judges there differed in their Arguments) 'tis not like this at Bar, for that Caſe was not upon a Covenant to ſtand ſeiſed, but upon a Dæd indented, and ſo a Conveyance at the Common Law: But for an Authority in the Point, the Caſe of Pybus and Mitford was cited and relied on, which was Trin. 24 Car. 2. Rot. 703. adjudged by Hale Chief Juſtice, Mod. Rep. 159. 1 Ven. 372.

Juſtice, Rainsford and Wild; but Juſtice Twiſden was of a contrary Opinion.

Serjeant Stroud, who argued on the other Side, made Three Points:

1. Whether this Limitation be good in its Creation.

2. If the Eſtate Tail be well executed in Thomas the Covenantor?

3. If it be good and well executed, whether when Edward died without Iſſue, the whole Eſtate Tail was not ſpent?

1. And as to the firſt Point, he held that this Limitation to the Heirs Males of Thomas, was void in the Creation, becauſe a Man cannot make himſelf or his own right Heir a Purchaſer, unleſs he will part with the whole Eſtate in Fee. Dyer, 309. b.

If A. being ſeiſed in Fee, makes a Leaſe for Life to B. the Remainder to himſelf for Years, this Remainder is void; ſo if it had been to himſelf for Life, becauſe he hath an Eſtate in Fee, and he cannot reſerve to himſelf a leſſer Eſtate than he had before. 42 Aſſ. 2.

If I give Lands to A. for Life, the Remainder to my ſelf for Life, the Remainder in Fee to B. after the Death of A. in this Caſe B. ſhall enter, for the Remainder to me was void. 1 H. 5. 8. 42 Edw. 3. 5. Bro. Eſtate 96. Dyer 69 b.

'Tis true, the Caſes are put at the Common Law, but the Statute of Uſes makes no Alteration; for according to the Rules laid down in Chudleigh's Caſe, by my Lord Chief Juſtice Popham. 1 Co. 138.

1. Uſes are odious, and ſo the Law will not favour them.

2. A Rule at Common Law ſhall not be broke to veſt an Uſe, and the Uſes here cannot veſt without breaking of a Rule in Law.

3. Uſes are raiſed ſo privately, that he who takes them may not know when they veſt, and for that Reaſon they are not to be favoured.

4. The Statute annexes both the Poſſeſſion and the Uſe together, as they veſt and deveſt both together. Moor 713. 2 Co. 91. Co. Lit. 22. Moor 284.

2. As to the ſecond Point, the Eſtate is not executed in Thomas, and therefore William cannot take it by Deſcent; Heirs of his Body, or Heirs male, are good Words of Limitation to take by Purchaſe from a Stranger, but not from an Anceſtor, for there he ſhall take by Deſcent, and for this there is an Authority. Co. Lit. 26. b. John had Iſſue by his Wife Roberga, Robert and Mawd: John dies, Michael gave Lands to Roberga, and to the Heirs of her Husband on her Body begotten; Roberga in this Caſe had

but an Eſtate for Life, for the Fee-Tail veſted in Robert, and when he died without Iſſue, his Siſter Mawd was Tenant in Tail per formam Doni, and in a Formedon ſhe counted as Heir to Robert, which ſhe was not, neither was ſhe Heir to her Father at the Time of the Gift, yet it was held good; for the Words, viz. Heirs of the Body of the Father, were Words of Purchaſe in this Caſe.

If therefore no Uſe for Life veſted in Thomas, then William cannot take by Deſcent. Dyer 156. Co. Lit. 22. Hob. 31. Dyer 309. 1 Co. 154. Lord Paget's Caſe, cited in Hob. 151.

3. To the third Point, Admitting both the former to be againſt him, yet ſince Edward is dead without Iſſue, the Eſtate Tail is ſpent.

But the whole Court were of Opinion, That William Judgment. ſhould inherit this Land in Queſtion; for though at the Common Law a Man cannot be Donor and Donee, without the Part with the whole Eſtate, yet 'tis otherwiſe upon a Covenant to ſtand ſeiſed to Uſes: And if any other Conſtruction ſhould be made, many Settlements would be ſhaken, in which nothing was more uſual now, than to covenant to ſtand ſeiſed to the Uſe of himſelf, and the Heirs Males of his Body, &c.

They all agreed alſo, That the Eſtate being well limited, William ſhould take per formam Doni, as ſpecial Heir, for Voluntas Donatoris in Charta manifeſte expreſſa obſervetur; and 'tis apparent Thomas intended that William ſhould have it, or elſe the Limitation to his Heirs Males had been needleſs.

So that taking it for granted, that the Eſtate Tail once veſted is not ſpent by his dying without Iſſue, but it comes to William by Deſcent, and not as a Purchaſer, for ſo he could not take it, becauſe he is not Heir, and 'till Thomas be dead without Iſſue, the Tail cannot be ſpent, ſo there was no Difficulty in that Point.

And they held the Opinions of Dyer and Saunders in Creſwold's Caſe to be good Law, who were divided from the other Juſtices, but they doubted of Pybus and Mitford's Caſe, whether it was Law or not; they doubted alſo, whether by any Conſtruction Thomas could be ſaid to have an Eſtate for Life by Implication; they doubted alſo of the ſpringing Uſe, but they held that this Limitation was good in its Creation, and Judgment was given accordingly.

## Cockram *Executor verſus* Welby.

Statute of Limitations not pleadable by a Sheriff, who levied Money by *Fi' fa'*, and 9 Years paſs. Mod. 245. Cro. Car. 297.

IN Debt, the Plaintiff declared, That his Teſtator recovered a Judgment in this Court, upon which he ſued out a Fieri facias, which he delivered to the Defendant being Sheriff of Lincoln, and thereupon the ſaid Sheriff returned Fieri feci, but that he hath not paid the Money to the Plaintiff, per quod Actio accrevit, &c.

The Defendant pleaded the Statute of Limitations, to which the Plaintiff demurred.

And the Queſtion was, Whether this Action was barely grounded on the Contract, or whether it had a Foundation upon Matter of Record?

If on the Contract only, then the Statute of 21 Jacobi cap. 16. is a good Plea to bar the Plaintiff of his Action, which enacts, That all Actions of Debt, grounded upon any Lending or Contract, without Specialty, ſhall be brought within Six Years next after the Cauſe of Action doth accrew; and in this Caſe Nine Years had paſſed.

But if it be grounded upon Matter of Record, that is a Specialty, and then the Statute is no Bar.

Serjeant Barrel held this to be a Debt upon a Contract without Specialty, for when the Sheriff had levied the Money, the Action ceaſes againſt the Party, and then the Law creates a Contract, and makes him Debtor, as it is in the Caſe of a Talley delivered to a Cuſtomer.

It lies againſt an Executor, where the Action ariſes quaſi ex Contractu, which it would not do if it did not ariſe ex Maleficio, as in the Caſe of Devaſtavit.

'Tis true, the Judgment recovered by the Teſtator, is now ſet forth by the Plaintiff Executor, but that is not the Ground but only an Inducement to the Action, for the Plaintiff could not have pleaded nul tiel Record, ſo that 'tis the meer Receiving the Money which charges the Defendant, and not Virtute Officii upon a falſe Return; for upon the Receipt of the Money he is become Debtor, whether the Writ be returned or not, and the Law immediately creates a Contract; and Contracts in Law are as much within the Statute, as actual Contracts made between the Parties.

All which was admitted on the other Side; but it was ſaid, that this Contract in Law was chiefly grounded upon the Record, and compared it to the Caſe of Attornies Fees, which hath been adjudged not to be within the Statute, though it be quaſi ex Contractu, becauſe it depends upon Matter of Record. Roll's Abridg. tit. Debt, 598. pl. 17.

And afterwards in Michaelmas-Term following, by the Opinions of the Chief Juſtice, Wyndham and Atkins, Juſtices, it was held that this Caſe was not within the Statute, becauſe the Action was brought againſt the Defendant as an Officer, who acted by vertue of an Execution; in which Caſe the Law did create no Contract, and that here was a Wrong done, for which the Plaintiff had taken a proper Remedy, and therefore ſhould not be barred by this Statute.

Juſtice Scroggs was of a contrary Opinion; for he ſaid, If another received Money to his Uſe due upon Bond, the Receipt makes the Party ſubject to the Action, and ſo is within the Statute.

But by the Opinions of the other Juſtices, Judgment was given for the Plaintiff.

## Major *verſus* Grigg. *In Banco Regis.*

THE Plaintiff brought an Action, for that the Defendant Non indempnem conſervavit ipſum de & concernente Occupation' quorundam clauſorum, &c. ſecundum formam Agreamenti, and ſets forth a Diſturbance by one who commenced a Suit againſt him in ſuch a Term Concernente Occupation' clauſorum præd', but doth not ſet forth that the Perſon ſuing had any Title, which (it was ſaid) ought to have been ſhewn; as if a Man makes a Leaſe for Years, and covenants for quiet Enjoyment, in an Action brought by the Leſſee upon that Covenant, it muſt be ſhewn that there was a lawful Title in the Perſon who diſturbed, or elſe the Action will not lie.

But this being after a Verdict, and the Plaintiff ſetting forth in his Declaration, that the Diſturber recovered per Judicium Curiæ, the Court now were all of Opinion that Judgment ſhould be given for the Plaintiff.

Covenant to ſave Harmleſs, and the Plaintiff ſets forth no Title in the Diſturber, good after Verdict. Cro. Eliz. 914. Cro. Jac. 315, 425. Vaugh. 120, 121 2 Sand. 178. Mod. Rep. 66.

Taylor

## Taylor *verſus* Baker.

Payment to the Marſhal no Diſcharge to the Plaintiff at whoſe Suit the Defendant was in Execution. T. Jones 97. 2 Lev. 203.

THE Caſe was, viz. A Man being in Execution, doth actually pay the Money to the Marſhal, for which he was impriſoned, and thereupon was diſcharged; and whether he ſhould pay it again to the Plaintiff upon a ſecond Execution, was the Queſtion.

Sanders argued, that he ſhould not pay it again; he ſaid, This Caſe was never adjudged, and therefore could produce no Authority in Point to warrant his Opinion, but Parallel Caſes there were many.

As if the Sheriff take Goods in Execution by vertue of a Fieri Facias, whether he ſells them or not, yet being taken from the Party againſt whom the Execution was ſued, he ſhall plead that Taking in Diſcharge of himſelf, and ſhall not be liable to a ſecond Execution, though the Sheriff hath not returned the Writ; and the Reaſon is, becauſe the Defendant cannot avoid the Execution, and he would therefore be in a very bad Condition if he was to be charged the ſecond Time.

And if the Sheriff ſhould die after the Goods are taken in Execution, his Executors are liable to the Plaintiff to ſatisfy the Debt, for they have paid pro quo, and 'tis in Nature of a Contract raiſed by Law.

By the Words of the Capias ad Satisfaciend' it doth appear, that the Deſign of that Writ is to enforce the Payment of the Debt by the Impriſonment of the Defendant: The Sheriff thereupon returns, that he hath taken the Body, and that the Defendant hath paid the Money to him, for which Reaſon he diſcharged him; and for this Return he was amerced, not becauſe he diſcharged the Party, but becauſe he had not brought the Money into the Court; for the Law never intended that a Man ſhould be kept in Priſon after he had paid the Debt.

In this Caſe the Defendant can have no Remedy to recover it again of the Marſhal, becauſe it was not a bare Payment to him, but to pay it over again to the Plaintiff, and likewiſe in Conſideration that he ſhould be diſcharged from his Impriſonment.

If it ſhould be objected by the Marſhall, that the Plaintiff hath an Action of Eſcape againſt him, and likewiſe by the Plaintiff, that he did not make the Gaoler his Steward or Bailiff to receive his Money.

Anſw. The Gaoler is made his Bailiff to keep the Party in Execution; and it would be very hard, that when the Priſoner will lay down his Money in Diſcharge of the Debt, that the Gaoler ſhould not have full Power to diſcharge him.

If he had come in Michaelmas-Term after the long Vacation, and informed the Court that he had offered to pay the Execution-Money to the Marſhal, and that he would not take it, and that the Plaintiff could not be found, the Court would have made a Rule to help him.

Mr. Holt, contra. If the Payment had been good to the Sheriff or Marſhal, yet 'tis not pleadable to the ſecond Execution, becauſe 'tis Matter in Fact.

That which hath been objected, that the Party ſhall plead to a ſecond Execution, that his Goods were taken by a former Fieri Facias cannot be; for no ſuch Plea can be good, becauſe by that Writ the Sheriff hath expreſs Authority to levy the Money; and the Plea is not Payment to the Sheriff, but that the Money was levied by him by vertue of the Writ, which ought to be brought into the Court, and an Audita Querela lies againſt the Plaintiff, and then the Defendant is to be bailed. 1 Leon. 141. Askew *verſus* the Earl of *Lincoln*.

Jones and Rainsford were of Opinion, That the Defendant might have Remedy againſt the Marſhal to recover his Money again, and that the Payment to him was no Diſcharge to the Plaintiff at whoſe Suit he was in Execution: But Juſtice Wyld was of another Opinion. Quære.

## *The Lord Marqueſs of* Dorcheſter's *Caſe. In Communi Banco.*

IN a Scandalum Magnatum: Serjeant Pemberton moved to have good Bail, which the Court denied, and ſaid, That in ſuch Caſe Bail was not requirable; but notwithſtanding the Defendant conſented to put in 50 l. Bail. 1 Lev. 148. Sid. 233. *Viſne* not chang'd in a *Scandalum Magnatum*. Sid. 183.

And then upon the uſual Affidavit moved to change the Viſne, the Action being laid in London, which was oppoſed by the Serjeant, who deſired that it might be tried where it was laid; but he ſaid in this Caſe, that the Viſne could not be changed.

1. Becauſe the King is a Party to the Suit, for 'tis tam pro Domino Rege quam pro ſeipſo.

2. The Plaintiff is a Lord of Parliament which is adjourned and will meet, and therefore it would be inconvenient to try the Cauſe in the Country, ſince the Service of the King and Kingdom doth require his Attendance here; and he ſaid, That upon the like Motion in B. R. betwæn the Lord Stamford and Needham, the Court would not change the Viſne.

1 Ven. 363. 4. T. Jones 192. cont. North, Chief Juſtice, ſaid, That he always took it as a current Opinion, that in a Scandalum Magnatum the Viſne could not be changed; for ſince it was in the Nature of an Information, it being tam quam, 'twas advisable whether it was not within the Statute of 21 Jac. which doth appoint Informations to be tried in their proper Counties.

T. Jones 192. But Juſtice Atkins inclined, that the Viſne might be changed; for though by the Wisdom of the Law a Jury of the Neighbourhood are to try the Cauſe, yet in Point of Juſtice the Court may change the Viſne; to which it was objected, that then there would be no Difference betwæn local and tranſitory Actions.

Actions of Debt and Accompt ſhall be brought in their proper Counties. 6 R. 2. and it was argued, that an Attorney is ſworn to bring Actions no where elſe.

But the Court not agæing, at laſt the Defendant was willing that the Cauſe ſhould be tried in London, if the Plaintiff would conſent not to try it before the firſt Setting in the next Term.

And as to that Reaſon offered, why the Viſne ſhould not be changed, becauſe the Plaintiff was a Lord of Parliament, Juſtice Atkins ſaid, That that did not ſatisfy him; it might be a good Ground to move for a Trial at the Bar; to which it was anſwered, That in the Caſe of the Earl of Shaftsbury the Court would not grant a Trial at the Bar without the Conſent of the Defendant.

The Viſne was not changed.

## Beaver *verſus* Lane.

COvenant made to Baron and Feme, the Husband alone brings the Action, Quod teneat ei conventionem ſecundum formam & effectum cujuſdam Indenturæ inter Querentem ex una parte, & Defendentem ex altera parte confect', and this was for not repairing his House: After Verdict for the Plaintiff it was moved in Arreſt of Judgment, becauſe of this Variance. Covenant to Baron and Feme, the Baron alone may bring the Action.

But the Court ordered, that the Plaintiff ſhould have his Judgment, for the Indenture being by Baron and Feme, it was therefore true, that it was by the Baron, and the Action being brought upon a Covenant concerning his Houſes, and going with them, though it be made to him and his Wife, yet he may refuſe quoad her, and bring the Action alone: And the Chief Juſtice ſaid, That he remembred an Authority in an old Book, That if a Bond be given to Baron and Feme, the Husband ſhall bring the Action alone, which ſhall be looked upon to be his Refuſal as to her.

## Calthorp *verſus* Phillips.

THE Queſtion was, in regard a Superſedeas is not returnable in the Court, whether the old Sheriff is bound to deliver it over to the new one or no; and it was urged that it ought not, becauſe the old Sheriff is to keep it for his Indempnity, and he may have Occaſion to plead it. *Superſedeas* muſt be delivered by the old Sheriff to the new one. Mod. Rep. 222.

But on the other Side it was inſiſted by Serjeant George Strode, that it ought to be delivered to the new Sheriff, and that there was a Writ in the Regiſter, which proved it, fol. 295. and if it ſhould be otherwiſe, theſe Inconveniences would follow:

1. It would be inconvenient that the Capias againſt the Defendant ſhould be delivered to the new Sheriff, and not the Superſedeas which was to admit the Charge and not the Diſcharge. Weſtby's Caſe. 3 Co. 73. And it was the conſtant Practice not only to deliver the Superſedeas, but the very Book in which 'tis allowed; and this he ſaid appeared by the Certificates of many Under-Sheriffs, which he had in his Hand.

2. If the Sheriff hath an Exigent againſt B. who appears and brings a Superſedeas to the old Sheriff. and then a new Sheriff is made, if he hath not the Superſedeas he may return him outlawed by vertue of the Exigent; ſo in the Caſe of a Judgment ſet aſide for Fraud or Practice,

and a Superſedeas granted; and the like in the Caſe of an Eſtrepment which is never returned; and it would be an endleſs Work upon the coming in of every Sheriff to renew this Writ.

As to the Objection, that the old Sheriff may have Occaſion to plead it: As often as ſuch Occaſion happens, he may have Recourſe to it in the Office of the new Sheriff; and he can have no Title to it by the Direction of the Writ, for that is Vicecomiti Berks, and not to him by expreſs Chriſtian and Sirname; and of that Opinion was all the Court, and Judgment was given accordingly, niſi Cauſa, &c.

## Hamond *verſus* Howel *Recorder of* London.

An Action will not lie againſt a Judge for what he doth judicially, tho' erroneouſly. Mod. Rep. 119. 184. T. Jones 14. Vaugh. 135.

FAlſe Impriſonment. The Defendant pleads ſpecially; the Subſtance of which was, That there was a Commiſſion of Oyer and Terminer directed to him amongſt others, &c. and that before him and the other Commiſſioners Mr. Penn and Mr. Mead, Two Preachers, were indicted for being at a Conventicle; to which Indictment they pleaded Not-Guilty, and this was to be tried by a Jury, whereof the Plaintiff was one; and that after the Witneſſes were ſworn and examined in the Cauſe, he and his Fellows found the Priſoners, Penn and Mead, Not-Guilty, whereby they were acquitted; & quia the Plaintiff male ſe geſſerit in acquitting them both againſt the Direction of the Court in Matter of Law, and againſt plain Evidence, the Defendant and the other Commiſſioners then on the Bench fined the Jury 40 Marks a-piece, and for Non-payment committed them to Newgate, &c.

The Plaintiff replies, de Injuria ſua propria abſque hoc, that he and his Fellows acquitted Penn and Mead againſt Evidence; and to this the Defendant demurred.

Serjeant Goodfellow, who would have argued for the Defendant, ſaid, That he would not offer to ſpeak to that Point, whether a Judge can fine a Jury for giving a Verdict contrary to Evidence, ſince the Caſe was ſo lately and ſolemnly reſolved by all the Judges of England, in * Buſhel's Caſe, that he could not fine a Jury for ſo doing.

* Vaugh. 146.

But admit a Judge cannot fine a Jury, yet if he doth, no Action will lie againſt him for ſo doing, becauſe 'tis done as a Judge. 12 H. 4. 3. 27 Aſſ. pl. 12. But the Court told him, That he need not labour that Point, but deſired to hear the Argument on the other Side what could be ſaid for the Plaintiff.

1 Roll. Abr. 92. Liter. Q. pl. 1.

Serjeant Newdigate argued, that this Action would lie.

1. It muſt be admitted, that the Impriſonment of the Jury was unlawful, and then the Conſequence will be, that all that was done at that Time by the Commiſſioners or Judges was both againſt Magna Charta and other Acts of Parliament, the Petition of Right, &c. and therefore their Proceedings were void, or at leaſt very irregular to impriſon a Jury-man without Preſentment or due Proceſs in Law, and conſequently the Party injured ſhall have an Action for his falſe Impriſonment.

In 10 H. 6. f. 17. In an Action brought for falſe Impriſonment, the Defendant juſtifies the Commitment to be for Suſpicion of Felony; but becauſe he did not ſhew the Ground of ſuch Suſpicion, the Juſtification was not good.

The Trial of Penn and Mead, and all Incidents thereunto, as ſwearing the Jury, examining of the Witneſſes, taking of the Verdict, and acquitting the Priſoner, were all within the Commiſſion; but the fining of the Jury, and the impriſoning of them for Non-payment thereof, was not juſtifiable by their Commiſſion, and therefore what was done therein was not as Commiſſioners or Judges.

If this Action will not lie, then the Party has a Wrong done, for which he can have no Remedy; for the Order for paying of the Fine was made at the Old-Baily, upon which no Writ of Error will lie; and though the Objection, that no Action will lie againſt a Judge of Record for what he doth quatenus a Judge, be great, the Reaſon of which is, becauſe the King himſelf is de Jure to do Juſtice to his Subjects, and becauſe he cannot diſtribute it himſelf to all Perſons, he doth therefore delegate his Power to his Judges, and if they misbehave themſelves, the King himſelf ſhall call them to Account, and no other Perſon. 12 Co. 24, 25.

But that concerns not this Caſe, becauſe what was done here was not warranted by the Commiſſion, and therefore the Defendant did not act as a Judge; and this Difference hath been taken and allowed, That in Caſe of an Officer, if the Court hath Juriſdiction of the Cauſe, no Action will lie againſt him for doing what is contrary to his Duty; but if all the Proceedings are coram non Judice, and ſo void, an Action doth lie. 10 Co. 77.

So in the Caſe of a Juſtice of the Peace or Conſtable, where he exceeds his particular Juriſdiction; ſo if a Judge of Niſi Prius doth any Thing not warranted by his Commiſſion, 'tis void.

And that the Commiſſioners here had no Power to impoſe this Fine, he argued from the very Nature of the pretended Offence, which was neither a Crime or in any wiſe puniſhable, becauſe what the Plaintiff did was upon his Oath; and for that Reaſon it hath been adjudged in the Caſe of *Agard *and* Wild, that an Action would not lie againſt one of the Grand Jury after an Acquittal, for procuring One to be indicted for Barretry, becauſe he is upon his Oath, and it cannot be preſumed that what he did was in Malice.

* Bridgman 131.

The Habeas Corpus gives the Party Liberty, but no Recompence for his Impriſonment, that muſt be by an Action of falſe Impriſonment, if otherwiſe, there would be a Failure of Juſtice; and it might encourage the Judges to act ad Libitum, eſpecially in inferior Courts, where Mayors and Bailiffs might puniſh Juries at their Pleaſures, which would not only be a Grievance to the Subject, but a Prejudice to the King himſelf, becauſe no Juries would appear where they are ſubject to ſuch arbitrary Proceedings.

An Action on the Caſe lies againſt a Juſtice of the Peace for refuſing to take an Oath of a Robbery committed. 1 Leon. 323. and yet it was objected that there he was a Judge. Quære. Brook 204. March 117. for which Reaſons he prayed Judgment for the Plaintiff.

Curia. But the whole Court were of Opinion, that the bringing of this Action was a greater Offence than fining of the Plaintiff, and committing of him for Non-payment, and that it was a bold Attempt both againſt the Government and Juſtice in general.

The Court at the Old-Baily had Juriſdiction of the Cauſe, and might try it, and had Power to puniſh a Miſdemeanour in the Jury; they thought it to be a Miſdemeanour in the Jury to acquit the Priſoners, which in truth was not ſo, and therefore it was an Error in their Judgments, for which no Action will lie: How often are Judgments given in this Court reverſed in the King's-Bench? And becauſe the Judges have been miſtaken in ſuch Judgments, muſt that neds be againſt Magna Charta, the Petition of Right, and the Liberties of the Subject? Theſe are mighty Words in Sound, but nothing to the Matter.

There hath not been one Caſe put which carries any Reſemblance with this; thoſe of Juſtices of the Peace and Mayors of Corporations are weak Inſtances; neither hath any Authority been urged of an Action brought againſt a Judge of Record for doing any Thing quatenus a Judge.

That Offences in Jury-men may be puniſhed without Preſentment, is no new Doctrine; as if they ſhould either eat or drink before they give their Verdict, or for any Contempt whatſoever: But 'tis a new Doctrine to ſay, That if a Fine be ſet on a Jury-man at the Old-Baily, he hath no Remedy but to pay it; for a Certiorari may be brought to remove the Order by which it was impoſed, and it may be diſcharged if the Court think fit.

As to what hath been objected concerning the Liberty of the Subject, that is abundantly ſecured by the Law already; a Judge cannot impoſe upon a Jury for giving their Verdict contrary to Evidence; if he doth any Thing unjuſtly or corruptly, Complaint may be made to the King, in whoſe Name Judgments are given, and the Judges are by him delegated to do Juſtice, but if there be Error in their Judgments, as here, 'tis void; and therefore the Barons of the Exchequer might refuſe to iſſue Proceſs upon it, and there needs no Writ of Error, for the very Eſtreats will be vacated.

Though the Defendants here acted erroneouſly, yet the contrary Opinion carried great Colour with it, becauſe it might be ſuppoſed very inconvenient for the Jury to have ſuch Liberty as to give what Verdicts they pleaſe; ſo that though they were miſtaken, yet they acted judicially, and for that Reaſon no Action will lie againſt the Defendant; and Judgment was given accordingly.

## The Caſe of the Warden of the *Fleet*.

COmplaint was made by Serjeant Turner on the Part of the Pariſhioners of St. Brides, London, againſt the Warden of the Fleet and his Priſoners, for that he ſuffered ſeveral of them to be without the Walls of his Priſon, in Taverns and other Houſes adjoining to the Priſon and fronting Fleet-Ditch, where they committed Diſorders, and when the Conſtable came to keep the Peace, and to execute a Warrant under the Hand and Seal of a Juſtice of Peace, they came in a tumultuous Manner, and hindered the Execution of Juſtice, and reſcued the Offenders, and often beat the Officers, the Warden often letting out 20 or 30 of his Priſoners upon any ſuch Occaſion to inflame the Diſorder.

It was prayed therefore, That this Court, to which the Priſon of the Fleet doth immediately relate, might give ſuch Directions to the Warden, that theſe Miſchiefs for the future might be prevented, and that the Court would declare thoſe Houſes out of the Priſon to be ſubject to the Civil Magiſtrate.

The

Curia. The Court were all of Opinion, (but Juſtice Atkins, who doubted) that nothing can properly be called the Priſon of the Fleet, which is not within the Walls of the Priſon, and that the Warden cannot pretend an Exemption from the Authority of the Civil Magiſtrate in ſuch Places as are out of the Priſon Walls, though Houſes may be built upon the Land belonging to the Fleet; for the Preſervation of the King's Peace is more to be valued than ſuch a private Right.

But Juſtice Atkins ſaid, If ſuch Places were within the Liberties of the Fleet, he would not give the Civil Magiſtrate a Juriſdiction in Prejudice of the Warden, but thought it might be fit for the Court to conſider upon what Reaſon it was that the Warden of the Fleet applied ſuch Houſes to any other Uſes than for the Benefit of the Priſoners; whereupon the Court appointed the Prothonotaries to go thither and give them an Account of the Matter, and they would take farther Order in it.

## *St.* Mary Magdalen Bermondſey *Church in* Southwarck. *In Scaccario.*

Rate for Building a Church ſhall be ſet by the Pariſhioners. Jones 89. Mod. Rep. 236.

IN a Prohibition, it was the Opinion of the whole Court, That if a Church be ſo much out of Repair, that 'tis neceſſary to pull it down, and that it cannot be otherwiſe repaired; that in ſuch Caſe upon a general Warning or Notice given to the Pariſhioners, much more if there be Notice given from Houſe to Houſe, the major Part of the Pariſhioners then preſent, and meeting according to ſuch Notice, may make a Rate for pulling down of the Church to the Ground, and building of it upon the old Foundation, and for making of Vaults where they are neceſſary, as they were in this Church, by reaſon of the ſpringing Water; and though the Rate be higher than the Money paid for doing all this, yet 'tis good, and the Church-Wardens are chargeable for the Overplus, they not being able to compute to a Shilling.

That if any of the Pariſhioners refuſe to pay their Proportion according to the Rate, they may be Libelled againſt in the Spiritual Court; and if the Libel alledge the Rate to be pro Reparatione Eccleſiæ generally, though in Strictneſs Eccleſia contains both the Body and Chancel of the Church; yet by the Opinion both of the Court of Common-Pleas and of the Exchequer, it ſhall be intended, that

the Rate was only for the Body of the Church; but in this Caſe it was made appear clearly, that the Rate was only for the Body, and that the Miniſter was at the Charge of the Chancel.

And both Courts agreed, That when a Prohibition is moved, and deſired on purpoſe to ſtop ſo good a Work, as the Building a Church, the Court will not compel the Parties to take Iſſue upon the Suggeſtion, when upon Examination they find it to be falſe, and therefore will not grant a Prohibition; for if the Rate be unduly impoſed, the Party grieved hath a Remedy in the Spiritual Court, or may appeal if there be a Sentence againſt him.

The Biſhop or his Chancellor cannot ſet a Rate upon a Pariſh, but it muſt be done by the Pariſhioners themſelves; and ſo North, Chief Juſtice, ſaid, That it had been lately ruled in the Common-Pleas.

Afterwards the Court of King's-Bench was moved for a Prohibition in this Caſe, and it was denied, ſo that in this Caſe there was the Opinion of all the Three Courts, This Matter was ſo much laboured, becauſe Twenty Four Quakers were reported to be concerned in the Rate, and they were unwilling to pay towards the Building of a Church.

## Paget *verſus* Voſſius. *In B. R.*

A Trial at the Bar in Ejectione Firmæ, in which the Jury found a ſpecial Verdict: The Caſe was, viz. That Dr. Voſſius the Defendant, being an Alien, and a Subject of the States of Holland, falling into Diſgrace there, had his Penſion taken from him by publick Authority: Afterwards he came into England, and contracted a great Friendſhip with one Dr. Brown a Prebendary of Windſor; then a War broke out between England and Holland, and the King iſſued forth his Proclamation, declaring the ſaid War, and the Hollanders to be Alien Enemies.

Judgment given upon the Conſtruction of Words in a Will. Jones 73. 1 Ven. 325. 2 Lev. 191.

Dr. Brown being ſeiſed of the Lands now in Queſtion, being of the Value of 200 l. per Ann. and upwards, made his Will in theſe Words in Writing, Inter alia, *viz.* Item I give all my Manor of S. with all my Freehold and Copyhold Lands, *&c.* to my dear Friend Dr. *Iſaac Voſſius*, during his Exile from his own Native Country; but if it pleaſe God to reſtore him to his

his Country, or take him out of this Life, then I give the ſame immediately after ſuch Reſtoration, or Death, to Mrs. *Abigail Heveningham* for ever.

A Peace was afterwards concluded between England and Holland, whereby all Intercourſes of Trade between the Two Nations became lawful; but Dr. Voſſius was not ſent for over by the States, nor was there any Offer of Kindneſs to him, but his Penſion was diſpoſed of and given to another.

That the Doctor might return into his own Country when he pleaſed, but that he ſtill continued in England.

And whether he or the Leſſor of the Plaintiff, Mrs. Heveningham, had the better Title, was the Queſtion.

Note, Dr. Voſſius was enabled to take by Grant from the King.

Ex parte Quer. Pemberton, Serjeant for the Leſſor of the Plaintiff, argued, That the Eſtate limited to the Defendant is determined, which depended upon the Conſtruction of this Deviſe. He did agree that the Will was obſcure, and the Intent of the Deviſor muſt be collected from the Circumſtances of the Caſe; and it is a Rule, That according to the * Intent of the Parties a Will is to be interpreted.

* 2 Cro. 62. 371, 416.

'Tis plain then, that the Deviſor never intended the Defendant an Eſtate for Life abſolutely, becauſe it was to depend upon a Limitation, and the Words are expreſs to that Purpoſe, for he deviſes to him during his Exile, &c.

Now the Queſtion is not ſo much what is the genuine and proper Senſe and Signification of thoſe Words, as what the Teſtator intended they ſhould ſignify.

1. Therefore the moſt proper Signification of the Word Exile, is a penal Prohibiting a Perſon from his Native Country; and that is ſometimes by Judgment or Edict, as in the Caſe of an Act of Parliament; and ſometimes 'tis choſen to eſcape a greater Puniſhment, as in Caſes of Abjuration and Tranſportation, &c.

But he did not think that the Teſtator took the Word Exile in this reſtrained Senſe, for Dr. Voſſius was never formally or ſolemnly Baniſhed; if that ſhould be the Senſe of the Word, then nothing would paſs to the Doctor by this Will, becauſe the Limitation would be void; and like to the Caſe of a Deviſe to a married Woman durante Viduitate, and ſhe dies in the Life-time of her Huſband; or to a Woman Sole during her Coverture, or of a Deviſe to A. the Remainder to the right Heirs of B. and A. dies living B. ſo that this could not be his Meaning.

2. The Word Exile, in common Parlance, is taken only for Abſence from ones Native Country; but this is a very improper Signification of the Word, and nothing but a Catachreſis can juſtify it, and therefore the Teſtator could not intend it in this Senſe; 'tis too loſe and inconſiderable an Interpretation of the Word for the Judgment of the Court to depend on, unleſs there were circumſtantial Proofs, amounting almoſt to a Demonſtration that it was thus meant: But it plainly appears by the following Words, this was not the Meaning of the Teſtator; for 'tis ſaid, If it pleaſe God to reſtore him to his Country; which ſhews that there was ſome Providence or other which obſtructed his Return thither, and ſo could not barely intend a voluntary Abſence; for if ſo, he might have expreſſed it; viz. during his Abſence from his Country, or 'till his Return thither, or whilſt he ſhould ſtay in England, and not in ſuch doubtful Words.

3. By the Word Exile, is meant a Perſons lying under the Diſpleaſure of the Government where he was born, or of ſome great Perſons who have an Influence upon the Government, or have an Authority over him; which makes him think convenient (conſidering ſuch Circumſtances) to withdraw himſelf, and retire to ſome other Place; and this is a Senſe of the Word betwæn both the former, and even in the Common Law we are not Strangers to the Acceptation of the Word in that Senſe. There is a Caſe omni exceptione major in the Writ of Waſte, which is, Fecit vaſtum de domibus, venditionem de boſcis, & exilium de hominibus; 'tis in the Regiſter, and in the Writ on the Statute of Marlebridge, cap. 24. where by the exilium de hominibus, is meant the hard Uſage of Tenants, or the Menacing of them, whereby they flie from their Habitations. 2 H. 6. 11.

'Tis found in this Caſe, that the Defendant was under the Diſpleaſure of his Governors, the War broke out, and therefore it might not then be ſafe for him to return; and for that Reaſon he might think it ſafe for himſelf to abide here, and this Dr. Brown the Teſtator might know, which might alſo be the Reaſon of making the Will.

But now all Acts of Hoſtility are paſt, and ſo the Defendant's Receſs is open; and it hath pleaſed God to reſtore the Doctor, but he is not pleaſed to reſtore himſelf, for the Jury find he is not returned: Now if a Man hath an Eſtate under ſuch a Limitation to do a Thing which may be done when it pleaſeth the Party; in ſuch Caſe if he neglect or refuſe to do the Thing, the Eſtate is determined. 15 H. 7. 1.

If I grant a Man an Annuity 'till he be promoted to a Benefice, and I provide a Preſentation for him, and he will not be Inſtituted and Inducted, the Annuity ceaſes; ſo ſhall the Eſtate in this Caſe, becauſe the Deviſor ſeems to appoint it to the Defendant till he may return.

Ex parte Def. Dr. Holt, contra, held, That the Eſtate is not determined, but had a Continuance ſtill. In his Argument he conſidered theſe Four Things.

1. Whether upon Dr. Voſſius's coming into England, (being under the Diſpleaſure of the Government where he was born) he was an Exile?

And he held, that he was an Exile: Which Word, in Plainneſs of Speech, doth not only concern a Perſon prohibited to live in his Native Country by Act of State, but one who leaves his Country upon other Occaſions. And Calvin the Civilian, in his Lexicon, tells us, That an Exile is one qui extra ſolum habitat; and in all the Deſcriptions of Exilium, 'tis divided into Voluntary and Involuntary. Plutarch and Livy uſe it in the Senſe of a voluntary Leaving of a Country, where 'tis ſaid of Petrellus, in voluntarium profectus eſt Exilium.

If a Man leaves his Country upon the Diſpleaſure of the Governors, or fearing any Danger of Life, or even upon the Loſs of his Livelihood, this is little different from involuntary Exile, and this is the Caſe of the Defendant, who, though he is not prohibited to continue in ſuch Exile, yet he is diſabled to return; and though he is not puniſhed for ſtaying, yet if he return, he is in Danger of being ſtarved.

As for the Caſe of Exilium de hominibus, it makes for the Defendant's Purpoſe; for in the 1 Inſt. 53. b. 'tis ſaid, If Tenants be impoveriſhed, that is an Exilium: And have not the States taken away the Doctor's Livelihood and impoveriſh'd him as much as they can? And therefore he had good Cauſe to ſeek Relief elſewhere.

Now the ſame Cauſe continues ſtill, for 'tis not found by the ſpecial Verdict that there was any Reconciliation betwæn the States and him, or that he may have his Penſion again, if he ſhould return; but on the contrary, that 'tis diſpoſed of to another: And 'tis apparent that there was a great Friendſhip betwæn the Teſtator and the Defendant, who took Notice of the Circumſtances of Dr. Voſſius's Condition at that Time, which is in no Sort altered from what it was at the Time of the Making of the Will; ſo that by the Word reſtored, nothing elſe could be intended by Dr. Brown, than when his Friend ſhould have the Favour of the States, and a comfortable Subſiſtence in his own Country.

2. Dr.

2. Dr. Voſſius is not to be conſidered with any Relation to the War, becauſe he came into England before the War proclaimed; neither doth it appear by the ſpecial Verdict that he was any wiſe concerned in it: If a Subject of England go into Holland, and a War break out, 'tis no Reſtraint of his Perſon if he be not active in it, for he may return as he hath Opportunity ſo to do.

3. Admitting Dr. Voſſius to be concerned in the War, yet the Peace enſuing can be no Reſtitution of him to his Country, that only extinguiſhes the Hoſtility between the Two Nations, and doth not reſtore the Doctor, who during the War adhered to the King of England, and ſo was a Rebel to the States; and for that Reaſon a Peace ſhall not extend to pardon him.

4. Admitting the Doctor to be no Exile, then the Limitation in the Will is void, and a void Limitation is like a void Condition, and then the Eſtate is abſolute in him; if it had been a Condition precedent, as a Deviſe to him in caſe he was not an Exile, that had prevented the veſting of the Eſtate; but if the ſubſequent Limitation be impoſſible, they muſt ſhew on the other Side that the Eſtate is determined.

Rainsford, Chief Juſtice, was clear of Opinion, that the Eſtate doth continue in the Defendant by this Limitation, until the Circumſtances of his Caſe, (as to the Favour of the States, and the Offer of his Penſion, or ſome competent Way of Livelihood) differ from what they did at the Time of the Making of the Will; and it doth not appear that there was any Alteration of his Condition, nor any Expectation of a Penſion from the States now, more than he had at that Time.

Whereupon in Michaelmas-Term following, Judgment was given for the Defendant Voſſius by the Opinion of the whole Court of King's-Bench.

## Strangford *verſus* Green.

IN an Action on the Caſe for Non-performance of an Award; the Defendant having, in Behalf of himſelf and his Partner, referred all Differences and Controverſies between the Plaintiff and them to Arbitrators, and promiſed to perform their Award; which was, That all Suits which are proſecuted by the Plaintiff againſt the Defendant ſhall ceaſe, and that he ſhall pay the Plaintiff ſo much, &c. And for Non-payment this Action was brought

Award that all Suits ſhall ceaſe amounts to a Releaſe.

upon this ſpecial Declaration, to which the Defendant did demur.

2 Cro. 639, 663. 1. Becauſe the Submiſſion was only of Matters concerning the Partnerſhip, and the Award was, That all Suits ſhall ceaſe.

2. It was of all Matters betwæn the Plaintiff and the Partner, and the Award is, That all Suits proſecuted againſt the Defendant only ſhall ceaſe.

3. The Award is not mutual; for the Defendant is to pay Money, but the Plaintiff is to give no Releaſe, 'tis only ſaid that all Suits ſhall ceaſe.

5. The other Partner is not made a Party to the Submiſſion.

2 Cro. 663. But theſe Exceptions were not allowed; for no Difference ſhall be intended but what concerned the Plaintiff and the Defendant, as the Defendant was concerned with his Partner in Trade only, unleſs the Contrary did appear; and if any ſuch were, they ſhould be ſhewn on the other Side.

And it ſhall be intended likewiſe that all Suits ſhall ceaſe only betwæn the Plaintiff and the Defendant, and that was an Award on both Sides; for the awarding that all Suits ſhall ceaſe hath the Effect of a Releaſe, and the Submiſſion and Award may be pleaded in Diſcharge as well as a Releaſe; and likewiſe the Defendant may undertake for his Partner, and having engaged for him, and promiſed that he ſhould perform the Award on his Part, (notwithſtanding the Partner is not bound ſo to do) yet if he refuſe, 'tis a Breach of the Defendant's Promiſe, and ſo the Plaintiff had Judgment upon the firſt Argument.

## *Sir* John Shaw *againſt a Burgeſs of* Colcheſter.

THIS was upon a Trial at the Bar, wherein the Caſe was this, viz. The Plaintiff was a Serjeant at Law, and Recorder of Colcheſter, and the Defendants reſolving to turn him out, procured Articles of Misdemeanour to be drawn againſt him, and then all who had Liberty to vote, proceeded to vote for and againſt him, and a Poll was granted to decide the Controverſy, it not appearing upon the View which had the Majority of Votes; but before the Plaintiff had taken all the Names, and whilſt he was taking off the Poll, the Defendants took away the Paper, and would not ſuffer him to proceed; the Jury gave him 300 l. Damages.

## Trotter *verſus* Blake. *In Scaccario.*

THIS was the Caſe of my Lord Hollis upon a Trial at the Bar in the Exchequer in an Ejectione firmæ, wherein the Caſe was this: viz.

Ejectment will not lie for a Forfeiture, where the Tenant refuſed to pay a Fine being doubtful.

The Lord Hollis was ſeiſed of the Manor of Aldenham in the County of Hartford in Fee, and the Lands in Queſtion were held of the ſaid Lord by Copy of Court-Roll, and are Parcel of the aforeſaid Manor.

That the Defendant was admitted Tenant, and a Fine of 8 l. impoſed upon him for ſuch Admittance, payable at Three diſtinct Payments; that the 8 l. was perſonally demanded of him by the Lord's Steward, and he refuſed Payment; whereupon the Lord enters and ſeiſes the Eſtate for a Forfeiture, which he would not have inſiſted on, but that the Obſtinacy of the Defendant made it neceſſary for him to aſſert his Title and Right.

Mr. Walker, the Lord Hollis his Steward, being ſworn, gave Evidence, that a Fine of 8 l. was ſet upon the Defendant when he was admitted, and that the Lands to which he was admitted were uſually let for 7 l. per Annum, ſo that the Fine was but a little more than a Year's Value: That he himſelf demanded the 8 l. of the Defendant, being a Seafaring Man, who refuſed to pay it. That he knew the Defendant to be the ſame Perſon who was admitted to this Copyhold: That the Demand was made at the Steward's Chamber in Staple-Inn, and becauſe it was payable at Three ſeveral Days, he then demanded of him only 2 l. 13 s. 4 d. as a Third Part of the 8 l. and that he did enter upon the 25th Day of November laſt, for Nonpayment of the ſaid 2 l. 13 s. 4 d.

Ex parte Def.

The Counſel for the Defendant inſiſted, That the Steward ought to produce an Authority in Writing given to him by the Lord, to make this Demand and Entry upon Refuſal, for the Lord's owning it afterwards will not make a Forfeiture.

Curia.

But the Court held clearly, that there was no Need of an expreſs Authority in Writing, and that it was not neceſſary for the Steward to make a Precept for the Seizure, but that it was neceſſary that the Demand ſhould be perſonal.

The Reaſon why the Defendant refuſed to pay this Fine was, becauſe he ſaid that by a Decree and Survey made of this Manor in the Reign of Queen Elizabeth the Fine to be paid for this Copyhold was ſettled, and it was but 3 l. and no more.

And

And Sir Francis Winnington, Solicitor General, ſaid for the Defendant, that the Caſe was very penal on his Side, but that he would make it clear that there was no Colour for the bringing of this Action either as to the Matter or the Form.

He ſaid, That the Manor of Aldenham had not been long in this noble Lord, he came in as Purchaſer or a Mortgagee under the Family of the Harvies whoſe Inheritance it was anciently; and there has been ſome Doubt whilſt it was in their Poſſeſſion what Fines were cuſtomary to be paid upon Deſcents and Alienations; but that is now ſettled, and the Defendant was in the Caſe of a Deſcent, for which the Fine is not to be arbitrary at the Will of the Lord; but is reduced to a Certainty in Queen Elizabeth's Reign by Conſent and Agreement between the Lord and Tenants; and that a Survey was then made by Vertue of a Commiſſion directed to ſome Men of Credit and Worth in thoſe Days, who were impowered to ſet forth the Quantity of Land, and the Value thereof, which was done accordingly; and it was then agreed, That a Year and an half's Value in caſe of a Deſcent, and Two Years Value in caſe of an Alienation, ſhould be paid as a Fine to the Lord, and the Proportion of the Value was then computed by the Commiſſioners, and decreed by the Court of Chancery to be binding to the Lords and Tenants for ever.

The Queſtion now is, How this Year's Value ſhall be computed? The Lord would have it according to the improved Value; the Tenant will pay according as it was rated in Queen Elizabeth's Time by thoſe Commiſſioners. Now if this Land had decayed in Value, the Tenant had ſtill been obliged to pay a Fine according to the Valuation of that Time; and if ſo, it would be very unreaſonable to make him pay for his Induſtry and Improvement of the Land now it is raiſed in Value, becauſe that was done by his Labour, and at his Expenſe; ſo that the Doubt being what Fine ſhall be paid, an Ejectione firmæ will not lie, becauſe the Matter is doubtful, and the Law gives the Tenant Liberty to conteſt it with the Lord, and will never let him be under the Peril of a Forfeiture, becauſe he will not comply with the Lord to give up his Right without Law.

But the Lord hath another, and a more proper Remedy; for he may bring an Action of Debt for the Fine thus impoſed, which will try the Right; and is not ſo penal to the Copyholder, which Point was lately reſolved: And that if a Copyholder had a probable Cauſe to induce him to be-

lieve that he ought not to pay the Fine demanded, (let the Right be as it would) yet no Ejectment will lie; for it muſt be only in a plain Caſe that the Lord can enter for a Forfeiture.

For no Man forfeits his Eſtate, but by a wilful Default in himſelf, ſuch a Forfeiture as is done and preſumed to be committed upon his own Knowledge, but Want of Underſtanding cannot be made a wilful Neglect. 'Tis true, the Decree in Chancery made here cannot vary the Law, but it may be Evidence of the Fact; for prima facie it ſhall be intended that ſuch Values have been paid Time out of Mind, becauſe the Court have ſo decreed; but then when the Fine was declared to be certain, a Doubt did ariſe how the Year's Value ſhall be reckoned, which has been ſettled alſo by another Decree, and from that Time all the reſpective Lords of this Manor have taken Fines according to that Value which is mentioned in the Survey, and this Lord himſelf hath taken Fines in Purſuance of the ſame, ſo that 'tis clear the Fine cannot be Arbitrary; but be it ſo or not, 'tis not material to this Purpoſe, becauſe the Tenant hath a good and colourable Ground to inſiſt upon the Decree and Survey, and conſequently there is no wilful Forfeiture.

The Lord Chief Baron agreed, That if it be a Doubt, and the Tenant gives a probable Reaſon to make it appear that no more is due than what he is ready to pay, 'tis no Forfeiture; but the Law in general preſumes that the Fine is incertain, if the Contrary is not ſhewed. Now if the Tenant's Doubt did ariſe upon the Equitableneſs of the Fine, in ſuch Caſe if he refuſe to pay, 'tis a Forfeiture; but here it was, whether it ſhall be paid according to the computed or improved Value, and therefore he inclined that the Action would not lie.

The Exemplification of the Decree was offered to be read, which being oppoſed, Serjeant Maynard informed the Court, that nothing was more uſual than to read a Sentence in the Eccleſiaſtical Court, or a Decree in Chancery, as Evidence of the Fact: It being allowed to be read, the Council for the Defendant took Notice, that the Commiſſion was therein mentioned which was returned into Chancery, and burned when the Six Clerks Office was on Fire, in the Year 1618. But a Duplicate thereof was produced, which the Defendant had from the Heir of the Harveys, and ſo the Survey was prayed to be read; which was oppoſed by Sir William Jones, for he ſaid that it was no Duplicate, the Commiſſioners Names being all written with one Hand, and no Proof being made that it was

a true Copy of that which was returned: He likewiſe obſerved upon the reading of the Decræ, that it was an Evidence for the Plaintiff, becauſe if there had bæn a ſettled Rule for Payment of the Fines, there had bæn no Occaſion to ſæk Relief in Equity, and that there was no Reaſon that the Defendant ſhould come into a Court of Law to prove ſuch Settlement by a Decræ in Chancery, for if there be ſuch a Decræ his Remedy is proper there; beſides, the Decræ it ſelf only mentions the Year's Value, which was to be ſettled by the Commiſſioners, and which he ſaid was never done, ſo that the Decræ which appointed the Commiſſion was not compleated, and therefore being but Executory, is of no Force even in Equity.

The Court were doubtful in the Matter, and Baron Thurland ſaid, That no Action of Debt would lie for this Fine, becauſe it was neither upon the Contract, nor as ex quaſi contractu: But as to that, Serjeant Meynard anſwered, That many Reſolutions had bæn made in his Time of Caſes, wherein the old Books were ſilent.

Upon the Whole, the Court thought this to be a proper Caſe for Equity, and ſo directed a Juror to be withdrawn, which was accordingly done.

# DE
# Term. Sanctæ Trin.
## Anno 29 Car. II. in Communi Banco.

### Addiſon *verſus Sir* John Otway.

IN a Special Verdict in Ejectione firmæ, the Caſe was thus, viz. There was the Vill of Rippon, and the Pariſh of the ſame Name; and likewiſe the Vill of Kirkby, and the Pariſh of the ſame Name, in the County of York. And Thomas Brathwaite being Tenant in Tail of the Lands in Queſtion, lying in the ſaid Pariſhes of Rippon and Kirkby; did by Bargain and Sale convey the ſame, lying (as in truth they did) in the Pariſhes of Rippon and Kirkby, to the Intent to make a Tenant to the Præcipe in order to ſuffer a Common Recovery, and thereby he did covenant to ſuffer the ſame, which Recovery was afterwards ſuffered of Lands in Rippon and Kirkby, but doth not ſay (as he ought) in the Pariſhes of Rippon and Kirkby; and the Verdict in effect found, That he had no Lands in the Vills; but farther, that it was the Intent of the Parties, that the Lands in the Pariſhes ſhould paſs; and whether they ſhould or not, was the Queſtion.

A Pariſh and a Vill within the Pariſh of the ſame Name; a Recovery is ſuffered of Lands in the Vill, and in the Deed to lead the Uſes, the Pariſh is named, they make but one Conveyance, and the Lands in the Pariſh do paſs. Mod. Rep. 250. 2 Ven. 31.

It was ſaid for the Defendant, That by this Indenture and Common Recovery the Lands which lie in the ſaid Pariſhes ſhall paſs.

1. Suppoſing this to be in the Caſe of a Grant, there if the Vill is only named, yet the Lands in the Pariſh of the ſame Name ſhall paſs, becauſe the Grant of every Man ſhall be taken ſtrongeſt againſt himſelf. Owen Rep. 61.

So where Part of the Lands lie in B. and the Grant is of all the Lands in D. all the Lands in the Pariſh of D. ſhall paſs, becauſe in that Caſe the Pariſh ſhall be intended; and if the Law be thus in a Grant, a fortiori in the Caſe of a Common Recovery, which is the Common Aſſurance of the Land.

Poſtea, Baker *and* Keit.

2. The Verdict hath found that the Defendant had no Lands in the Mills of Rippon and Kirkby, and the Court will not intend that he had any there, if not found; so that nothing paſſes by the Recovery, if the Lands in the Pariſhes do not paſs, which is contrary to the Intention of the Parties, and to the Rules of Law in the like Caſes; for if a Man deviſeth all his Lands in Dale, and hath both Freehold and Leaſehold there, by this Deviſe the Freehold only paſſes, but if no Freehold the Leaſes ſhall paſs. Cro. Car. 293. So adjudged in the Caſe of Roſe *and* Bartlet, for otherwiſe the Will would be void.

3. The Pariſh and Mill ſhall be both intended to ſupport a Trial already had; as where a Venire facias ought to iſſue from the Pariſh of Dale, and it was awarded from Dale generally, 'tis well enough, * Roll. Rep. 27. A fortiori to ſupport a Common Recovery, which has always been favourably interpreted, and yet a new Trial will help in the one Caſe, but a Man cannot command a new Recovery when he will; and therefore the Judges uſually give Judgments to ſupport and maintain Common Recoveries, that the Inheritances of the Subject might be preſerved; for if there be Tenant in Tail, the Reverſion in Fee, or if Baron and Feme ſuffer a Recovery, this is a Bar of the Reverſion, and the Dower, and yet the intended Recompence could not go to either. Pl. Com. 515. 2 Roll. Rep. 67. 5 Co. Dormer's Caſe.

*1 Rol. Rep. 21, 27, 293. Hob. 6. 2 Cro. 263.

Antea. 4. The Jury have found that the Intention of the Parties was to paſs the Lands in the Pariſhes, which Intention ſhall be Equivalent to the Words omitted: And for that there is a notable Caſe in 2 Roll. Rep. f. 245, where the Intent of the Parties ſaved an Extinguiſhment of a Rent. The Caſe was, A. makes a Leaſe for Years, rendring Rents, and then grants the Reverſion for 40 Years to B. and C. which he afterwards conveyed to them and their Heirs by Bargain and Sale, and covenanted to levy a Fine accordingly, to make them Tenants to the Præcipe, to ſuffer a Common Recovery to another Uſe; the Bargain, Fine, and Recovery were all executed, and it was adjudged that they made all but one Conveyance, and that the Reverſion was not deſtroyed, and by Conſequence the Rent not extinguiſhed; for though the Bargainor might intend to deſtroy the Reverſion, by making this Grant to them and their Heirs, yet the Bargainees could never have ſuch Intention, and though they were now ſeiſed to another Uſe, yet by the Statute of Mills, their former Right is ſaved which they had to their proper Uſe; and their Intention being only to make a Tenant to the Præcipe, the

Statute ſhall be ſo conſtrued that the Intent of the Parties ſhall ſtand.

5. The Lands in the Pariſhes paſs, becauſe the Deed and Common Recovery make but one Conveyance and Aſſurance in the Law; and therefore as a Conſtruction is not to be made upon Part, but upon the whole Deed, ſo not upon the Deed or Recovery alone, but upon both together. 2 Co. 75. Lord Cromwell's Caſe. 1 Anderſ. 83.

6. 'Tis the Agreement of the Parties which governs Fines and Recoveries, and Lands ſhall paſs by ſuch Names as are agreed between them, though ſuch Names are not proper; and therefore a Fine of a Lieu conus is not good, though neither Hill or Pariſh is named therein. Poph. 22. 1 Cro. 270, 276, 693. 2 Cro. 574. Antea.

So if a Fine be levied of a Common of Paſture in Dale, 'tis good, though Dale be neither Hill or Hamlet, or Lieu conus out of a Hill. 2 Roll. Abr. f. 19. So in Sir George Symonds his Caſe, Lands as Parcel of a Manor were adjudged to paſs, though in truth they were uſed with the Manor but Two Years; and the Reaſon of all theſe Caſes is, becauſe it was the Agreement of the Parties that they ſhould paſs. Cro. Car. Winch. 12. Sid. 190, 191. Antea.

Object. If it be objected, That all theſe Authorities are in Caſes of Fines, but the Caſe at Bar is in a Common Recovery, which makes a great Difference.

Anſw. The Proceedings in both are amicable, and not adverſary, and therefore as to this Purpoſe there is no Difference between them; and for an Authority in the Point, the Caſe of Lever *and* Hoſier was cited, which was adjudged in this Court, Trin. 27 Car. 2. Where the Queſtion was, Whether upon a Common Recovery ſuffered of Lands in the Town of Sale or the Liberty thereof, Lands lying in Dale, being a diſtinct Hill, in the Pariſh of Sale ſhould paſs or not; and after divers Arguments it was allowed to be well enough, being in the Caſe of a Common Recovery: And ſo was the Caſe, Paſch. 16 Car. 2. in B. R. In a Special Verdict the Caſe was, That Sir Thomas Thinn being ſeiſed of the Manor of Buckland in Tail, and of Twenty Acres of Land, called and known by a particular Name, which Twenty Acres of Land were in Edw. the 6th's Time reputed Parcel of the ſaid Manor, and always uſed with it, ſold the ſaid Manor and all the Lands reputed Parcel thereof, with the Appurtenances, of which he did ſuffer a Common Recovery; and it was adjudged upon great Conſideration, that though the Recovery did not mention the Twenty Acres particularly, yet it did Dock the Entail thereof, becauſe the Indenture which Antea 47. Sid. 190.

leads the Uſes of the Recovery was of the Lands reputed Parcel thereof, or enjoyed with it, and that the Shortneſs in the Recovery was well ſupplied by the Deed; in which Caſe the Court were guided by the Reſolution in Sir George Symond's Caſe. Vide 6 Co. Sir Moyle Finch's Caſe.

The Authorities againſt this Opinion are Two:

Antea, Lever *and* Hoſier. 47. 1. That of Stock *verſus* Fox, Cro. Jac. 120. There were Two Hills, Walton and Street in the Pariſh of Street, and a Fine was levied of Lands in Street; it was adjudged that the Lands in Walton did not paſs by this Fine.

But there is another Report of this very Caſe, by my Lord Chief Juſtice Rolls in his Abr. tit. Grants 54. where 'tis ſaid, If there be in the County of Somerſet the Hill of Street, and the Hill of Waltham within the Pariſh of Street, and a Man being ſeiſed of Lands in the Hill of Street, and of other Lands in the Hill of Waltham, all within the Pariſh of Street, and he bargains and ſells all his Lands in Street, and having covenanted to levy a Fine, doth accordingly levy it of Lands in Street, and doth not mention either in the Indenture or in the Fine any Lands in Waltham, the Lands lying there ſhall not paſs; from which Report there may be a fair Inference made, That it was the Lord Roll's his Opinion, That if Waltham had been named in the Indenture, tho' not in the Fine, the Lands would have paſſed; and in this Caſe the Pariſhes are named in the Indenture of Bargain and Sale; but beſides, in that Caſe the Party had Lands both in Street and Waltham, and ſo the Conveyances were not in vain, as they muſt be here if the Lands in the Pariſhes do not paſs.

Antea. 2. The other Caſe is that of Baker *and* Johnſon in Hutton 106. But this Caſe is quite different from that, becauſe there was neither Hill or Pariſh named in the Indenture; but here the Indenture was right, for the Lands are mentioned therein to lie in the Pariſhes, &c. And for theſe Reaſons, Judgment was prayed for the Defendant.

This Caſe was afterwards argued in Michaelmas-Term following, by Serjeant Pemberton and Maynard for the Plaintiff, who ſaid,

Ex parte Quer. That the Government of this Nation was Eccleſiaſtical and Civil; the Eccleſiaſtical runs by Pariſhes, and the Civil by Hills; That a Pariſh is conſtituted by the Eccleſiaſtical Power, and may be altered by the King and Ordinary of the Place; that the Parſon was Superintendent of the Pariſh, and the Conſtable of the Hill, which was alſo conſtituted by the Civil Magiſtrate; and from hence it is, that in real Actions which are adverſary, Lands ought not to be demanded as lying in a Pariſh,

but within a Vill, that being the Place known to the Civil Jurisdiction; and if a Trespass which is local be laid at Dale generally, there being both the Parish and Vill of Dale, the Proof of the Trespass done in the Parish is not good, for it must be at the Vill.

They agreed, That in conveying of Lands a Fine or Common Recovery of Lands in a Parish or Lieu conus was good. 2 Cro. 574. But if there be both a Vill and a Parish of the same Name, and severally bounded; if the Vill be only named without the Parish, nothing doth pass but what is in the Vill, because where a Place is alledged in Pleading it must be of a Vill. Moor 710. 2 Cro. 121. 1 Inst. 125. b.

And this was the ancient Way of demanding Lands in a Præcipe quod reddat, because of the Notoriety of Vills from whence Visnes do arise; and because the Vill is more particular and of more Certainty than a Parish, and therefore 'tis requisite that the Demandant should be very particular in his Demand, that the Tenant may know how to make his Defence, and the Sheriff of what to deliver Possession.

Besides, a Vill is more Ancient than a Parish, and Lands have been demanded within them Time out of Mind, so that the Demand (when 'tis doubtful of what 'tis made) shall be supposed of that which is most Ancient; and such Construction is most conformable to the like Cases, for Additio probat Minoritatem: And therefore if Father and Son are both of one Name, and Mention is made of one without an Addition of Junior, the Law intends the Father; so the Vill being more ancient than the Parish, that shall be intended, if the Parish is not named.

In 2 Anderson 124. Hartwel, Rode and Ashen, were several Vills in the Parish of Rode the King granted all his Tythes in Rode and Ashen in tenura Richardi Wake, and at the Time of the Grant the Tythes of Hartwel were in the Tenure of Wake; it was adjudged in the King's-Bench that the Tythes in Hartwel did pass, but that Judgment was reversed in the Exchequer-Chamber, because Rode could not be * intended a Parish and so to comprehend Hartwel, but must be intended a Vill distinct from a Parish, and so the Tythes of Hartwel being also a Vill, could not pass by the Grant of them in Rode; this also was the Opinion of Popham, Owen 60. But Gawdy and Fenner were of another Opinion.

* In a *Præcipe* it must be intended a Vill, if a Parish be not named, because Vills are known at the Common Law, but not Parishes, those were constituted by the Counsel of *Lyons*, but 'tis otherwise in Grants. Owen 61.

As to the finding of the Jury, that doth not help if the Recovery be not full, for they may expound, but they cannot enlarge each other: In a Formedon, nient compriſe

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in the Record, and not what is compriſed in the Deed, is the Plea. Things upon a Record are open to the View of all People; but a Deed is a Pocket-Record, and the Perſons whom it concerneth cannot come at the Sight of it: So Fines are open and to be ſeen by all, and are to be proclaimed, but according to this Interpretation Deeds ſhould be alſo proclaimed.

And there is a manifeſt Difference betwen Things contained in a Fine, and in a Deed; for a Fine of a Tenement is not good, but a Deed of a Tenement is well enough, but will not help the Fine; and therefore Men ſhould not go out of the Rules of the Law to help a Miſtake: For which Reaſons they prayed Judgment for the Plaintiff.

But the whole Court were of Opinion that the Lands in the Pariſhes did well paſs; for as Fines and Recoveries did grow in Uſe, and are now become Common Aſſurances, they are to be favoured in the Law: And it hath been a Rule, That even in doubtful Things, Conſtructions ſhall be made to ſupport a Deed if poſſible, Ut res magis valeat quam pereat. Co. Lit. 183.

By Rippon generally the Will ſhall be intended, but ſtabitur præſumptio donec probetur in contrarium, and that is proved by the Deed which ſhews where the Lands lie.

Indenture by an Infant to declare Uſes of a Fine or Recovery, make but one Conveyance, otherwiſe he might avoid it as he may a Deed by Infancy. Hob. f. 6. 2 Cro. 676.

Both the Indenture and Recovery being one Conveyance, muſt be expounded ſo that every Part may ſtand, beſides, 'tis apparent by the Intent of the Parties (which the Jury have alſo found) that the Lands in the Pariſhes ſhould paſs.

In the Caſe of Brock *and* Spencer a Treſpaſs was laid in Hurſly, and it was not ſaid whether Will or Pariſh; the Defendant pleaded that the Lands were held of the Manor of Marden in the Pariſh of Hurſly, &c. and the Venire facias was de Vicineto only, and not de Vicineto Parochiæ Hurſly, and it was adjudged good, for the Will and the Pariſh ſhall be underſtood to be the ſame.

And as to this Purpoſe they were all of Opinion, That there was no Difference betwen a Fine and Recovery: 'Tis true, the Law originally took Notice of a Will only, becauſe the Diviſion of a County into Pariſhes was of Eccleſiaſtical Diſtribution; but now by Proceſs of Time that Diſtinction is taken Notice of in Civil Affairs, and the Law hath great Regard to the Uſage and Practice of the People, the Law it ſelf being nothing elſe but common Uſage, with which it complies, and alters with the Exigency of Affairs. It was but lately that the Curſitors would put the Word Pariſh into a Writ; for if a Note was

delivered to them of Lands in the Parish of Dale, they used always to make it of Lands in Dale, till the Court ordered them to do otherwise; so that though the Common Usage was so formerly, 'tis now otherwise, and the Reason of Things changing, the Things themselves also change.

And if this Recovery should not be construed to pass the Lands, the Intention of the Parties would fail: 'Tis true, there is no Authority express in the Point to guide this Judment, nor is there any against it; but if such should be, the Opinion of the Court is not to be bound against apparent Right; and 'tis for the Honour of the Law that Men should enjoy their Bargains according as they intended; for which Reasons, Judgment was given for the Defendant.

## Goffe *versus* Elkin.

THE Condition of a Bond was, That if the Plaintiff shall seal to the Defendant a good and sufficient Conveyance in the Law of his Lands in Jamaica, with usual Covenants in such Manner as by the Defendant's Counsel shall be advised; then if the Defendant should thereupon pay unto the Plaintiff such a Sum of Money, &c. the Condition should be void: In Debt brought upon this Bond, the Defendant (after Oyer of the Condition) pleads, that Mr. Wade a Counsellor at Law, did advise a Deed of Bargain and Sale from the Plaintiff to the Defendant with the usual Covenants, of all his Lands in Jamaica, and tendred the Conveyance to the Plaintiff, who refused to seal the same, and so would discharge himself of the Condition, the Money being not to be paid unless the Assurance made.

Affirmative Plea where it ought to be particular, where not.

To this Plea the Plaintiff demurred by Serjeant George Strode,

1. Because the Defendant hath not shewed the Conveyance, and an affirmative Plea ought to be particular, and not so general as this; for to plead generally quod exoneravit is not good, but it must be shewed how; and so it was adjudged in the Case of * Horseman *and* Obbins, where the Condition was to indempnify Lands from the yearly Rent of 20 l. during the Demise; the Defendant pleaded quod a tempore confectionis scripti obligatorii hucusque exoneravit, &c. And upon Demurrer as here, it was held no good Plea.

* 2 Cro. 165, 359, 363, 503, 634. Sid. 106. 2 Co. 4. a. Cro. Car. 383, 384. 2 Leon. 214.

2. The

2. The Matter of the Condition consists both of Law and Fact, and both ought to be set out; the preparing of the Deed is Matter of Fact, and the Reasonableness and Validity thereof is Matter of Law, and therefore they ought to be set forth that the Court may judge thereof.

*Hob. 107. * In 22 E. 4. 40. The Condition of a Bond was, That the Defendant should shew the Plaintiff a sufficient Discharge of an Annuity, who pleaded that he tendered a good and sufficient Discharge in general without setting it forth; it was not good.

Mod. Rep. 67. 3. The Plea is, That the Indenture had the usual Covenants, but doth not set them forth, and for that Cause 'tis also too general.

In 26 H. 8. 1. The Condition was for the Performance of Covenants; one whereof was, That he should make such an Estate to the Plaintiff as his Counsel should advise: The Defendant pleaded, That he did make such Conveyance as the Counsel of the Plaintiff did advise, and the Plea was held ill and too general, because he shewed not the Nature of the Conveyance, and yet Performance was pleaded according to the Covenant.

But notwithstanding these Exceptions, the whole Court were of Opinion that this Plea was good; for if the Defendant had set forth the whole Deed verbatim, yet because the Lands are in Jamaica, and the Covenants are intended such as are usual there, the Court cannot judge of them, but they must be tried by the Jury.

He hath set forth that the Conveyance was by a Deed of Bargain and Sale, which is well enough; and so it had been if by Grant, because the Lands lying in Jamaica pass by Grant, and no Livery and Seisin is necessary; if any Covenants were unreasonable and not usual, they are to be shewed on the other Side: And so Judgment was given for the Defendant.

## Spring *versus* Eve.

Verdict cures the Mis-recital of the Time of the Session of Parliament. 3 Keb. 742, 813.

DEBT upon the Statute of 29 Eliz. cap. 4. by the Sheriff for his Fees for serving of an Execution: After Verdict for the Plaintiff, it was moved in an Arrest of Judgment by Serjeant Pemberton, because the Time of holding the Parliament was mis-recited, being mistaken in both the Statute-Books of Poulton and Keble as it appeared by the Parliament-Roll, whereupon Judgment was stayed till this Term; and the Court had Copies out of the Rolls of the Time when the Parliament was held,

and they were all clear of Opinion, that the Time was miſtaken in the Declaration, and ſo are all the Precedents; for the Plaintiff here declared, that this Statute was made at a Seſſion of Parliament by Prorogation held at Weſtminſter, 15 Febr. 29 Eliz. and there continued 'till the Diſſolution of the ſame; whereas in truth the Parliament began 29 Octob. and not on the 15th of February; for it was adjourned from that Time to the 15th of February, and then continued 'till it was diſſolved.

My Lord Coke in his 4th Inſtitutes, fol. 7. takes Notice of this Miſtake in the printed Books.

But the Court were all of Opinion, That tho' it was miſtaken and ought to have been otherwiſe, yet being after * Verdict 'tis well enough, and the rather becauſe this is a particular Act of Parliament, and ſo they are not bound to take Notice of it; and therefore if it be miſtaken, the Defendant ought to have pleaded Nul tiel Record; but ſince he hath admitted it by Pleading, they will intend that there is ſuch a Statute as the Plaintiff hath alledged, and they could not judicially take Notice of the Contrary. Curia. * Dyer 95. Yelv. 127. 2 Cro. 111. pl. 9. Br. Abr. tit. Parl. 87.

The Serjeant perceiving the Opinion of the Court, deſired Time to ſpeak to it, being a new Point, and told the Court, that they ought to take Notice of the Commencement of private Acts, which the whole Court denied.

And the Chief Juſtice ſaid, That they were not bound to take Notice of the Commencement of a general Act, for the Court was only to expound it; and though this had not been in the Caſe of a particular Act (where 'tis clear the Defendant ought to plead Nul tiel Record) yet being after Verdict 'tis well enough, becauſe the Party took no Benefit of it upon the Demurrer, and becauſe of the Multiplicity of Precedents which run that way.

So in the Caſe upon the Statute of Tythes, though it be miſtaken, yet it hath often been held good; as if an Action be brought upon that Statute for not ſetting out of Tythes, declaring Quod cum Quarto die Novembris Anno Secundo Edw. 6. It was enacted, &c. and the Parliament began 1 Ed. 6. and was continued by Prorogation until 4 Novembris, yet this hath often been held good, and Multitudo errantium tollit peccatum.

And tho' in this Case the Parliament was adjourned, but in that upon the Statute of Ed. 6. it was prorogued, yet the Chief Justice said, That as to this Purpose there was but little Difference betwæn an Adjournment and a Prorogation; for an Adjournment is properly where the House adjourn themselves, and a Prorogation is when the King adjourns them.

But Justice Atkins doubted, whether the Court ought not to take Notice of the Commencement of a general Act, and could have wished that there had bæn no such Resolution as there was in the Case of Partridge *and* Strange in Pl. Commentaries; for that he was satisfied with the Argument of Serjeant Morgan in that Case, who argued against that Judgment, and held, That he who vouched a Record, and varies either in the Year or Term, hath failed of his Record: But since there had bæn so many Authorities since in Confirmation of that Case, he would say nothing against it.

But he held, that there was a manifest Difference between an Adjournment and a Prorogation; for an Adjournment makes a Session continue, but after a Prorogation all must begin de Novo; and that an Adjournment is not always made by themselves, for the Chancellor hath adjourned the House of Peers ex mandato Domini Regis; and Quæn Elizabeth adjourned the House of Commons by Commission under the Great Seal.

4 Inst. 7.

## Mires *versus* Solebay.

Servant shall be charged in *Trover* for taking Goods by the Command of his Master.

IN a Special Verdict in Trover and Conversion, the Case was this, viz.

H. being possessed of several Sheep, sells them in a Market to Alston, but did not deliver them to the Vendee, and afterwards in that very Market they discharge each other of this Contract, and a new Agreement was made betwæn them, which was, That Alston should drive the Shæp home and depasture them 'till such a Time, and that during that Time H. would pay him so much every Week for their Pasture; and if at the End of that Time (then agræd betwæn them) Alston would pay H. so much for his Sheep (being a Price then also agræd on), that then Alston should have them.

Before the Time was expired H. sells the Shæp to the Plaintiff Mires, and afterwards Alston sells them to one Marwood, who brought a Replevin against the Plaintiff for taking of the Sheep; and the Officers, together with Solebay the Defendant (who was Servant to Marwood) did

by his Order, and in Assistance of the Officers, drive the Sheep to Marwood's Grounds, where they left them.

The Plaintiff demands the Sheep of Solebay, and upon his Refusal to deliver them, brings this Action against the Servant; and whether it would lie or not, was the Question.

It was urged at the Bar, that the Action would not lie against the Defendant, because he had not the Possession of the Goods at the Time of the Action brought; for he presently put them into his Master's Ground: And it was said, if A. finds Goods, and S. takes them away before the Action brought, Trover will not lie against A. but it is otherwise if he sell them.

In this Case it would have been a Breach of Trust in the Servant, to have delivered the Goods belonging to his Master to another: 'Tis true, if there be a Conversion, tho' the Possession be removed before the Action brought, yet the Action will lie, but that is because of the Conversion.

Many Cases were put where the Servant is not liable to an Action for a Thing done by the Command of his Master; and where a Bailiff, who is but a Servant to the Sheriff, shall not be charged in a false Return made by his Master. Cro. Eliz. 181. So if a Smith's Man pricks an Horse, the Action lies against the Master, and not against the Servant. 1 Roll Abr. 94, 95.

The Court, before they delivered any Judgment in this Case, premised these Two Things, viz.

1. That 'tis necessary in Trover to prove a Property in the Plaintiff, and a Trover and Conversion in the Defendant: And it was said by Justice Atkins, (but denied by the Chief Justice) That though Goods are sold in a Market, yet the Property is not changed 'till the Delivery; for which he cited Keilway 59, 77.

But the Court held clearly in this Case, that the first Sale to Alston was defeated by the Agreement of the Parties afterwards; for when a Bargain is made, and all the Parties consent to dissolve it, and other Conditions are proposed, the new Agreement destroys the former Bargain. And the Chief Justice said, That if an Horse was bought in a Market, for which the Vendee is to pay 10 l. if the ready Money be not paid, the Property is not altered, but the Party may sell him to another.

2. This new Agreement to have the Sheep, if Alston would pay such a Sum of Money at a future Day, will not amount to a Sale, and the new Property is changed, and consequently the Sale by H. to the Plaintiff before the Day is good, and so the Property of the Sheep is in him.

But by the Opinion of the whole Court the Action would not lie againſt the Defendant.

1. The Defendant could be guilty of no Converſion, unleſs the Driving the Cattle by vertue of the Replevin would make him guilty; but at that Time the Sheep were in Cuſtodia Legis, and the Law did then preſerve them, ſo that no Property can be changed, and if ſo, then there could be no Converſion.

2. The Action will not lie againſt the Servant, for it being in Obedience to his Maſter's Command, though he had no Title, yet he ſhall be excuſed: And this Rule Juſtice Scroggs ſaid would extend to all Caſes where the Maſter's Command was not to do an apparent Wrong; for if the Maſter's Caſe depended upon a Title, be it true or not, 'tis enough to excuſe the Servant; for otherwiſe it would be a miſchievous Thing, if the Servant upon all Occaſions muſt be ſatisfied with his Maſter's Title and Right before he obey his Commands; and 'tis very requiſite that he ſhould be ſatisfied if an Action ſhould lie againſt him for what he doth in Obedience to his Maſter: But it was ſaid, the * Servant cannot plead the Command of his Maſter in Bar of a Treſpaſs; and it was likewiſe ſaid, that in this Caſe the Driving of the Cattle by the Servant to the Grounds of his Maſter, or a Stranger's helping to drive them without being requeſted, is juſtifiable.

* Wyne *and* Rider, antea.

3. Becauſe what was done by the Defendant was done in the Execution of the Proceſs of the Law, and he might as well juſtify as the Officer; for if he forbid the Defendant to have aſſiſted him, yet his Aſſiſting him afterwards would not have made him guilty, becauſe done in Execution of the Law.

4. Becauſe 'tis not found that the Servant did convert the Sheep to his own Uſe; for the ſpecial Verdict only finds the Demand and the Refuſal, which is no Converſion; and though 'tis an Evidence of it to a Jury, yet 'tis not Matter upon which the Court can give Judgment of a Converſion. 10 Co. 57.

2 Bulſtr. 313. 1 Roll. Abr. 5. And therefore the Jury ſhould have found the Converſion as well as the Demand and Refuſal, like the Caſe in 2 Roll. Abr. 693. In an Aſſiſe of Rent-Sech, upon Nul tort pleaded, the Jury found a Demand and Refuſal, & ſic diſſeiſivit; it was held to be no good Verdict, for the Demand ought to have been found on the Land, and ſhall not be ſo intended unleſs found.

The Plaintiff here hath ſet forth in his Declaration a Requeſt to deliver; then a Refuſal and Converſion too,

which shews that they ought to be found, because distinct Things; and the Finding of the Demand and Refusal was only a Presumptive, not a Concluſive Proof of the Converſion; and if the Jury themselves know that there was no Converſion, yet the Plaintiff hath failed in his Action; as if a Trover be brought for cutting Trees and carrying of them away, and the Jury know, that though the Defendant cut them down, yet they still lay in the Plaintiff's Close, this is no Converſion.

And though it hath been strongly insisted at the Bar, that the Court shall intend a Converſion, unless the Contrary appeared, and are to direct a Jury to find the Demand and Refusal to be a Converſion, and the Opinion of Dodridge *and* Croke, in 1 Roll. Rep. 60. was much relied on, where Adams recovered against Lewis 40 l. in the Court of Exon, and Three Buts of Sack were taken in Execution, and the Plaintiff depoſited 22 l. in the Hands of the Defendant to prevent the Sale of the Sack, which was to be a Pledge to return it upon Requeſt, if the Defendant was not paid before the next Court Day; the Jury found the Debt was not paid, and that no Requeſt was made to return the Sack, but that the Plaintiff requeſted the Defendant to return the Money: Yet it was held by those Two Juſtices, that the Law would supply the Proof of a * Converſion though it was not found; for it shall be presumed that the Money was denied to the Plaintiff, and that the Defendant might use it himself; and because no other Proof could be made, that very Denial shall be a Converſion in Law; so a Denial of a Rent-Seck after Demand is a Diſſeiſin, much more in perſonal Actions where the Subſtance is found, 'tis well enough. 1 Inſt. 282. a.

*Bulſtr. 308. Cro. Eliz. 495. Goldſ. 152. Moor 460. Stile 361. Pl. Com. 92. b.

But the Court said, That notwithstanding this Authority, they would not intend a Converſion, unless the Jury had found it, especially in this Case, because they ought to have found it to make the Servant liable, or if the Converſion was to the Uſe of his Maſter, there is no Colour for this Action to be brought against the Defendant, but it ought to be brought against the Maſter.

Whereupon a Ve. fa. de Novo was prayed to help the Inſufficiency of the Verdict, the Converſion not being found; but the Court said, it was to no Purpoſe to grant a new Trial, unless the Plaintiff had a new Case; and so Judgment was given for the Defendant.

Bill

## Bill *verſus* Nicholl.

Variance between the Record pleaded and the Record it ſelf.

IN an Action brought in the Court of Exchequer, the Defendant pleaded another Action depending againſt him for the ſame Matter in the Common-Pleas, and upon nul tiel Record replied by the Plaintiff, a Day was given to bring in the Record, and when it was brought in, it appeared that there was a Variance between the Record in the Common-Pleas, as mentioned in the Defendant's Plea, and the Record it ſelf; for the Defendant in his Plea had alledged one Gerrard to be Attorney inſtead of Gardiner, who was Attorney upon Record; and whether this was a Failure or not of the Record, was the Queſtion.

It was ſaid on the Defendant's Side, That it was ſuch a Variance, that it made it quite another Action; and on the Plaintiff's Side it was ſaid, That an immaterial Variance will not prejudice where the Subſtance is found. 7 H. 4. 1. Bro. Failure, pl. 2. 15. Curia adviſare vult.

## Foreſt *qui tam, &c. verſus* Wire.

Action lies in the Courts at *Weſtminſter*, upon the Statute of 5 Eliz. but not an Information. 3 Cro. 316.

DEbt upon the Statute of 5 Eliz. cap. 4. for uſing the Trade of a Silk-Weaver in London, not having been an Apprentice Seven Years; the Action was brought in this Court, and laid in London, and tried by Niſi prius, and a Verdict for the Defendant; and now the Plaintiff to prevent the Payment of Coſts, moved by Mr. Ward againſt his own Action, and ſaid, That it will not lie upon this Statute in any of the Courts of Weſtminſter; for 'tis not only to be laid (as here) but in the proper County, but 'tis to be brought before the Juſtices in their Seſſions, and this is by force of the Statute made 31 Eliz. cap. 4. and 21 Jac. cap. 4. which enacts, That all Informations upon Penal Statutes muſt be brought before the Juſtices of the Peace, in the County where the Fact was committed.

* 2 Cro. 178. Stile 383. By the Opinion of Roll, Cro. Car. 112.

But the Court were clear of * Opinion, That the Action may be brought in any of the Courts of Weſtminſter, who have a concurring Juriſdiction with the Juſtices, and ſo they ſaid it hath been often reſolved.

## Attorney-General *verſus* Alſton.

AN Inquiſition upon an Accompt ſtated went out to inquire what Lands one Havers had in the Twentieth Year of this King, or at any Time ſince, he being the Receiver-General in the Counties of Norfolk and Huntingdon.

The Jury found that he was ſeiſed of ſuch Lands, &c. whereupon an Extent goes out to ſeiſe them into the King's Hands, for Payment of 1100 l. which he owed to the King.

Alſton the Tertenant pleads, That Havers was indebted to him, and that he was ſeiſed of thoſe Lands in which was before the Debt contracted with him, and that he became a Bankrupt likewiſe before he was indebted to the King, and thereupon theſe Lands were conveyed to the Defendant by Aſſignment from the Commiſſioners of Bankruptcy for the Debt due to him from Havers, abſque hoc that he was ſeiſed of theſe Lands at the Time he became indebted to the King.

Where the King's Title is not precedent to that of the Tertenant, the Lands of his Receiver ſhall not be liable by the Statute of 13 Eliz.

The Attorney-General replies, That he was ſeiſed of theſe Lands before the Commiſſion of Bankruptcy iſſued, and before he became a Bankrupt, and that at the Time of his Seiſin he was Receiver, and accountable for the Receipt to the King, and being ſo ſeiſed in the 20th Year of this preſent King, he was found in Arrear 1100 l. for the Payment whereof he was chargeable by the Statute of the 13 Eliz. cap. 4. Which ſubjects all the Lands of a Receiver which he hath or ſhall have in him during the Time he remains accomptable, and ſo prays that the King's Hands may not be amoved: To this the Defendant demurred.

And Sawyer for him held, that the Replication was ill both in Form and Subſtance.

1. It doth not appear that the Defendant continued Receiver from the Time he was firſt made, as it ought to be, or elſe that he was Receiver during his Life; for if a Man is Receiver to the King, and is not indebted but is clear, and ſells his Land and ceaſes to be Receiver, and afterwards is appointed to be Receiver again, and then a Debt is contracted with the King, the former Sale is good.

2. The Replication is a Departure from the Inquiſition, which is the King's Title, for the Lands of which Inquiry was to be made, were ſuch which Havers had. 20 Car. 2. And the Defendant ſhews, that Havers was not then ſeiſed thereof,

thereof, but makes a good Title to himself, by Indenture of Bargain and Sale made to him by the Commissioners of Bankruptcy, and so the Attorney-General cannot come again to set up a Title precedent to the Defendant, for that is a Departure; 'tis enough for the Defendant that he hath avoided the King's Title, as alledged; and though Mr. Attorney is not bound to take Issue upon the Traverse, yet he cannot avoid waving both the Title of the Defendant and the King, by insisting upon a new Matter.

It was agreed, That the King had Two Titles, and might either have brought his Inquisition grounded upon the Debt stated, or upon the Statute of the 13th of Eliz. upon Havers his becoming Receiver; but when he hath determined his Election, by grounding it upon the Debt stated, he cannot afterwards have Recourse to the other Matter, and bring him to be liable from the Time of his being Receiver; as if an Inquisition goes to inquire what Lands the Debtor of the King had such a Day when he entred into a Bond, if there be an Answer given to that, Mr. Attorney cannot afterwards set up a precedent Bond, because 'tis a Departure, and the Statute it self vests no Estate in the King, but makes the Receiver's Lands liable as if he had entred into a Statute Staple.

The Inquisition therefore should have been grounded upon the Statute, and then the Defendant might have pleaded the Act of Indempnity, of which he might have the Benefit; but if not, he may be let into the Equity of the Statute of the 33 H. 8. cap. 39. which gives Liberty to Purchasers to have Contribution, and to plead sufficient Matter, if they have any in Discharge of the Debt.

Ex parte Quer. But on the other Side it was said, That the Replication was good; for if the Sale was after his being Receiver, though before he became indebted, yet by the Statute of 13 Eliz. the Lands are subject to a Debt contracted afterwards, because it hath a Retrospect to the Time he was first Receiver.

Pl.Com.321 Dyer 160. By the Common Law, both the Body and Lands of the King's Debtor were liable from the Time he became indebted; but because such Debtors oftentimes sold those Lands which they had whilst they were Officers, and so the King was defeated, therefore was this Statute made to supply that Defect of the Common Law, by which Statute all the Lands he had at any Time during his Continuance in the Office were made liable.

And tho' it may be objected, that because of this Inquisition the King is limited to a Time, viz. That Inquiry should

be made what Lands Havers had in the 20th Year of the King, yet it was said the Inquiry may be general.

The Elegit anciently left out the Time, because the Law doth determine from what Time the Party doth become liable; so that the Question is about the King's Title, which if it appear to precede that of the Tertenant, then the King's Hands are not to be amoved; and thereupon Judgment was prayed for him. Bro. Prerogative 59. Curia advisare vult.

## Barker *versus* Keat.

IN a Special Verdict in Ejectione firmæ, the Jury made a special Conclusion by referring to the Court, Whether there was a good Tenant to the Præcipe or not, which was made by a Bargain and Sale, but no Money paid, nor any Rent reserved, but that of a Pepper-Corn, to be paid at the End of Six Months upon Demand, and the Release and Grant of the Reversion thereupon was only for divers good Considerations.

Reservation of a Pepper-Corn a good Consideration to raise an Use to make a Tenant to the *Præcipe*. Mod. Rep. 262.

The Question was, If this Lease upon which no Rent was reserved, but that of a Pepper-Corn, be executed by the Statute of Uses or not; if it be, then there is no Need of the Entry of the Lessee, for the Statute will put him in actual Possession, and then the Inheritance by the Release or Grant of the Reversion will pass.

Cro Jac. 664 Jones 7 1 Cro. 110. 5 Rep. 124. b. Lit. Sect. 465 Co. Lit. 46. b.

But if this Lease be not within the Statute, because no Use can be raised for Want of a Consideration, then it must be a Conveyance at the Common Law, and so the Lessee ought to make an actual Entry, as was always usual before the making of the Statute.

Serjeant Waller and Maynard argued, that here was no Consideration to raise an Use, for the Reservation of a Pepper-Corn, is no Profit to the Lessor, 'tis not a real and good Rent; for so small and trivial a Matter is no Consideration, for that which must be a good Consideration ought to be Money, or some other valuable Thing.

Then this Conveyance is not executed by the Statute of Uses, and if so, 'tis not good at the Common Law, it being only a Lease for Years, and no Entry, without which there can be no Possession, and if not, then there can be no Reversion upon which the Release may operate, 'tis only an Interesse termini, and so was the Opinion of my Lord Coke since the * making of this Statute.

*Co. Lit. 270

1 Leon. 194, 195. And that no Uſe was raiſed here, the Caſe of my Lord Paget was cited, to which this was compared: My Lord being ſeiſed in Fee, covenanted to ſtand ſeiſed to the Uſe of Trentham and others, in Conſideration of Payment of his Debts out of the Profits of his own Eſtate; this was adjudged a void Uſe, becauſe there was no Conſideration on Trentham's Part to raiſe it, the Money appointed to be paid being to be raiſed out of the Profits of my Lord's Eſtate.

The Words of the Leaſe are, Demiſe, Grant, &c. which are Words at the Common Law. Co. Lit. 45. b. and 'tis not poſſible that a future Executory Conſideration ſhould raiſe a preſent Uſe, for the Pepper-Corn is not to be paid 'till the End of Six Months; and as this Conſideration is Executory, ſo it is Contingent too, for the Leſſor might have releaſed before the Expiration of Six Months.

* Cro. Jac. 604. pl. 32. If the Caſe of * Lutwitch and Mitton be objected, where it was reſolved by the Two Chief Juſtices and Chief Baron, That upon a Deed of Bargain and Sale of Lands, where the Bargainee never entred, and the Bargainor reciting the Leaſe, did grant the Reverſion expectant upon it; that this was a good Grant of the Reverſion, from which the Poſſeſſion was immediately divided, and was executed and veſted in the Bargainee, by vertue of the Statute of Uſes.

Cro. Car. 110, 400.

This is no Objection to the Purpoſe, becauſe in that Caſe the Bargainor was himſelf in actual Poſſeſſion.

So that if there be no good Tenant to the Precipe in this Caſe, though all that join in it are eſtopped to ſay ſo, yet the Tenant in Tail who comes in above, is not barred. 5 H. 5. 9.

But on the other Side it was ſaid, That the Leſſee was in Poſſeſſion by the Statute, for the Word Grant being in the Leaſe, and the Reſervation being a Pepper-Corn, that will amount to a Bargain and Sale, though it hath not thoſe preciſe Words in it. 8 Co. 94.

Pl. Com. 308 Dyer 146. b. *contra.* But if it ſhould not, yet another Uſe may be averred than what is in this Leaſe, like Bedel's Caſe, 7 Co. 40. b. Where a Man, in Conſideration of Fatherly Love to his eldeſt Son, did covenant to ſtand ſeiſed to the Uſe of him in Tail, and afterwards to the Uſe of his ſecond Son; there, though the Conſideration reſpected his eldeſt Son only in Words, yet a Conſideration which is not repugnant to it may be averred; and though an Entry is not found, yet it ſhall not be intended, ſince the Jury have not found the Contrary.

North, Chief Justice: At first when this Sort of Conveyance was used, the Lessee upon the Lease for a Year did always make an actual Entry, and then came the Release to convey the Reversion; but that being found troublesome, the constant Practice was to make the Lease for a Year, by the Deed of Bargain and Sale, for the Consideration of Five Shillings, or some other small Sum; and this was held and is so still to be good without any actual Entry, and the Bargainee thereby is capable of a Release, (though he cannot bring an Action of Trespass without Entry) for when Money is the Consideration of making the Bargain and Sale, 'tis executed by the Statute of Uses, and so the Release upon it is good; but if the Deed be not executed, 'tis otherwise. 2 Cro. 604.

But this being to support a common Recovery, was to be favoured; and therefore the Court took Time to consider 'till the next Term: And then Antea Addison *and* Otway.

The Chief Justice said, That if a real Action be brought against A. who is not Tenant to the Præcipe, and a Recovery be had against him, the Sheriff can turn him out who is in Possession; but if he who is not in Possession comes in by Voucher, he is estopped to say afterwards that he was not Party to the Writ, so that he who is bound must be Tenant or Vouchee, or claim under them.

Conveyances have been altered, not so much by the Knowledge of the Learned, as by the Ignorance of unskilful Men in their Profession.

The usual Conveyance at Common Law, was by Feoffment, to which Livery and Seisin were necessary, the Possession being given thereby to the Feoffee; but if there was a Tenant in Possession, and so Livery could not be made, then the Reversion was granted, and the particular Tenant always attorned, and upon the same Reason it was that afterwards a Lease and Release was held a good Conveyance to pass an Estate, but at that Time it was made no Question but that the Lessee was to be in actual Possession before the Release. Antea Lord *Salisbury*'s Case.

Afterwards Uses came to be frequent, and Settlements to Uses were very common, by Reason whereof many Inconveniencies were introduced; to prevent which the Statute of the 27th of H. 8. was made, by which the Use was united to the Possession; for before that Statute, Uses were to be executed according to the Rules of Equity, but now they are reduced to the Common Law, and are of more Certainty, and therefore are to be construed according to the Rules of Law.

Cro. Car. 110. At the Common Law, when an Eſtate did not paſs by Feoffment, the Leſſor or Vendor made a Leaſe for Years, and the Leſſee actually entred, and then the Leſſor granted the Reverſion to another, and the Leſſee attorned, and this was good.

Afterwards when an Inheritance was to be granted, then alſo was a Leaſe for Years uſually made, and the Leſſee entred as before, and then the Leſſor releaſed to him, and this was good.

But after the Statute of Uſes, it became an Opinion, That if a Leaſe for Years was made upon a valuable Conſideration, a Releaſe might operate upon that without an actual Entry of the Leſſee, becauſe the Statute did execute the Leaſe, and raiſed an Uſe preſently to the Leſſee. Sir Francis Moor, Serjeant at Law, was the firſt who practiſed this way.

Nota. But becauſe there were ſome Opinions, that where Conveyances may enure Two Ways, the Common Law ſhall be preferred, unleſs it appear that the Party intended it ſhould paſs by the Statute; thereupon the uſual Courſe was to put the Words Bargain and Sale into the Leaſe for a Year, to bring it within the Statute, and to alledge that the Leaſe was made to the Intent and Purpoſe that by the Statute of Uſes the Leſſee might be capable of a Releaſe; but notwithſtanding this, Mr. Noy was of the Opinion, That this Conveyance by Leaſe and Releaſe could never be maintained without the actual Entry of the Leſſee.

This Caſe goes farther than any that ever yet came into Judgment, for Money is not mentioned here to be the Conſideration, or any Thing which may amount to it, unleſs the Pepper-Corn, which he held to be a good Conſideration.

The Leaſe and Releaſe are but in nature of one Deed, and then the Intent of the Parties is apparent that it ſhould paſs by the Statute, and eo Inſtanti that the Leaſe is executed, the Reſervation is in Force.

The Caſe put by Littleton, in Sect. 459. is put at the Common Law, and not upon the Statute; where he ſaith, That if a Leaſe be made for Years, and the Leſſor releaſeth all his Right to the Leſſee before Entry, ſuch Releaſe is void, becauſe the Leſſee had only a Right and not the Poſſeſſion, which my Lord Coke, in his Comment upon
Cro. Car. 110. it, calls an Intereſſe Termini, and that ſuch Releaſe ſhall not enure to enlarge the Eſtate without the Poſſeſſion, which is very true at the Common Law, but not upon the Statute of Uſes.

And therefore Judgment was given by the whole Court, That the Word Grant in the Leaſe will make the Land paſs by way of Uſe; that the Reſervation of a Pepper-Corn was a good Conſideration to raiſe an Uſe to ſupport a Common Recovery; that this Leaſe being within the Statute of Uſes, there was no need of an actual Entry to make the Leſſee capable of the Releaſe; for by vertue of the Statute he ſhall be adjudged to be in actual Poſſeſſion, and ſo a good Tenant to the Præcipe; and Judgment was given accordingly in Michaelmas-Term following. Judgment.

## Kendrick *verſus* Bartland.

THE Plaintiff brought an Action on the Caſe for ſtopping the Water going to his Mill with a Continuando, &c. *Continuando* laid after a Nuſance abated, yet Damages ſhall be recovered for what was done before.

The Defendant pleads, That the Stopping was contra Voluntatem, and that Tali Die, which was between the firſt and the laſt Day laid in the Continuando, the Plaintiff himſelf had abated the Nuſance, and ſo he had no Cauſe of Action.

To this Plea the Plaintiff demurred; and Serjeant Baldwyn, who argued to maintain the Plea, did not rely upon that Part of it where the Defendant ſaith, That the Stopping of the Water was involuntary, becauſe he doing the Thing, it could not be contra Voluntatem; but the Queſtion would be, Whether the Plaintiff had any Cauſe of Action to recover Damages after the Abatement of the Nuſance? And he ſaid, That he had abated it before the Action brought, and counted for Damages after the Abatement, for which he had no Cauſe of Action; and this he had confeſſed by his Demurrer.

But the Court were of Opinion, that it was not a good Plea, and took this Difference between a Quod permittat, or an Aſſize for a Nuſance, and an Action on the Caſe for the ſame; for the End of a Quod permittat, or an Aſſize, was to abate the Nuſance, but the End of an Action on the Caſe was to recover Damages; therefore tho' the Nuſance was removed, the Plaintiff is intituled to his Damages that accrued before; and 'tis uſual in Actions on this Nature, to lay the * Continuando for longer Time than the Plaintiff can prove, but he ſhall have Damages for what he can prove, and ſo here he ſhall recover the Damages which he ſuſtained before the Abatement: And thereupon Judgment was given for the Plaintiff. 2 Cro. 207, 618. * Sid. 319.

Walwyn

## Walwyn *verſus* Awberry *and others.*

Tythes of a Rectory ſhall not be ſequeſtred for Repairs of the Chancel. Mod. Rep. 258.

TRespaſs for the Taking and Carrying away of Four Loads of Wheat, and Four Loads of Rye, &c.

The Defendants juſtify, for that the Plaintiff is Rector of the Rectory Impropriate of B. and that the Chancel was out of Repair, and that the Biſhop of Hereford, after Monition firſt given to the Plaintiff, had granted a Sequeſtration of the Tythes of the Rectory for the Repairing of the Chancel; and that the Defendants were Church-wardens of the Pariſh; and that the Particulars mentioned in the Declaration were Tythes belonging to the Plaintiff as Rector aforeſaid; and that by Vertue of the ſaid Commiſſion they took the ſame for Repairing of the ſaid Chancel, and that for theſe Tythes ſo taken they had accounted to the Biſhop.

To this the Plaintiff demurred.

The Queſtion was, Whether an Impropriate Rectory be chargeable for the Repairs of the Chancel by the Sequeſtration of the Tythes by the Biſhop? And thoſe who argued in the Negative for the Plaintiff could not deny, but that Church-Reparations did belong to the Eccleſiaſtical Courts, and that as often as Prohibitions have been prayed to that Juriſdiction, Conſultations have been as often granted; notwithſtanding in many Caſes the Rates for ſuch Reparations have been very unequally impoſed, and the Reaſon is, becauſe thoſe Courts have original Juriſdiction of the Matter.

It was admitted alſo, that Pariſhioners are bound to repair the Church, and the Rector the Chancel, and this in reſpect of their Lands; and therefore if a Man hath Lands in one Town and dwell in another, he ſhall be contributary to the Reparation of that Church where the Lands are, and not where he inhabits.

And that all this was by the common Cuſtom of England long before the Making of the Statute of 31 H. 8. cap. 13. by which Parſonages were made Lay-Fees; but then it muſt be underſtood that this was no real Duty incumbent upon them, but was a perſonal Burden for which every Pariſhioner was chargeable proportionably to the Quantity of Land which he held in the Pariſh; in which Caſe if he refuſed to be contributary, the Ordinary did never intermeddle with the Poſſeſſions, but always proceeded by Eccleſiaſtical Cenſures, as Excommunication of the Party refuſing, which is the proper Remedy.

But in Caſe of an Appropation in the Hands of an Eccleſiaſtical Corporation, as Dean and Chapter, &c. there if a Refuſal be to contribute to the Repairs, the Ordinary may ſequeſter; and the Reaſon is, becauſe a Corporation cannot be excommunicated.

The Ordinary may alſo ſequeſter in Things of Eccleſiaſtical Cognizance, as if the King do not preſent; ſo he may take the Profits within the Six Months that the Patron hath to preſent, and apply them to the Paſtor of the Church by him recommended, becauſe the Ordinary hath a Proviſional Superintendency of the Church; and there is a Neceſſity that the Cure ſhould be ſupplied until the Patron doth preſent, and this is a Kind of Sequeſtration.

But in ſome Caſes the Ordinary could not ſequeſter the Profits belonging to Spiritual Perſons, though he was lawfully entituled to them for a particular Time and Purpoſe: For by the Statute of 13 Eliz. cap. 20. 'tis enacted, That if a Parſon make a Leaſe of his Living for a longer Time than he is reſident upon it, that ſuch Leaſe ſhall be void, and he ſhall for the ſame loſe one Year's Profits of his Benefice, to be diſtributed by the Ordinary amongſt the Poor of the Pariſh.

Now he hath no Remedy to recover the Year's Profits, but in the Eccleſiaſtical Court; he could not ſequeſter, and to give him Authority ſo to do, a Supplemental Statute was made Five Years afterwards, in the 18th Year of the Queen's Reign, cap. 11. by which Power is given him to grant a Sequeſtration; ſo that if he could not ſequeſter in a Caſe of which he had a Juriſdiction by a precedent Statute, a fortiori he cannot in a Caſe exempted as this is from his Juriſdiction.

But admitting a Sequeſtration might go, then this Inconveniency would follow, that if other Lands ſhould be ſequeſtred for the ſame Purpoſe, the former Sequeſtration could not be pleaded to diſcharge them, becauſe the Intereſt is not bound thereby, no more than a Sequeſtration out of Chancery is pleadable to an Action of Treſpaſs at the Common Law.

This Caſe cannot be diſtinguiſhed from that of Jefferies in 5 Co. and from what the Civilians teſtified to the Court there, viz. That the Church-wardens and greater Part of the Pariſhioners, upon a general Warning given, may make a Taxation by Law, but the ſame ſhall not charge the Land, but the Perſon in reſpect of his Land; ſo that 'tis he that is chargeable, and may be excommunicated in Caſe of Refuſal to contribute, but his Lands cannot be ſequeſtred, becauſe 'tis not the Buſineſs of the Ordinary to meddle with the Temporal

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Poſſeſſions of Lay-men, but to proceed againſt them by Eccleſiaſtical Cenſures; and the Pariſhioners Lands may be as well ſequeſtred for the Repairs of the Church, as the Lands of the Impropriator for the Repairs of the Chancel; for which Reaſons it was held, that a Sequeſtration would not lie.

Ex parte Def. But on the other Side it was ſaid, That before the Making of the Statute the Rector was to repair the Chancel under Pain of Sequeſtration, which the Ordinary had Power to grant in Caſe of Refuſal; and that his Authority in many Caſes was not abridged by the Statute: The * 2 Cro. 518. Caſe of * Parry *and* Banks was cited, where in the 24th Year of H. 8. a Parſonage was appropriated to the Deanary of St. Aſaph, and a Vicaridge endowed, which the Biſhop diſſolved in the 24th Year of Quæn Elizabeth, and Parry pretending, that notwithſtanding this Diſſolution it was in the King's Hands by Lapſe obtained a Preſentation; and it was reſolved that after the Statute of Diſſolutions, which made Parſonages Lay-Fees, the Ordinary could not diſſolve the Vicaridge where the Parſonage was in a Temporal Hand, but being in that Caſe in the Hands of the Dean, he might.

The Rector is to repair the Chancel, becauſe of the Profits of the Glebe, which is therefore Onus reale impoſitum Rebus & Perſonis; and of that Opinion was Johannes de Atkin, who wrote 100 Years before Lynwood, where in fol. 56. he ſaith, That if the Chancel was out of Repair, it affected the Glebe.

Vaugh. 327. And that the Conſtitution of the Canon Law is ſuch will not be denied, and if ſo Canons being allowed, are by Uſe become Parcel of the Common Law, and are as much the Law of the Kingdom as an Act of Parliament, for what is Law doth not Suſcipere Magis aut Minus.

Several Caſes were put where the Biſhop doth intermeddle with the Profits of a Parſonage, as in the Caſe of a Sequeſtration upon a Judgment obtained againſt a Spiritual Perſon, where a Fi' Fa' is directed to the Sheriff upon that Judgment, and he returns Clericus beneficiatus non habens Laicum feodum; for which Reaſon he cannot meddle with the Profits of the Glebe, but the Biſhop doth it by a Sequeſtration to him directed.

He may likewiſe retain for the Supply of the Cure, and pay only the Reſidue, which hath been omitted on the other Side.

As the Ordinary might diſſolve a Vicaridge endowed where the Parſonage was in the Hands of a Dean, ſo he may ſee veſteran Appropriation in any Spiritual Perſon;

and there is no Statute which exempts an Impropriation from such a Sequestration, because 'tis Onus reale at the Common Law: And as the Lay Impropriator may sue for Tythes and receive them as before the Making this Statute; 'tis as reasonable since he hath the same Advantage, that he should have the same Charge, and the rather because the Saving in the Statute of 31 H. 8. cap. 13. doth still continue the same Authority the Bishop had before, though the Possession was thereby given to the King.

The Words of which are, viz. Saving to all and every Person, &c. such Right which they might have had as if the Act had not been made, which must be the Right of the Ordinary, and of no other Person.

An Impropriator pays Synodals and Procurations as well as an Appropriation in the Hands of Ecclesiastical Persons, and it would be very inconvenient if a Sequestration should not lie, which would quicken them more than an Excommunication; and it was said, That in England there were above 1000 Appropriations belonging to Corporations aggregate, as Deans and Chapters, which could not be excommunicated; and if the Bishop could not sequester, then there was no Remedy to repair the Chancel; for which Reasons, Judgment was prayed for the Defendant.

But the whole Court, besides Justice Atkins, held, That the Lay-Impropriation was not to be sequestred for the Repairs of the Chancel: And the Chief Justice said, That the Repair of the Chancel was an Ecclesiastical Cause, but that the Rectory and Impropriator were Lay, and not to be sequestred, as the Possessions in the Hands of Ecclesiastical Corporations may, which he did agree could not be excommunicated, but the Persons who made up such Corporation might.

And as to the Sequestration upon a Judgment, it made nothing for the Matter to entitle the Ordinary to a Sequestration in this Case, because what he doth in that is in the Nature of a Temporal Officer; for the Sequestration is like the Fieri Facias, and being directed to the Bishop, he is in that Case (if he may be so called) an Ecclesiastical Sheriff, and by Vertue thereof may do as the Sheriff doth in other Cases, that is, he may seise Ecclesiastical Things, and sell them, as the Sheriff doth Temporal Things upon a Fieri facias; but 'tis to be observed, that he must return Fieri feci, and not Sequestrari feci upon this Writ.

And as to the Saving in the Statute, that doth not alter the Case; for if any Right be thereby saved, 'tis that of the

Parſon, for the Parishioners have no Right to ſit there; indeed the Vicar may, becauſe he comes in under the Parſon.

So that this Caſe is not to be put as at the Common Law, but upon the Statute of Diſſolutions, by vertue whereof the Rectory being in the Hands of a Lay-Perſon is become a Lay-Fee, and ſo cannot be ſubject to a Sequeſtration; if it ſhould, the next Step would be, that the Biſhop would increaſe Vicaridges as well in the Caſe of an Impropriation as Appropriation, which would leſſen the Poſſeſſions of ſuch as have purchaſed under the Act.

But Juſtice Atkins was of a contrary Opinion; he ſaid, That it was agreed by all, that an Impropriator is chargeable with the Repairs of the Chancel; but the Charge was not perſonal but in regard of the Profits of the Impropriation, which are originally the Debtor according to the firſt Donation. That the primary Rights of Rectories are the Performance of Divine Service and the Repairs of the Chancel, and that the Profits which are over and above muſt then go to the Impropriator, and are to be eſteemed then a Lay-Fee; but that thoſe Duties are the firſt Rights, and therefore muſt be firſt diſcharged.

That this Right, this Duty of Repairing, was certain, and therefore ſhall not be taken away by Implication, but by expreſs Words in the Act, which if wanting ſhall remain ſtill, and the Parties ſhall be compelled to repair under the ſame Penalties as before.

But admitting it ſhould be taken away, yet the Saving in the Act extends to the Right of the Pariſhioners, which is not to ſit in the Chancel, but to go thither when the Sacraments are adminiſtred, of which they are deprived when 'tis out of Repair; nor can they have the Uſe of the Church which properly belongs to them, becauſe when the Chancel is out of Repair, it not only defaces the Church, but makes it in a ſhort Time become ruinous.

He denied that a Sequeſtration in Chancery cannot be pleaded to bar a Treſpaſs at the Common Law; for if it be ſaid that the Chancery have iſſued ſuch Sequeſtrations, it will be as binding as any other Proceſs iſſuing according to the Rules of the Common Law.

And he alſo denied the Caſe put by the Chief Juſtice, that the Lands of the Pariſhioners might as well be ſequeſtred for the Repair of the Church, as thoſe of the Impropriator for Repair of the Chancel, becauſe the Profits of the Rectory might originally be ſequeſtred, but the Lands of the Pariſhioner could not; and ſo the Caſes are quite different.

*But in Easter Term following, Judgment was given against the Defendant upon the Point of Pleading, which the Court all agreed to be ill. Judgment.

1. The Defendants should have averred, that the Chancel was out of Repair. 1 Ven. 35.

2. That no more was taken than what was sufficient for the Repair thereof. 1 Mod. 261. 1 Ven. 35.

3. For that the Plaintiff had declared for the Taking of several Sorts of Grain; and the Defendant justifies the Taking but of Part, and saith nothing of the Residue, and so 'tis a Discontinuance; and the general Words, quoad residuum transgressionis, will not help, because he goes to Particulars afterwards, and doth not enumerate all; and thereupon Judgment was given accordingly.

## Edwards *versus* Weeks.

Assumpsit. The Plaintiff declared, That the Defendant, in Consideration that the Plaintiff at his Request had exchanged Horses with him, promised to pay him 5 l. and he alledged a Breach in the Non-performance. Parol Discharge good before Breach of Promise, but not afterwards. Mod. Rep. 262. * Cro. Car. 383. Sid. 293.

The Defendant pleads, That the Plaintiff, before any Action brought, discharged him of his Promise: And upon a Demurrer, the Question was, Whether after a Breach of a Promise, a Parol Discharge could be good? The Case of * Langden and Stokes was an Authority, that such a Discharge had been good before the Breach, viz. The Defendant promised to go a Voyage, the Breach was alledged in Non-performance; and the Defendant pleaded, that before any Breach the Plaintiff exoneravit eum; and upon Demurrer it was held good before the Breach.

But here was no Time agreed for the Payment of this 5 l. and therefore it was due immediately upon Request, and not being paid, the Promise is broken, and the Parol Discharge cannot be pleaded; and of that Opinion was all the Court, and Judgment for the Plaintiff, Nisi, &c.

Quære. If he had pleaded such a Discharge before any Request of Payment, Whether it had been good?

## Arris & Arris *verſus* Stukely. *In Scaccario.*

*Indebitatus aſſumpſit* will lie for the Receipt of the Profits of an Office, tho' no Contract.

INdebitatus Aſſumpſit for 200 l. in Money had and received to the Uſe of the Plaintiffs: Upon Non aſſumpſit pleaded, the Jury find a Special Verdict to this Effect; viz. They find that King Charles the Second did on the 17th Day of Auguſt, in the 12th Year of his Reign, by his Letters Patents under the Great Seal, grant unto the Defendant and another the Office of Comptroller of the Cuſtoms at the Port of Exceſter, durante beneplacito: That the other Perſon died; and that the King afterwards by other Letters Patents, bearing Date primo Maii, in the 21ſt Year of his Reign, did grant the ſaid Office to the Plaintiffs, which was Two Years before this Action brought; and that the Defendant ſtill, and for Seven Years paſt, had exerciſed the ſame upon Pretence of a Right by Survivorſhip, and received the Profits thereof: But whether upon the whole Matter the Defendant made any ſuch Promiſe as in the Declaration, they did not know, Et petunt adviſamentum Curiæ in præmiſſis; and if upon the Matter ſo found the Court ſhall be of Opinion that the Defendant made ſuch Promiſe, then they ſay that he did make ſuch Promiſe, and aſſeſs Damages Occaſione præmiſſorum in narratione mentionat' ad 100 l. and Coſts to 53 s. and 4 d. &c.

Winnington, Solicitor, argued, That the firſt Patent was determined by the Death of one of the Patentæs, and then the ſecond Patent takes Effect, and ſo the Plaintiffs have a good Title; for there ſhall be no Survivorſhip of an Office of Truſt, no not if the Office had been granted to Two for their Lives, if it be not ſaid, to the Survivor of them. 11 Co. 34. Auditor Curle's Caſe; and of that Opinion
1 Mod. 187. was the Court clearly.

But Pollexfen for the Defendant ſaid, That he agreed that Point, but that the Plaintiff's Patent was not good; for though there be a general Non obſtante of all the Statutes in it, yet there ought to have been one in particular againſt the Statute of 14 R. 2. cap. 10. which enacts, That
31 H. 6. c. 5. no Cuſtomer or Comptroller ſhall have any Office in the Cuſtoms for his Life, but only during the Pleaſure of the King; which being made for the publick Good, the King cannot by any Non obſtante diſpenſe with it.

In many Cases the Dispensation of the King by a Non obstante is good; as where a Statute prescribes the Form of the King's Grant, where it doth not directly prohibit a Thing, but only under Pain of a Forfeiture; for if it be direct, and pro bono publico, there a Non obstante is not good, and so is this Statute.

He cannot dispense with the Statute of 31 Eliz. against Symony; for the Party being disabled by an * Act of Parliament, cannot be enabled by a Non obstante; he cannot dispense with the Statute of Leases of † Ecclesiastical Persons, nor with the Jurisdiction of the Admiralty encroaching upon the Common Law; for the Foundation of a Non obstante is in the King's Prerogative, and is current in his Grants; but in those Statutes the Subject hath an Interest. * Hob. 57. 1 Inst. 120. † 5 Co. 15. * 13 R. 2. c. 3. 15 R. 2. c. 5. 2 H. 4. 11. 4 Inst. 153.

The Laws concerning Non obstante's are none of the * ancient Laws of this Land, but brought in by the Pope. The Book of 2 H. 7. F. 6. b. and 7. did first give Rise to this exorbitant Power; yet it is not the Opinion of all, or indeed of any of the Judges then, as 'tis affirmed to be, for Broke Par. 45, 109. who abridged that Case, took no Notice of any Opinion of the Judges; yet some grounding themselves on that Book, affirm that the King may dispense with the Statute of the 23 H. 6. cap. 8. which enacts, That no Man shall be Sheriff for above one Year; and that therefore a Patent granted by Ed. 4. to the Earl of Northumberland, to be Sheriff of the same County for Life, was held good, which is a plain Mistake, for there never was any such Resolution, neither did the Judges make any Determination upon that Statute, it was only a Discourse Obiter by Radcliff, (who was then one of the Barons of the Exchequer) concerning the Statutes of the 14 E. 3. cap. 7. and of the 42 E. 3. cap. 9. which are only Prohibitory, That no Sheriff shall continue in his Office above one Year; but have not any such Clause in them as the Statute of 23 H. 6. hath, which saith, That all Patents made to any to be Sheriff for above a Year shall be void, any Clause or Word of *Non obstante* in any wise put in such Patent notwithstanding: This was the Mistake of Baron Radcliff, who upon a sudden Discourse thought there might be such Clauses in those former Statutes of Ed. 3. and that notwithstanding which, there being a Non obstante in that Patent to those Statutes, he held that to be a good Dispensation of them; but 'tis plain there are no such Clauses in those Statutes, and therefore a Non obstante to them is good, and which was the true Reason why that Patent in Henry the 7th's Time was held good. *Davis Rep. 69, 70, 71. Vaugh. 332. Thomas *versus* Sorrel. Hob. 146. Colt *and* Glover. Long 5 E. 4. 33, 34. Postea.

2. An-

2. Another Reaſon might be, becauſe the Office of Sheriff was grantable for Life, and ſo not within the Reach of the Prohibition by thoſe Statutes.

3. But if it was, yet the Proviſo in the Act of Reſumption of 1 H. 7. protected that Patent, by which the King reſumed all Grants made by E. 4. but provides for the Earl's Grant.

Dyer, 352.a. 2 Roll. Abr. 193. Cro. Eliz. 513. But admitting the Statute of R. 2. and of H. 6. may be diſpenſed withal in this Caſe, yet it ſhould be more particular than in this Patent to the Plaintiff; for Non obſtante aliquo Statuto generally will not ſerve.

T. Jones, 117, 128. *2 H. 4. 12. Bro. Accompt 24, 5, 89. Inſt. 212. 2. Point. A general Indebitatus aſſumpſit will not lie here for Want of *Privity, and becauſe there is no Contract, 'tis only a Tort, a Diſſeiſin, and the Plaintiff might have brought an Aſſiſe for this Office, which lies at the Common Law; and ſo it hath been adjudged in Jehu Webb's Caſe, 8 Co. 4. Which is alſo given by the Statute of Weſtminſt. 2. cap. 25. for a Profit apprender in alieno ſolo.

The Plaintiff might have brought an Action on the Caſe againſt the Defendant, for diſturbing him in his Office, and that had been good, becauſe it had been grounded on the Wrong.

6 H. 6. 9. 1 Roll. Abr. 97. pl 5. In this Caſe the Defendant takes the Profits againſt the Will of the Plaintiff, and ſo there is no Contract; but if he had received them by the Conſent of the Plaintiff, yet this Action would not lie for Want of Privity. 'Tis true, in the Caſe of the King, where his Rents are wrongfully received, the Party may be charged to give an Accompt as Bailiff; ſo alſo may the Executors of his Accomptant, becauſe the Law createth a Privity, but 'tis otherwiſe in the Caſe of a Common Perſon, 10 Co. 114. b. 11 Co. 90. b. becauſe in all Actions of Debt, there muſt be a Contract, or quaſi ex Contractu, and therefore where Judgment was had, and thereupon an Elegit, and the Sheriff returned that he had appriſed the Goods, and extended ſuch Lands, which he delivered to the Plaintiff, ubi revera he did not, per quod Actio accrevit, which was an Action of Debt; but it was adjudged that it would not lie, becauſe the Sheriff had not returned that he meddled with the Goods or with the Value of them, and therefore for Want of Certainty how much to charge him with, this Action would not lie, but an Action on the Caſe for a falſe Return; but if he had returned the Goods ſold for ſo much Money certain, which he had delivered, then an Action of Debt would lie; for though 'tis not a Contract, 'tis quaſi ex Contractu. Hob. 206.

Godb. 276. 2 Sand. 344. 2 Cro. 566.

3. Point. The Jury find that the Defendant received the Profits for ſeven Years, and that the Plaintiff had his

Patent but two Years, and do not ſhew what was received by the Defendant within thoſe two Years, and then the Court cannot apply it.

But on the other Side it was ſaid by Sawyer, That this Non obſtante was good; for where an Act of Parliament comes to reſtrain the King's Power and Prerogative, it was always held ſo to be, and he relied upon the Judgment of 2 H. 7. f. 6. that the King might diſpenſe with the Statute of 23 H. 6. which he affirmed to be the conſtant Uſage ever ſince, and that therefore the Law is ſo taken to be at this Day. Ex parte Quer. Pl. Com. 502. b. Dyer 303.

As to the Second Point, both he and the Solicitor General Winnington ſaid, That an Indebitatus Aſſumpſit would lie here, for where one receives my Rent, I may charge him as Bailiff or Receiver; or if any one receive my Money without my Order, though 'tis a Tort, yet an Indebitatus will lie, becauſe by the Receipt of the Money the Law creates a Promiſe, and the Action is not grounded on the Tort, but on the Receipt of the Profits in this Caſe.

As to the Objection about the Finding, they held that to be nugatory and idle; for it cannot be intended that the Damages given were for the Time the Defendant received the Profits, before the Plaintiff had his Patent, neither is there any Thing found in the Verdict to that Purpoſe.

In Michaelmas Term following, the Court gave Judgment for the Plaintiffs. Judgment.

1. They held, that the King might diſpenſe with this Statute, for the Subject had no Intereſt, nor was in any wiſe concerned in the Prohibition, it was made only for the Eaſe of the King; and by the like Reaſon he might diſpenſe with the Statute of 4 H. 4. 24. That a Man ſhall hold the Office of * Aulnager, without a Bill from the Treaſurer; and with the Statute of 31 H. 6. 5. That no Cuſtomer or Comptroller ſhall have any Eſtate certain in his Office, becauſe theſe and ſuch like Statutes were made for the Eaſe of the Sovereign, and not to abridge his Prerogative, and that the general Clauſe of Non obſtante aliquo alio Statuto was ſufficient. Hob. 146. *Dyer 203.

2. An Indebitatus Aſſumpſit will lie for Rent received by one who pretends a Title, for in ſuch Caſe an Accompt will lie: Wherever the Plaintiff may have an Accompt, an Indebitatus will lie. 4 H. 7. 6. b. Moor 458. T. Jones 127, 128.

As to the Finding 'tis well enough, for the Jury aſſeſs Damages Occaſione præmiſſorum in narratione mentionat', which muſt be for the Time the Plaintiff had the Office, and that a Patent would make a Man an Officer before Admittance.

Steward

## Steward *Executor of* Steward *verſus* Allen.

Demand muſt be made where an Intereſt is to be determined.

DEBT for a Rent reſerved upon a Leaſe for Years, in which there was a Proviſo, That if the Rent be behind and unpaid by the Space of a Month next after any or either of the Days of Payment, then the Leaſe to be void.

The Plea was, That the Rent was behind a Month after a Day on which it was reſerved to be paid, and ſo the Leaſe is void; to which Plea the Plaintiff demurred, becauſe the Defendant did not ſay that the Plaintiff demanded the Rent; for though the Rent be due without Demand, yet the Intereſt ſhall not be determined without it, which muſt be expreſly laid in the Pleading; and of that Opinion was the Court, except Juſtice Atkins, who doubted.

## Searl *verſus* Long.

*Quare impedit*, real Mainpernors muſt be returned upon the Summons, Pone *and* GrandCape. 2 Inſt. 124. Mod. Rep. 248.

JUdgment final was given in a Quare Impedit, according to the Statute of Marlebridge, cap. 12. Which Serjeant Pemberton moved to ſet aſide.

He ſaid, That at the Common Law the Proceſs in a Quare Impedit was Summons, Pone, and Diſtreſs infinite, which being found miſchievous in reſpect of a Lapſe, it was therefore provided by this Statute, that if the Diſturbers do not appear upon the Summons, then they ſhall be attached to appear at another Day, &c. Now here upon the Attachment the Sheriff hath returned, Attachiatus fuit by John Doe and Richard Roe, who are feigned Perſons, and not Mainpernors; for the Defendant hath made Oath, that he did not know any ſuch Perſons, neither was he ever attached; ſo that 'tis not only a Matter of Form, for he ought to have that Notice which the Law requires, it being ſo penal upon him.

'Tis probable this Miſtake might ariſe from Mr. Dalton, who in his Book of the Office of Sheriffs, in the Returns of Writs there, hath put down theſe feigned Attachers for Example's ſake, from whence the Sheriff in this Caſe might infer that they need not be real Perſons, as in Truth they ought, both upon the Summons, Pone, and Diſtreſs; and he cited a Caſe lately adjudged, where the like Return was made upon the Grand Cape, and the Judgment ſet aſide; and of this Opinion was the whole Court, and ſaid, Where the Proceſs is ſo fatal, the Party ought

to be duly ſerved, and that the Sheriff ought to have gone to the Church and to have ſeiſed the Profits; and if there be nothing, to return a Nihil; and though the Judgment was given before the Term, or long ſince, yet when 'tis Irregular, 'tis to be ſet aſide, and ſo it was now; and being moved again, the Court continued of their former Opinion.

The like Caſe was moved in Michaelmas Term following, between Fleming *and* Lee, where the Patron Defendant was thus ſummoned and never appeared, and the Incumbent did caſt an Eſſoin; and a Caſe was cited between Vivian and the Biſhop of London, Mich. 23 Car. 2. in C. B. where the like Judgment was ſet aſide.

But on the other Side it was objected, That leaving due Notice upon the Summons, was as much as was required, for the other Writs are only to give the Defendant Time to plead, and therefore 'tis not neceſſary that Notice ſhould be given upon every one of the Writs; for if once ſerved, 'tis enough. 11 H. 6. 3, 4. 36 H. 6. 23. 8 H. 6. 8. Long 5 to E. 4. 26. 29 E. 3. 42, 43. Doctor and Stud. 125, 126. 21 H. 6. 56.

But the Court were of Opinion, That the Defendant having not appeared, nor caſt an Eſſoin; and Judgment final being given, it was Reaſon that all the Proceſs ſhould be ſerved really, of which there had been no Occaſion, if he had either appeared or eſſoined, and therefore the Proceſs not being duly ſerved, Judgment was ſet aſide. Raſt. Ent. 217. And then they held, that the Eſſoin of the other Defendant was no wiſe binding to the Patron Defendant, becauſe they may ſever in Pleading, and ſo that Judgment was likewiſe ſet aſide. Curia.

# DE

# Term. Sancti Mich.

## Anno 29 Car. II. in Communi Banco.

### *Sir* John Otway *verſus* Holdips *Executor*, &c.

Bond to pay 40 l. when an Accompt ſhall be ſtated, 'tis a Covenant, and not a *Solvendum*.

DEBT upon Bond brought by the Plaintiff againſt the Defendant as Executor, wherein the Teſtator did acknowledge himſelf to be indebted to the Plaintiff in 40 l. which he thereby did covenant to pay when ſuch a Bill of Coſts ſhould be ſtated by two Attornies indifferently to be choſen between them; and ſets forth in his Declaration, that he named one Attorney, and deſired the now Defendant to name another, which he refuſed, and ſo intitles himſelf to this Action

The Defendant pleads Non detinet, to which the Plaintiff demurred.

But the Plea was not offered to be maintained, becauſe the Executor cannot plead Non detinet but where the Teſtator himſelf might plead Nil debet, which in this Caſe he could not do. But it was inſiſted, That the Declaration is not good, becauſe the Money was to be paid upon an Accompt ſtated, which not being done, by the Plaintiff's own Shewing 'tis not yet due; and this ought to be taken as penned, viz. Solvendum, and not an expreſs Covenant.

But on the Contrary, it was held not to be a Solvendum, but a Covenant to pay the Money, the Debt and the Duty being in the firſt Place aſcertained; but if it be a Solvendum, and repugnant to the Obligatory Clauſe, 'tis void. 21 Ed. 4. 36.

As the Defendant would have it expounded, it would be in his Power totally to defeat the Bond either way; for if he would never chuſe an Attorney, there could be never any Thing due.

The whole Court were of Opinion, that it was not a Solvendum, but a Covenant, which did not take away the Duty aſcertained by the Obligation; and if it ſhould not be a Covenant, but an entire Bond, then it would be in the Power of the Obligor whether ever it ſhall be payable; but be it either the one or the other, the Plaintiff having named an Attorney, ought to recover; and Judgment was accordingly given for him.

## Dunning *verſus* Laſcomb.

DEBT on a Bond, the Condition was to pay Money when a Ship ſhould go from A. to C. and from thence to Briſtol, and ſhould arrive there or at any other Port of Diſcharge in England; the Ship going from A. to C. took in Proviſions at Briſtol, but not to be diſcharged there, but proceeded in her Voyage to Cales, and was caſt away: And by the Opinion of the Court, the Money was not payable; but if he had never intended to perform the Voyage, it might have been otherwiſe. 1 Roll. Abr. 142. 39 H. 6. 10. Judgment for the Defendant niſi.

## Atkins *verſus* Bayles.

AN Information was exhibited againſt the Defendant, being a Juſtice of the Peace, for refuſing to grant his Warrant to ſuppreſs a Conventicle.

Outlawry pleaded to an Information, good. 3 Inſt. 194.

The Defendant pleads an Outlawry in Diſability; and the Plaintiff demurred.

1. This Plea is not good, becauſe the King is intereſted qui tam, &c. and therefore where the Informer dies, the Attorney General may proceed.

2. The Statute gives Power to any Perſon to inform, &c. by which general Words the Diſability of this Perſon is removed.

But the Court held, that there was no Colour in either of theſe Objections.

4. 'Tis not pleaded ſub pede ſigilli, ſed non allocatur, for it need not be ſo pleaded being in the ſame Court.

4. 'Tis not averred that the Plaintiff was the ſame Perſon who was outlawed; but it was anſwered that the prædictus makes that certain, and that though the King be

Moor 541. Dyer 227. b. Cro. Eliz. 583.

intereſted, yet the Informer only is Plaintiff and entituled to the Benefit, and that though he was diſabled, yet he might ſue for the King, but not for himſelf; and therefore Judgment was given that the Plea was good.

## Harwood & Binks *verſus* Hilliard, &c.

Notice, where 'tis agreed to be in Writing, muſt be ſo pleaded.

By an Agræment betwæn the Plaintiffs and the Teſtator of the Defendant, a Parcel of Lands was to be ſold for 400 l. but if it did not ariſe to ſo much, then they covenanted with each other to repay proportionably to the Abatement; and the Defendant's Teſtator covenanted for himſelf and his Executors to pay his Proportion to the Plaintiffs, ſo as the Plaintiffs gave him Notice in Writing of the ſaid Sale by the Space of ten Days, but doth not ſay, that ſuch Notice was to be given to his Executors or Adminiſtrators.

And now the Plaintiffs averred, That they gave Notice accordingly to the Defendant who was Executor, and the Breach aſſigned was, That he hath not paid, &c.

The Defendant demands Oyer of the Indenture, wherein was a Variance betwæn the Covenant (which was for Notice to be given to the Teſtator) and this Declaration (by which Notice is averred to be given to the Executor); and for this Reaſon he demurred.

And Serjeant Dolben, Recorder of London, argued for him, That this was in the Nature of a Condition Precedent, and therefore they ought to have given the Teſtator Notice, which according to the Agræment ought alſo to have been perſonal; which not being done, but only Notice given to his Executor, did make a material and fatal Difference betwæn the Covenant and this Declaration. 14 H. 6. 1. 1 H. 6. 9.

And that in this Caſe there was no Covenant by the Teſtator at all, for all agræ to pay their Proportions, and the Teſtator ſhould pay his Part, which is not a Covenant.

Barrel, Serjeant on the other Side, ſaid, That the Executor doth repreſent the Perſon of the Teſtator; and that though this Covenant was to give Notice to the Teſtator, yet if the Declaration had bæn of a Covenant to give Notice to him, his Executors and Adminiſtrators, &c. it had bæn no material Variance ſo as to prejudice the Action of the Plaintiff, becauſe 'tis no more than what the Law implies. Pl. Com. 192.

And upon the firſt Opening this Matter this Term, the Chief Juſtice and Juſtice Atkins enclined, That the Notice ought to be Perſonal, and that the Variance was material: But afterwards in Hillary Term following mutata opinione, the whole Court agreed it to be otherwiſe, becauſe the Covenant runs in Intereſt and Charge, and ſo the Executor is bound to pay; and therefore 'tis neceſſary that he ſhould have Notice, and that there was no material Difference between the Declaration and the Covenant. And Laſtly, That the Teſtator being a Party to the Deed, his Agreement to pay amounts to a Covenant, though the formal Words of Covenant, Grant, &c. were wanting. Antea.

But then Serjeant Dolben perceiving the Opinion of the Court, inſiſted, that the Declaration was naught, for another Reaſon, viz. They had not declared, that this Notice was given in Writing, which is expreſly agreed in the Covenant; to which it was anſwered, that the Defendant having pleaded that he gave Notice ſecundum formam & effectum Conditionis, it was well enough.

But he ſaid, that would not help the Want of Subſtance, and cited a Caſe where an Action of Debt was brought for the Performance of an Award, ſo as the ſame was delivered in Writing, &c. The Defendant pleaded Non deliberavit in ſcriptis, &c. The Plaintiff replied and ſet forth the Award in Writing, but did not directly anſwer the Plea of delivering it in Writing, only by way of Argument; and upon Demurrer, there omnes Juſticiarii contra Querentem; and ſo they were in this Caſe, that the Notice muſt be pleaded in Writing, and that ſecundum formam Conditionis was not good: And ſo Judgment was given for the Defendant. Dyer 243, b.

## Froſdick *verſus* Sterling.

THE Plaintiff alone brought an Action on the Caſe againſt the Defendant, and ſets forth, That he and his Wife in her Right were ſeiſed of a Meſſuage, Bake-houſe and Cole-yard, &c. and that the Defendant had erected two Houſes of Office ſo near the ſaid Bake-houſe, that the Walls thereof became foundrous, and the Air ſo unwholeſome, that he loſt his Cuſtom; and that the Defendant had digged a Pit ſo near the ſaid Cole-yard that the Walls thereof were in Danger of falling; and that he had built another Wall ſo near the ſaid Meſſuage, that he had ſtopped an old Light therein: Upon Not-guilty pleaded, there was a Verdict for the Plaintiff. Baron and Feme where the Action, if it's not diſcharged, ſhall ſurvive to her, they muſt both join.

And

And now Serjeant George Strode moved in Arrest of Judgment; for that the Wife should have been joined in this Action, for where she may maintain an Action for a Tort done in the Life-time of her Husband, if she survive, and where she may also recover Damages, in such Cases she must join; and it hath been adjudged, that she ought to join with her Husband for stopping a Way upon her Land. Cro. Car. 418.

1 Roll. Abr. 348. pl. 1. 20 H. 6. 1. 7 Ed 4. 15. Cro. El. 461. So also for cutting down Trees on the Jointure of the Wife, made to her by a former Husband, by Reason whereof the present Husband lost the Loppings, they both joined; for though the Wrong was done to his Possession, and he might have released, yet because there was also a Wrong done to the Inheritance, they ought both to join. Cro. Car. 438.

2 Inst. 650. 2 Cro. 205, 399. 9 E. 4. 55. So it hath been adjudged, That the Husband and Wife in Right of the Wife joined in an Action of Debt upon the Statute of 2 E. 6. cap. 13. for not setting out of Tythes, and held good, and where the Wife cured a Wound, both joined in the Action. 11 H. 4. 16. 46 E. 3. 3.

The Court held, That where the Action (if not discharged) shall survive to the Wife, they ought both to join, which if they had done here, it would have been hard to have maintained this Action, because entire Damages are given; and for losing the Custom to his Bake-house, the Husband alone ought to have brought the Action. He may bring an Ejectment of the Lands of his Wife; but Judgment was stayed, till moved on the other Side.

## Barker *versus* Warren.

Justification where 'tis not local, a Traverse of the Place makes the Plea naught.

An Action was brought against a Carrier, and laid in London, for losing of Goods there, which were delivered to him at Beverly in Yorkshire to re-deliver at London.

The Defendant pleads, That he was robbed of the said Goods at Lincoln, absque hoc that he lost them in London. And the Plaintiff demurred.

1. For that Robbery is no Excuse for a Common Carrier, so that the Plea is not good in Substance.

2. This was no local Justification, so that the Traverse was ill.

But on the other Side it was ſaid by Serjeant Hopkins, that the Plea was good, and that the Defendant might Traverſe the Place: For in Treſpaſs for the Taking of Goods in Coventry, the Defendant pleaded, that the Plaintiff did deliver the Goods to him at London to deliver at Dale, by Force whereof he took them at London, and delivered them at Dale accordingly, abſque hoc that he took them at Coventry, and held good, for by his Plea he hath confeſſed the Delivery and the Taking both at one Time and Place; and he could not have pleaded the Delivery at London, and juſtify the Taking at Coventry, becauſe the Poſſeſſion is confeſſed by the firſt Delivery at London, and therefore the Juſtification of the Taking at Coventry had been inconſiſtent. 24 H. 6. 5. But it had been otherwiſe, if the Defendant had juſtified, becauſe the Plaintiff gave him the Goods at London, by Force whereof he took them at London, abſque hoc that he took them at Coventry, becauſe by ſuch Gift or Delivery he might juſtify the Taking any where, as well as where the Delivery was made.

2. That the Declaration was ill, for the Agreement was to deliver the Goods at London, and the Breach was, that he left them at London, and ſo but Argumentative. Aſton pl. Red. 62. Hern's Pleader 76. Brownl. Pleadings 139.

But the Court were of Opinion, that the Declaration was good, and the Plea was naught in Subſtance; but if it had been good, the Traverſe notwithſtanding had been ill, becauſe the Juſtification was not local, though Juſtice Scroggs was of a contrary Opinion: And Judgment was given for the Plaintiff. 2 Cro. 45, 372.

Nota, The Plaintiff had Leave given by the Court to alter the Viſne from London to Middleſex, becauſe all the Sittings in London were on a Saturday, and his Witneſs was a Jew, and would not appear that Day. Viſne altered, *Propter neceſſitatem.*

## Mendyke *verſus* Stint.

PRohibition was prayed to the Sheriff's Court of London: The Suggeſtion was, That the Plaintiff was ſued in that Court in an Action on the Caſe, and ſets forth the Proceedings at large, that there was a Verdict againſt him there, and averred that the Contract upon which he was ſued there revera was made in Middleſex, and ſo the Cauſe of Action did not ariſe within their Juriſdiction; and upon Demurrer to the Prohibition, Serjeant Pemberton argued, Prohibition to the Sheriff's Court after Verdict and Judgment, comes too late.

1. That

2 Inſt. 229, 243, 601. Weſt. 1. c. 35. F.N.B. 45. b. Hob. 106.

1. That a Prohibition doth lie to any Court, as well Temporal as Spiritual, (where ſuch Courts exceed their Bounds) for both thoſe Juriſdictions are united to the Imperial Crown; it may be granted to the Dutchy Court, if they hold Plea of Lands not Parcel of the Dutchy.

2. Though the Jury have here found that the Defendant aſſumpſit modo & forma, yet ſuch Finding as to Time and Place is not material; nor is any Eſtoppel in a new Action laid in another County, to aver that it was for the ſame Thing: 'Tis true, both Time and Place may be made material by Pleading, and ſo it had been in this Caſe, if the Jury had found the Place preciſely, for it would have been an Eſtoppel.

The Verdict therefore is nothing, and all they have done is coram non Judice. The Caſe of * Squibb and Hole he cited as an Authority in Point, where it was adjudged no Eſcape in the Officer, to let a Man at Liberty, who was in Execution upon a Bond ſued in an Inferior Court, the Bond not being made within the Juriſdiction thereof.

* Antea, Squibb *and* Hole.

Ex parte Def.

But Maynard, Dolben, Goodfellow and Sympſon, Serjeants, contra. They agreed, that where it appears by the Plaintiff's Libel that the Court had no Juriſdiction, there a Prohibition lies at any Time; but if what is in the Declaration is laid infra Juriſdictionem, there the Party muſt plead extra Juriſdictionem; and if they refuſe to allow the Plea, a Prohibition will lie after Sentence.

But here is an Action on the Caſe brought, of which the Sheriff's Court can hold Plea, and which is laid to be infra Juriſdictionem, and not denied by the Plaintiff in his Plea, and therefore now, after Verdict and Judgment, he comes too late for a Prohibition; and upon this Difference, Prohibitions have been uſually either granted or denied to the Spiritual Courts.

Though the Court hath not Cogniſance of the Cauſe, yet the Proceedings are not coram non Judice; for if it be alledged to be within the Juriſdiction, and the Defendant takes no Exception to it, and then Sentence is given againſt him, he hath thereby admitted the Juriſdiction.

Stile 45. by the Opinion of Rolle C. J. 2 Roll. Abr. 318.

So where a Man ſued for a Legacy in the Prerogative Court, where the Will was proved, and Sentence given, and an Appeal to the Delegates, and Sentence affirmed, and then a Prohibition granted (but without Notice) upon the Statute of 23 H. 8. cap. 9. for that the Parties lived in another Dioceſe; but the Plaintiff having allowed the Juriſdiction in all the former Proceedings, though the

hibition was granted, the Court would not compel the Party to appear and plead, but granted a Conſultation. Cro. Car. 97. Smith *verſus* the Executors of Pondrel.

In Hillary-Term 1675, in B. R. betwæn Spring *and* Vernon, and in Michaelmas Term in 22 Car. 2. B. R. Buxton's Caſe, and in Hillary Term the 22 & 23 Car. 2. in the ſame Court, beewæn Cox *and* St. Albon Prohibitions were denied, after the Juriſdiction admitted by Pleading. Mod. Rep. 81.

The Chief Juſtice, Wyndham and Atkyns, upon the firſt Argument enclined that a Prohibition ought to be granted, becauſe the Admittance of the Party cannot give a Juriſdiction where originally there was none; but afterwards they were all of Opinion, that the Prohibition ſhould not go, but ſaid, That the Plaintiff in the Inferior Court ought to have been nonſuited, if it appeared upon the Evidence, that the Cauſe of Action did ariſe extra Juriſdictionem.

In this Caſe, theſe Things were agræd by the Court:

1. That if any Matter appears in the Declaration, which ſheweth that the Cauſe of Action did not ariſe infra Juriſdictionem, there a Prohibition may be granted at any Time. Sid. 151. Vaughan 405.

2. If the ſubject Matter in the Declaration be not proper for the Judgment and Determination of ſuch Court, there alſo a Prohibition may be granted at any Time.

3. If the Defendant, who intended to plead to the Juriſdiction, is prevented by any Artifice, as by giving a ſhort Day, or by the Attornies refuſing to plead it, &c. or if his Plea be not accepted or is over-ruled; in all theſe Caſes, a Prohibition likewiſe will lie at any Time. 1 Ven. 333.

And the Chief Juſtice, and Wyndham, Juſtice, were of Opinion, that after the Defendent had admitted the Juriſdiction by pleading to the Action, eſpecially if Verdict and Judgment paſs, the Court will not examine whether the Cauſe of Action did ariſe out of the Juriſdiction or not: But Atkyns and Scroggs, Juſtices, ſaid nothing to this laſt Point, but that many times an Advantage given by the Law was loſt by coming too late, and inſtanced that a Viſne may be changed in Time, but not if the Party come too late, ſo if the Time of the Promiſe be laid above ſix Years from the Time of the Action brought, if the Statute of Limitations be not pleaded, the Defendant cannot take afterwards Advantage of it.

Whereupon a Prohibition was denied, and Judgment was given for the Defendant.

## Birch *verſus* Wilſon.

Plea, tho' it amount to a general Iſſue, if it doth diſcloſe Matter of Law beſides, it ſhall not be demurred unto.

IN an Action on the Caſe, the Plaintiff declared that he was ſeiſed of a Meſſuage and ſeveral Lands in the Pariſh of Dale, and that he and all thoſe whoſe Eſtate he hath, have uſed to have Right of Common, for all Commonable Cattle Levant and Couchant upon the Premiſſes, in a certain Meadow there, called Darpmore Meadow, and in a certain Place called Cannock Wood. That the Defendant Præmiſſorum non ignarus, had encloſed the ſaid Places in which the Plaintiff had Right of Common, and likewiſe put in his Cattle, as Horſes, Cows, Hogs, Geeſe, &c. ſo that he could not in tam amplo & beneficiali modo enjoy the ſame.

The Defendant as to the Incloſure, and putting in of his Hogs and Geeſe, pleaded Not Guilty: And as to the Reſidue, That the Lord Paget was ſeiſed of a Meſſuage, 300 Acres of Land, 40 Acres of Meadow, and 100 Acres of Paſture, and likewiſe of Darpmore Meadow and Cannock Wood, and being ſo ſeiſed, did by Deed of Bargain and Sale enrolled, in Conſideration of 2000 l. convey the ſaid Meſſuage, 300 Acres of Land, 40 Acres of Meadow, and 100 Acres of Paſture, to the Defendant and his Heirs, and by the ſame Deed did grant unto him all Ways, Commons, and Emoluments whatſoever to the ſaid Meſſuage and Premiſſes belonging, or therewithal uſed, occupied or enjoyed, or taken as Part, Parcel or Member thereof, virtute cujus the Defendant became ſeiſed of the Premiſſes; and that the ſame were leaſed and demiſed for Years by the ſaid Lord Paget, and all thoſe whoſe Eſtate he had a tempore cujus contrarii memoria hominum non exiſtit; and that the Tenants or Occupiers thereof a tempore cujus, &c. uſed to have Common in Darpmore Meadow and Cannock Wood, for all commonable Cattle Levant and Couchant upon the Premiſſes, and uſed to put in their Cattle into the ſaid Places, in which, &c. virtute cujus the Defendant having Right, did put in his ſaid Cattle into the ſaid Places to take Common there, and averred, That there was Common ſufficient both for the Plaintiff and himſelf.

To this Plea the Plaintiff demurred.

This Case was argued by Serjeant Pemberton for the Plaintiff, and by Serjeant Weston for the Defendant; and for the Plaintiff it was said, That it was no good Plea, but rather a Design to introduce a new Way of Common. Ex parte Quer.

The Reasons offered why the Plea was not good, were,

1. That the Defendant could not prescribe, because of the Unity of Possession; for the Lord Paget had the Premisses in and to which, &c. and therefore he hath prescribed by a collateral Matter, viz. by alledging that the Land was usually let to Tenants for Years, but doth not say whether they were Tenants by Copy of Court-Roll, or not; neither doth he make out any Title in them. Cro. Car. 419.

In some Cases where a Man is not privy to the Title, he may say generally, that the Owners and Occupiers used to do such a Thing, &c. and this Way of Pleading may be good; but here the Defendant claiming under them, ought to set forth their Title, or else he can have no Right to the Common.

2. By this Plea he intended that the Lord Paget had made a New Grant of this Common; for he sets forth, That he granted the Premisses, and all Commons used with the same, and so would intitle himself to a Right of Common in those two Places, as if Common had been expressly granted to him there, which if it should, 'tis but Argumentative, and no direct Affirmance of a Grant, upon which the Plaintiff might have replied non concessit, for no Issue can be joined upon it.

3. He ought to have set forth, That the Tenants lawfully enjoyed the Common there; but he lays only an Usage to have Common, which may be tortious.

4. He doth not say, That there is sufficient Common for all the Commoners, but only for the Plaintiff and himself: 'Tis true, the Owner of the Soil may feed with his Tenant, who hath a Right of Common, but he cannot derogate from the first, by streightning the Common by a second Grant, and so leave not Sufficient for the Tenant.

5. This Plea amounts to the General Issue, and the Plaintiff hath specially assigned that for a Cause of Demurrer; for the Plaintiff saith, That the Defendant, without any Title, put in his Cattle, by which the Plaintiff had not sufficient Common; and the Defendant pleads he put in his Cattle rightfully, and the Plaintiff had Common enough, which if it signify any Thing, must amount to Not Guilty. Cro. Car. 157.

Ex parte Def. But on the other Side, the laſt Objection was endeavoured to be anſwered firſt, becauſe if that hold, yet if the Plea be never ſo good in Subſtance, the Plaintiff would have Judgment.

It was agreed that this Plea doth amount to a General Iſſue, and no more, but that every Plea that doth ſo, is not therefore bad; for if it otherwiſe contain reaſonable Matter of Law, which is put upon the Court for their Judgment, rather than referred to the Jury, there is no Cauſe of Demurrer; for it is the ſame Thing to have the Doubt or Queſtion in Law before the Judges in Pleading, as to have it before them upon a Special Verdict.

In 2 R. 2. 18. A Retainer was pleaded ſpecially by an Adminiſtrator, which is no more than Plene Adminiſtravit, yet no Demurrer; but the Book ſaith, that the Court ought to be moved.

2. The Plea is good as to the Matter of it; for the Defendant claims the ſame Common by his Grant, which had been uſed Time immemorial, and alledges it to be of all Common uſed with the Premiſſes, and this was a Common ſo uſed.

In Treſpaſs, The Defendant juſtified that Godfrey was ſeiſed in Fæ of a Houſe, and of 20 Acres of Land, and that he and all thoſe, &c. had Common in the Place where, &c. to the ſaid Meſſuage belonging; and that he made a Feoffment to Bradſhaw of the ſame, who made a Leaſe thereof to the Defendant, with all Profits and Commodities thereunto belonging, vel occupat' vel uſitat' cum prædicto Meſſuagio: It was adjudged, that though the Common was gone and extinct in the Hands of the Feoffor, by the Unity of the Poſſeſſion, yet thoſe Words were a good Grant of a New Common for the Time granted in the Leaſe, and that it was quaſi a Common in the Hands of Godfrey the Feoffor. Cro. Eliz. 570. Godfrey *verſus* Eyre.

And though it hath been objected, That this Plea is not formally pleaded, becauſe it ought to have been direct in alledging a Grant; whereas it was only Argumentative, and brought in by a Side-Wind: He ſaid, That as bad as it was, 'tis drawn by that Serjeant who argued againſt him, and who did very well know, that the Averment of Sufficiency of Common was needleſs.

Curia. The Court were all of Opinion, That though the Plea did amount to the general Iſſue, yet for that Reaſon alone the Plaintiff had no Cauſe of Demurrer; for the Defendant may well diſcloſe the Matter of Law in Plea-

Pleading, which is a much cheaper Way than to have a Special Verdict, and that this is on the same Reason of giving Colour; but if the Matter by which the Defendant justifies be all Matter of Fact, and proper for the Trial of a Jury, then the Defendant ought to plead the General Issue. 2 Ven. 295.

And as to the Matter of the Plea, the Chief Justice and Windham Justice held it to be good; for the Common which was pleaded was a Common by Grant, and not argumentatively pleaded; for if the Defendant had pleaded an express Grant of Common in those two Places, and the Plaintiff had demanded Oyer of the Deed, it would have appeared that there was no such Deed, and this had been a good Cause of Demurrer.

If this Plea should not be good, it would be very mischievous to the Defendant; for there being a perpetual Unity, as to the Freehold there can be no Prescription to the Common; but there being a constant Enjoyment thereof by the Tenants, and so a perpetual Usage and a Grant made referring to that Usage, 'tis well enough: And since, whilst the Lands were in Possession of the Lord, the Commoners could not complain of a Surcharge; why should they, if he grant the Premisses, the Grantee being in Loco, &c.

In the Case of the King, a Grant of tot & talia Libertates & Privilegia quot & qualia the Abbot lately had, was held good by such general Words: Here the Lord Paget granted to the Defendant that which the Lessees had before, viz. That Common which the Tenants had Time out of Mind; and it cannot be conceived, but that the Tenants had a Right; for as a Tort cannot be presumed to be from Time immemorial, so neither shall it be intended that the Lord gave only a Licence, and permitted his Tenants to enjoy this Common. 9 Co. 23. Abbot *de Strata Marcella.*

But Justice Atkins was of Opinion, that the Plea was not good; he said, he knew not by what Name to call this Common, for it was no more than a Permission from the Lord, that the Tenants might put their Cattle into his Freehold, or a Connivance at them for so doing; and if it be taken as a new Grant, then nothing can pass but the Surplus; for the Lord cannot derogate from his former Grant, and the new Grantee shall not put in an equal Proportion with him who hath the Prescription: for if he may, then such Prescription would be quite destroyed

ſtroyed by ſuch puiſne Grant; for as the Lord might grant to one, ſo he might to Twenty, and then there would not be ſufficient Common left for him, who preſcribes to the Right: So that he conceived that the Defendant had no Right of Common, or if he had any, it would not be till after the Right of the Plaintiff was ſerved; and he ſaid, that Uſage ſhall not intend a Right, but it may be an Evidence of it upon a Trial.

But if there had been an Uſage, 'tis now loſt by the Unity of the Poſſeſſion, and ſhall not be revived by the new Grant, like the Caſe of Maſſam *and* Hunter; there was
Yelv. 189. a Copyholder of a Meſſuage and two Acres in Fee, which the Lord afterwards granted and confirmed to him in Fee cum Pertinentiis, it was adjudged that though the Tenant by Uſage had a Right to have Common in the Lord's Waſte, yet by this new Grant and Confirmation that Right was gone (the Copyhold being thereby extinguiſhed); for the Common being by Uſage and now loſt, theſe Words cum Pertinentiis in the new Grant will not revive it.

But notwithſtanding, Judgment by the Opinion of the other three Juſtices, was given for the Defendant.

## Week's *Caſe*.

A Prohibition was prayed to the Eccleſiaſtical Court at Briſtol; the Suggeſtion was, That he was excommunicated for refuſing to anſwer upon Oath to a Matter by which he might accuſe himſelf, viz. to be a Witneſs againſt another; that he himſelf was preſent ſuch a Day, and ſaw the other at a Conventicle, which if he confeſſed, they would have recorded his Confeſſion of being preſent at a Meeting, and ſo have proceeded againſt him.

The Court granted a Prohibition, but ordered him to appear in the Eccleſiaſtical Court, to be examined as to the other Perſons being there.

## Anonymus.

A Man wins 100 l. of another at Play; the Winner owed Sharp 100 l. who demanded his Debt: The Winner brought him to the other, of whom he won the Money at Play, who acknowledged the Debt, and gave Sharp a Bond for the Payment of the 100 l. who not being privy to the Matter, or knowing that it was won at Play, accepted the said Bond, and for Default of Payment puts it in Suit; the Obligor pleads the Statute of Gaming.

Gaming not within the Statute where the Security is given to a Third Person.

The Plaintiff in his Replication discloseth the Matter aforesaid and saith, That he had a just Debt due and owing to him from the Winner, and that he was not privy to the Monies being won at Play, &c. and that he accepted of the said Bond as a Security for his Debt; and the Defendant demurred.

And the Court were all of Opinion, that this Case was not within the Statute, the Plaintiff not knowing of the Play; and though it be pleaded that the Bond was taken pro Securitate, and not for Satisfaction of a just Debt, it was held well enough, like the Case of Warns and Ellis, Yelv. 47. Warns owed Alder 100 l. upon an usurious Contract, and Alder owed the Plaintiff Ellis 100 l. for which they were both bound; and in an Action of Debt brought upon this Bond, Warns pleads the Statute of Usury betwæn him and Alder; and Ellis replied as the Plaintiff here; and upon a Demurrer it was adjudged for the Plaintiff by three Judges, because the Plaintiff had a real Debt owing him, and was not privy to the Usury: And upon this Case the Court relied, and said, the Reason of it governed this Case at the Bar; whereupon Judgment was given for the Plaintiff.

Hill *and* Pheasant, Antea.

## Tissard *versus* Warcup.

INdebitatus Assumpsit for 750 l. laid out by the Plaintiff for the Use of the Defendant: Upon Non assumpsit pleaded, there was a Trial at the Bar; and the Evidence was, That the Defendant and another, now deceased, farmed the Excise; that the Money was laid out by the Plaintiff on the Behalf of the Defendant and his Partner; and that the Defendant promised to repay the Money out of the first Profits he received.

And

Curia. And by the Opinion of the whole Court this Action would not lie.

1. Two Partners being concerned, the Action cannot be brought againſt one alone; he ought in this Caſe to have ſet out the Death of the other: But if Judgment be had againſt one, the Goods in Partnerſhip may be taken in Execution.

1 Cro 239. Hob. 180. Rol. Rep. 233. 2. The Promiſe here was not to pay the Money abſolutely, but ſub modo; ſo that the Evidence did not maintain the Action, and the Plaintiff was nonſuited.

## Nichols *verſus* Ramſel.

Releaſe of all Demands uſq; 26 *Apr.* a Bond dated that Day is not releaſed. TReſpaſs done 24 Martii 26 Car. 2. uſque 26 Aug. 2. 28 Car. diverſis diebus & vicibus, &c.

The Defendant pleaded, That on the 24th Day of April, in the 26th Year of King Charles the Second, he paid the Plaintiff 6 d. which he received in full Satisfaction of all Treſpaſſes uſque ad the ſaid 24th Day of April, abſque hoc that he was guilty ad aliquod aliud tempus præter prædictum 24 Aprilis anno 26 Car. 2. aut aliquo tempore poſtea, but leaveth out the 24th Day of April; and for that Reaſon the Plaintiff demurred, becauſe the Defendant had not anſwered that Day; for the Word uſque excludes it.

Owen 50. 2 Rol. Abr. 521. So where Debt was brought upon a Bond dated 9 Julii, the Defendant pleaded a Releaſe of all Actions, &c. the ſame Day uſque diem dati ejuſdem ſcripti, the Bond was not diſcharged, becauſe the Releaſe excludes the 9th Day, on which it was made.

But Serjeant Weſton contra. Though generally in Pleading the Word uſque is excluſive; yet in the Caſe of Contracts, becauſe of the Intent of the Parties, 'tis incluſive; and therefore in one Nichol's Caſe, 20 Car. 2. B. R. Rot. 21. (The Term was not named) a Leaſe was made Habendum from Lady-day uſque Feſtum Sancti Michaelis, 1655, paying the Rent reſerved at Michaelmas during the Term; the Rent ſhall be paid on Michaelmas-day, 1665, and ſo the Day ſhall not be excluded.

So where a Man preſcribes to put Cattle from and immediately after Lady-day, where they are to ſtay till Michaelmas-day; the Putting them in on Lady-day, and Driving them away on Michaelmas-day, is not juſtifiable in Strictneſs, yet it hath been allowed good.

So in a Deviſe the Queſtion was, Whether the Teſtator was of Age or not; and the Evidence was, That he was born the firſt Day of January in the Afternoon of that Day, and died in the Morning on the laſt Day of December: And it was held by all the Judges that he was of full Age, for there ſhall be no Fraction of a Day.

North, Chief Juſtice, ſaid, That Prima facie this is to be intended good; for a Day is but Punctum temporis, and ſo of no great Conſideration.

But the other Three Juſtices were of Opinion, That the Word Uſque was excluſive; and that the Plaintiff ſhould not be put to ſhew that there was a Treſpaſs done on the 24th of April; and ſaid, That in a Releaſe of all Demands till the 26th of April, a Bond dated that Day is not releaſed; wherefore Judgment was given for the Plaintiff.

## Trevil *verſus* Ingram.

COvenant to pay an Herriot Poſt mortem J. S. or 40 s. at the Election of the Plaintiff; and ſets forth the Death of J. S. and that afterwards he choſe to have the 40 s. for which he brought this Action, and aſſigns the Breach for Non-payment.

Releaſe of all Demands doth not bar a future Duty. Mod. Rep. 216. 2 Lev. 210. Antea, 93.

The Defendant pleaded, that the Plaintiff releaſed to him all Actions and Demands, &c. But this Releaſe was made in the Life-time of J. S. and there was an Exception in it of Herriots.

The Plaintiff demurred, and Serjeant George Strode argued, that this Action was not diſcharged by that Releaſe, and cited Hoe's Caſe, 5 Co. 70. where it was held, that a Duty incertain at firſt, which upon a Condition Precedent was to be made certain afterwards, was but a Poſſibility which could not be releaſed; that the Duty in this Caſe was incertain, becauſe the Plaintiff could not make his Election 'till after the Death of J. S.

A Covenant to repair, and a Releaſe pleaded to it within Three Days after the Date of the Indenture: And upon a Demurrer it was held, that it being a future Covenant, and not in Demand at the Time of the Releaſe, although it was of all Demands, yet that Covenant was not thereby releaſed.

2 Cro. 170. Roll. Abr. 407. But a Releaſe of all Covenants in ſuch an Indenture had been a Bar. 5 Co. 71. a. 2 Cro. 623.

So here neither the Herriot nor the 40 s. were either of them in Demand at the Time of the Releaſe given; and it plainly appears by the Exception in the Releaſe, that it was the Intention of the Parties not to releaſe the Herriots: And of that Opinion was the whole Court; whereupon Judgment was given for the Plaintiff.

North, Chief Justice: It is the Opinion of * Littleton, That a Release of all Demands doth release a Rent: And of that Opinion was Justice Twisden in the Argument of Hen *and* Hanson's Case, though it was resolved there, that a Release of all Demands did not discharge a Rent reserved upon a Lease for Years, because such Rent is Executory, and incident to the Reversion, and grows every Year out of the Land; but when it is severed from the Reversion, as by assigning over the whole Term, then it becomes a Sum in gross, and is due upon the Contract, and in that Case a Release of all Demands discharges a Rent afterwards due.

* Sect. 508. 510. 2 Roll. Abr. 408. Sid. 141.

2 Cro. 486.

# DE

# Term. Sancti Hill.

## Anno 29 & 30 Car. II. in Communi Banco.

### Shambrook *verſus* Fettiplace.

PRohibition. The Queſtion was, Whether a Preſcription be good to an Iſle in a Church which he and all thoſe, &c. uſed to Repair, as belonging to a Manor, where he had no Dwelling-houſe but only Land; and Serjeant Geo. Croke argued that it was good, and cited the Caſe of Boothby *and* Bayly, where ſuch a Preſcription as this was held to be a good Ground for a Prohibition. Vide Moor Rep. 878. contra.

Preſcription to have an Iſle in a Church becauſe of Repairing, no good Cauſe for a Prohibition. Hob. 69.

The Court inclined that it was not good, but ordered the Prohibition to go, and the Defendant to plead, that it might come judicially before them to be argued.

### Daſhwood *verſus* Cooper & *alios*. *In Camera Scaccarii.*

ERror of a Judgment in Treſpaſs, wherein Cooper and others brought an Action of Treſpaſs againſt Daſhwood for entring into a Brew-houſe and keeping of Poſſeſſion, and taking away of 50 s.

In a Negative Plea, *viz.* That Three did not ſuch a Thing, it muſt be ſaid, *nec eorum aliquis.*

The Defendant pleaded, That the Plaintiffs had committed an Offence againſt the Statute of 12 Car. 2. cap. 23. by which it is enacted, That all Offences thereby prohibited (except in *London*) ſhall be heard by Two or more of the next

Juſtices of Peace, and in caſe of their Neglect or Refuſal by the Space of Fourteen Days after Complaint made, then the Sub-Commiſſioners of the Exciſe are to determine the ſame, from whom no Appeal doth lie to the Juſtices of the Peace at their next Seſſions, which Commiſſioners of Exciſe, Juſtices of the Peace, and Sub-Commiſſioners, amongſt other Things, are inabled by the ſaid Act to iſſue out Warrants under their Hands, *&c.* to levie the Forfeitures, and ſo juſtified the Entry under a Warrant from the Sub-Commiſſioners, Three Juſtices having refuſed to hear and determine this Offence.

To this Plea the Plaintiffs demurred, and had Judgment in the Court of King's-Bench, and a Writ of Inquiry of Damages was executed, and 750 l. Damages given; and it was alledged, that the Defendant could not move to ſet aſide the Judgment in that Term it was given, becauſe the Writ of Inquiry was executed the laſt Day of the Term, and the Court did immediately riſe; and that he could not move the next Term, becauſe the Judgment was given the Term before the Writ of Error was brought.

The Attorney General therefore ſaid, That this was a hard Caſe, and deſired a Note of the Exceptions to the Plea, which he would endeavour to maintain, which Mr. Pollexfen gave him, and then he deſired Time to anſwer them.

The Exception to the Plea upon which the Judgment was given, was this, viz.

The Act giveth no Power to the Sub-Commiſſioners to hear and determine the Offences, and ſo to iſſue out Warrants for the Forfeitures, but where the Juſtices or any Two of them refuſe: And though it was ſaid by the Defendant, that Three refuſed, yet it was not ſaid that Two did refuſe; for there is a great Difference between the Allegation of a Thing in the Affirmative and in the Negative; for if I affirm, that A. B. C. did ſuch a Thing, that Affirmation goes to all of them, but Negatively it will not hold; for if I ſay A. B. C. did not ſuch a Thing, there I muſt add nec eorum aliquis.

So if an Action be brought againſt ſeveral Men, and a Nolle proſequi is entred as to One, and a Writ of Enquiry awarded againſt the reſt, which recites, That the Plaintiff did by Bill implead (naming thoſe only againſt whom the Inquiry was awarded, and leaves out him who got the Nolle proſequi); this is a Variance, for it ſhould have been brought againſt them all.

'Tis true, where a Judgment is recited, 'tis enough to mention those only against whom it is had, but the Declaration must be against all; so in a Writ of Error, if one is dead he must be named; and so the Justices ought all to be named in this Case, viz. That the Three next Justices did not hear and determine this Offence, nec eorum aliquis,

## Wells *versus* Wright. *In Communi Banco.*

DEBT upon Bond conditioned, That if the Obligæ shall pay 20 l. in Manner and Form following, that is to say, 5 l. upon four several Days therein named; but if Default shall be made in any of the Payments, then the said Obligation shall be void, or otherwise to stand in full Force and Vertue. Bond with an insensible Condition, good.

The Defendant pleads, that tali die, &c. non solvit 5 l. &c. and upon this the Plaintiff demurred.

Barrel, Serjeant. The first Part of the Condition is good, which is to pay the Money, and the other is Surplusage void and insensible; but if it be not void, it may be good by transposing thus, viz. If he do pay, then the Obligation shall be void; if Default shall be made in Payment, then it shall be good; and for Authority in the Point, the Case of Vernon *and* Alsop was cited, Hill. 14 Car. 2. Rot. 1786. in B. R. where the Condition was, That if the Obligæ pay 2 s. per Week, until the Sum of 7 l. 10 s. be paid, (viz. on every Saturday) and if he fail in Payment at any one Day, that the Bond shall be void; and upon the like Plea and Demurrer as here, it was adjudged that the Obligation was single, and the Condition repugnant. Sid. 105; 1 Sand. 66. 2 Sand. 79.

The Court were all of Opinion, that Judgment should be given for the Plaintiff; and the Chief Justice said, that he doubted whether the Case of 39 H. 6. 9, 10. was Law.

Brittam

## Brittam *verſus* Charnock.

Where the Heir takes by the Will with a Charge, he is a Purchaſer, and the Lands ſhall not be Aſſets.

DEBT upon Bond againſt the Defendant as Heir: Upon Riens per diſcent pleaded, the Jury found a Special Verdict, in which the Caſe was; viz.

The Father was ſeiſed of a Meſſuage and Three Acres of Land in Fæ, and deviſed the ſame to his eldeſt Son, (the Defendant) and his Heirs within Four Years after his Deceaſe, provided the Son pay 20 l. to the Executrix towards the Payment of the Teſtator's Debts, and then he deviſeth his other Lands to be ſold for Payment of Debts, &c. The Father dies, the Son pays the 20 l. and if this Meſſuage, &c. was Aſſets in the Hands of the Defendant, was the Queſtion.

Cro. Car. 161. Cro. Eliz. 431, 833. Vaugh. 271.

That it was not Aſſets (it was ſaid) becauſe the Heir ſhall not take by Deſcent, but by Purchaſe; for the Word Paying is no Condition; if it ſhould, the Heir is to enter for the Breach, and that is the Defendant himſelf, and for that Reaſon it ſhall be a Limitation.

Southcot *and* Stowel, Antea.

'Tis true, where there is no Alteration of the Eſtate the Heir muſt take by Deſcent; but in this Caſe there is an Alteration of the Eſtate from what is directed by the Law, viz. the Manner how he ſhall come by the Eſtate, for no Fæ paſſeth to him during the Four Years.

But this was denied by Serjeant Pemberton, for he ſaid, If a Deviſe be of Land to one and his Heirs within Four Years, it is a preſent Deviſe, and if ſuch be made to the Heir 'tis a Deſcent in the mean Time, and thoſe Words (within Four Years) are void; ſo that the Queſtion will be, Whether the Word Paying will make the Heir a Purchaſer; and he held it would not: He agreed, that it was uſual to make that Word of Limitation, and not a Condition when the Deviſe is to the Heir; and therefore in a Deviſe to the Heir at Law in Fæ he ſhall take by Deſcent. Style Rep. 148.

But if this be neither a Condition or Limitation, 'tis a Charge upon the Land, and ſuch a Charge as the Heir cannot avoid in Equity.

North, Chief Juſtice, and Atkins. Where the Heir takes by a Will with a Charge, as in this Caſe, he doth not take by Deſcent, but by Purchaſe, and therefore this is no Aſſets.

## Moor *verſus* Pit.

Special Verdict in Ejectment: The Caſe was this, viz. A Copyholder for Life, the Remainder for Life, he in Remainder for Life ſurrenders the Copyhold to the Lord Pro tempore (who was a Diſſeiſor only of the Manor) ut inde faciat voluntatem ſuam; the Diſſeiſor grants it to a Stranger for Life, the Diſſeiſee enters, the Stranger dies, and whether the Diſſeiſor, or he in the Remainder for Life who made the Surrender, had the better Title, was the Queſtion. Surrender of a Copyhold to a Diſſeiſor, whether good to extinguiſh the Right. 1 Ven. 359. T. Jones 153.

So that the Point was, Whether this Surrender by a Copyholder in Remainder into the Hands of the Diſſeiſor be good, and ſhall ſo extinguiſh the Right to the Copyhold, that it ſhall not be revived by the Entry of the Diſſeiſee into the ſaid Manor. Cro. Car. 205. 2 Sid. 151. 1 Roll. Abr. 540.

It was ſaid, that in ſome Caſes a Surrender into the Hands of a Diſſeiſor was good, that is, when the Surrender is made to him to the Uſe of another and his Heirs, and he admits him; there the Perſon admitted claims not under the Lord, but under the Copyholder who made the Surrender, for nothing paſſes to the Lord, but only to ſerve the Limitation of the Uſe. 1 Roll. Abr. 503. Lit. Q. pl. 1. 1 Inſt. 59. b. 4 Co. 24.

But in this Caſe the Grantee muſt claim from the Lord himſelf, and not from the Copyholder, becauſe he had but an Eſtate for his own Life, with which he wholly departed when he made the Surrender to the Uſe of the Diſſeiſor himſelf.

In Trinity-Term following, this Caſe was argued by Serjeant Maynard on the other Side.

There are Two Sorts of Surrenders of a Copyhold:

1. Proper.
2. Formal and Ceremonious.

If a Surrender be to the Lord to the Uſe of another, this is no proper Surrender; for no Eſtate paſſeth to the Lord, he being only the Inſtrument to convey it to the Surrendree, and this is but Nominal.

But here the Surrender was to the Uſe of the Lord himſelf, which is a proper Surrender, and in ſuch Caſe 'tis neceſſary that the Lord have a Reverſion, for one Eſtate is to be turned into the other, and there muſt be a Continuing of Eſtates.

But Dominus pro tempore, who is a Diſſeiſor hath no ſuch Eſtate: Executor de ſon Tort ſhall ſue, but he cannot retain.

If therefore he is not capable to take a Surrender to himself, unless he hath such an Estate, then here is no Disseisin of the Copyhold, 'tis only of the Manor; and then no greater Interest passeth to the Disseisor than to a Stranger, whilst the true Lord had been in Possession, for so he is quoad this Copyhold, if he was not disseised of it; for if the Copyholder had the Possession, there could be then no Disseisin; if he was out of Possession, then he had nothing but a Right, and that cannot be surrendred, for it must be an Estate; as if a Lease for Years keep Possession, 'tis the Possession of the Lord, and the Law is the same in case of a Copyhold. 2 Co. Bettisworth's Case.

Piggot *and Lord* Salisbury's *Case* Antea.

The true Owner makes a Feoffment in Fee; if Lessee for Years continue in Possession, no Freehold passeth.

If Tenant at Will of Parcel of the Manor be in Possession, that prevents a Disseisin of the Freehold, much more in case of a Copyhold.

Lessee for Years, the Remainder to B. for Life, the Remainder to C. in Fee; C. by Deed makes a Feoffment to B. and Livery, &c. 'tis a void Conveyance, because the Possession of Lessee for Years is the Possession of him in the Remainder for Life, and as long as the Lessee for Years is in the Possession, the Owner of the Inheritance cannot be out. Lit. 324. cap. Attornment.

North, Chief Justice, and Wyndham inclined that the Surrender was not good, for it was a material Distinction where the Surrender was made to the Use of a Stranger, and where it terminates in the Lord; that a Surrender made by a Copyholder for Life could not transfer, but extinguish his Right, for he could not give a greater Estate than he had; that there must be a Reversion in the Lord to make a Surrender to him to be good; and that if a Copyholder keeps in Possession, there could be no Disseisin.

But Justice Atkins contra. That this Surrender must have Operation to extinguish his Right; for though a Copyholder for Life cannot surrender for longer Time than his own Life, yet if a Surrender be made of such a Copyhold to an Use, 'tis good, and works by way of Extinguishment of his Right, though the Use be void; and if a Copyholder of Inheritance surrender to a Disseisor, ut faciat Voluntatem, who regrants to the said Copyholder an Estate in Tail according to the Surrender, this shall bind the Disseisee. 1 Roll. Abr. 503. pl. 3. Tamen quære.

The Copyholder in this Case might have sold his Estate to the Disseisor, and it had been good; and though the Acts of a Disseisor shall not prejudice the Disseisee, yet he could see no Reason why the Copyholder, who had parted with his Estate, should have it again.

## Taylor *versus* Biddal.

Special Verdict in Ejectment: The Case was thus; Richard Ben was seised in Fee of the Lands in Question, and had a Sister named Elizabeth, formerly married to one Smith, by whom she had Issue Augustine Smith, now Lessor of the Plaintiff, and she afterwards married one Robert Wharton, by whom she had Issue a Son called Benjamin, and a Daughter called Mary, the now Defendant. 1 Mod. 189. Devise till he be of Age, then to him in Fee, he died within Age, yet a Fee vested in him presently.

Richard Ben devised these Lands to Elizabeth his Sister and Heir, for so long Time, and until her Son Benjamin Wharton should attain his full Age of 21 Years; and after he shall have attained his said Age, then to the said Benjamin and his Heirs for ever; and if he die before his Age of 21 Years, then to the Heirs of the Body of Robert Wharton, and to their Heirs for ever; as they should attain their respective Ages of 21 Years.

Richard the Testator dies, Benjamin died before he came to the Age of 21 Years, living Robert Wharton his Father, afterwards Robert died.

And the Question was, Whether the Lessor of the Plaintiff as Heir to Elizabeth or Mary, either as Heir to her Brother Benjamin, or as Heir of the Body of Robert, should have this Land?

This Case was argued by Serjeant Pemberton this Term, and by Serjeant Maynard in Easter-Term following for the Plaintiff, and they held that Augustine Smith, the Lessor of the Plaintiff, should have this Land, because no Estate vested in Benjamin Wharton, he dying before he had attained his Age of 21 Years, and the Testator had declared, that his Sister should have it till that Time, and then, and not before, he was to have it; so that if he never attained that Age (as in this Case he did not) the Land shall descend to the Heir of the Testator; that Elizabeth had only an Estate for Years, and so having no Freehold, the Contingent Remainder could not be supported; that Mary could not take by Way of Executory Devise, because Robert was living when his Son Benjamin died within Age; that therefore 'tis quasi a Condition Precedent. Grant's Case, 10 Co. cited in Lampet's Case. Ex parte Quer. 1 Leon. 101.

There is a Difference between Boraſton's Caſe, and this at the Bar, for that was a Deviſe to Executors till Hugh ſhall attain his Age of 21 Years, and the mean Profits in the mean Time to be applied by them for Payment of the Teſtator's Debts; and becauſe he might have computed how long it would be before his Debts could be paid, therefore it was adjudged, that after the Death of Hugh within Age, the Executors ſhould continue in Poſſeſſion till Hugh might have attained his full Age had he lived, and ſo a preſent Deviſe to them.

But here the Deviſe is generally till Benjamin Wharton ſhall attain his Age of 21 Years, ſo that nothing veſted in him until that Time, and he dying before, then the Eſtate ſhall deſcend to the general Heir, who is the Plaintiff.

2. Admitting this ſhould be taken as an Executory Deviſe, there muſt be ſome Perſon capable to take when the Contingency happens; and there was no ſuch Perſon in this Caſe, for Robert was alive when Benjamin died, and Mary could not then take as Heir of his Body, for Nemo eſt Hæres viventis; like the Caſe of * Pell *and* Brown, *viz.* Brown had Iſſue William and Thomas, he deviſes Land to his youngeſt Son Thomas, and his Heirs; and if he die (living William), then to William and his Heirs; Thomas did die without Iſſue (living William), and it was adjudged, That if thoſe Words (living *William*) had been left out of the Will, Thomas would have a Fee-Tail, which he might have docked by a Common Recovery; but by Reaſon of thoſe Words he had only a limited Fee, becauſe the Words (viz. If he died without Iſſue) are not indefinite to create a Tail, but are reſtrained to his dying without Iſſue (living *William*), which is a limited Fee; and his Eſtate being determined, William then had a Fee; but if he had died before the Contingency happened, viz. in the Life-time of Thomas, and then Thomas had died without Iſſue, the Heirs of William would not have an Eſtate in Fee for the Reaſons aforeſaid.

2 Cro. 590. Vaugh. 272.

If therefore nothing veſted in Benjamin Wharton, nor in Mary his Siſter, then the Land deſcends to Auguſtine Smith as Heir at Law to Elizabeth, who was Heir to the Teſtator, and ſo the Plaintiff hath a good Title.

Ex Parte Def. Newdigate Serjeant contra. Here is only an Eſtate for Years in the Siſter of the Teſtator, and an Eſtate in Fee preſently veſted in Benjamin Wharton; and he relied upon Boraſton's Caſe, where the Father having Iſſue, Humfry and Henry, deviſed to his Executors till Hugh his Grandſon, the Son of Henry ſhould be of Age, and then to him in Fee; it was there adjudged, that the Executors had a Term

till Hugh might have attained his full Age, and that tho' he died at the Age of Nine Years, yet the Remainder did immediately vest in him in Possession upon the Death of his Grandfather, and that by his Dying without Issue the Lands did descend to his Brother.

So here the Fee descends to Benjamin Wharton in Possession, and he dying without Issue, and within Age, the Land shall then descend to his Sister and Heir.

The like Judgment was given in the Case of Taylor *and* Wharton about 12 Years since; and in Dyer, 124. a. A Devise to his Wife, 'till his Son shall be of the Age of 24 Years, then to the Son in Fee, and if he die before 24 Years without Issue, then to the Wife for Life, the Remainder to A. &c. The Testator died. It was adjudged that the Son had a Fee-Simple presently, for an Estate-Tail he could not have till he was 24 Years old; and after the Death of his Father there was no particular Estate to support that Estate in the Remainder till he should come to the Age of 24 Years, so that he took by Descent immediately. 2 Leon. 11. pl. 16. Dyer 354. a.

So here a Fee vested in Benjamin presently, and he being dead within Age, Mary may take as Heir; however when she is of Age, she shall take as Heir of the Body of Robert by Way of Executory Devise arising out of the Estate of the Devisor, which needs no particular Estate to support it, as in Case of a contingent Remainder; for before Mary was of Age, Robert her Father was dead, and so she might well take. Trin. 19 Car. 2. in B. R. Snow *versus* Cutler, Rot. 1704. Stile 240. Owen 148.

North, Chief Justice. Favourable Distinctions have been always admitted to supply the Meaning of Men in their last Wills; and therefore a Devise to A. till he be of Age, then to B. and his Heirs: this is an Estate for Years in A. with a Remainder in Fee to B. And if such a Devise to A. who is also made Executor, or for Payment of Debts, it shall be for a certain Term of Years, viz. for so long as, according to Computation, he might have attained that Age, had he lived. Curia.

Contingent Remainders are at the Common Law, and arise upon Conveyances as well as Wills; one may limit an Estate to A. the Remainder to another; and so it may be by Devise, if the Intent of the Parties will have it so.

But as at the Common Law all Contingent Remainders shall not be good, so in Wills no such Latitude is given, as if none could be bad; they are subject to the same Fate in Wills as in Conveyances.

In this Case Elizabeth had a Term till Benjamin Wharton be of Age, for she is Executrix; she was likewise Heir at Law to the Devisor, and this Land had gone to her, had it not been for this Will; so that 'tis plain the Testator never intended that a Fee-Simple should vest in her, but somewhere else; for he could never intend the Descent of the Inheritance to that Person to whom he had devised the Term.

It has been argued, That Mary is Heir at Law to Benjamin, as well as Heir of the Body of Robert, and so if she can take either Way 'tis good; but to make her Heir to Benjamin, 'tis necessary that the Estate vest in him before he comes to 21 Years; and for that, Boraston's Case was much relied on, which was also said not to differ from this at the Bar; that an Estate passes to Benjamin Wharton in præsenti, and that there was no Incapacity for Mary to take by way of Executory Devise, as was urged on the other Side, and therefore why should she not take by way of Executory Devise as Heir of the Body of her Father, or at least as Heir of Benjamin her Brother?

An Executory Devise needs no particular Estate to support it, for it shall descend to the Heir till the Contingency happen; 'tis not like a Remainder at the Common Law, which must vest eo instanti that the particular Estate determines; but the Learning of Executory Devises stands upon the Reasons of the old Law, wherein the Intent of the Devisor is to be observed: For when it appears by the Will, that he intends not the Devisee to take but in futuro, and no Disposition being made thereof in the Time, it shall then descend to the Heir till the Contingency happen; but if the Intent be that he shall take in præsenti, and there is no Incapacity in him to do it, he shall not take in futuro by an Executory Devise.

Sid. 153. pl. 2. A Devise to an Infant in ventre sa mere is good, and it shall descend to the Heir in the mean Time; for the Testator could not intend he should take presently, he must first be in rerum natura.

3 Co. 20. a. 1 Inst. 378. a. If an Estate be given to A. for Life, the Remainder to the right Heirs of B. this is a contingent Remainder, and shall be governed by the Rules of the Law; for if B. die during the Life of A. 'tis good; but if he survive 'tis void, because no Body can be his right Heir whilst he is living; and there shall be no Descent to the Heir of the Donor in the mean Time to support this contingent Remainder, that so when B. dies, his right Heirs may take.

In this Case a Fee did vest in Benjamin presently, and therefore after his Death without Issue the Defendant is

his Heir, and hath a good Title, if not as Heir at Law, yet he may take by way of Executory Deviſe as Heir of the Body of her Father; which though it could not be whilſt he was living, (becauſe nemo eſt Hæres viventis) yet after his Death ſhe was Heir of his Body, and was then of Age, at which Time, and not before, ſhe was to take by the Will.

That Elizabeth, the general Heir, had only an Eſtate for Years, till Benjamin ſhould or might be of Age: And ſo by the Opinion of the whole Court Judgment was given for the Defendant.

## Evered *verſus* Hone.

SPecial Verdict in Ejectment, wherein the Caſe was thus, viz. A Man hath Iſſue Two Sons, Thomas his eldeſt, and Richard his youngeſt Son.

Thomas hath Iſſue John.

Richard hath Iſſue Mary.

The Father deviſed Lands to his Son Thomas for Life, and afterwards to his Grandſon John, and the Heirs Males of his Body; and if he die without Iſſue-Male, then to his Grandaughter Mary in Tail, and charged it with ſome Payments, in which Will there was this Proviſo, viz. Provided if my Son *Richard* ſhould have a Son by his now Wife *Margaret*, then all his Lands ſhould go to ſuch Firſt Son and his Heirs, he paying as *Mary* ſhould have done. Conſtruction of Words in a Deviſe.

Afterwards a Son was born, and the Queſtion was, Whether the Eſtate limited to Thomas the eldeſt Son was thereby defeated. And the Court were all clear of Opinion, that this Proviſo did only extend to the Caſe of Mary's being intituled, and had no Influence upon the Firſt eſtate limited to the eldeſt Son.

## Anonymus.

IN the Exchequer Chamber, before the Lord Chancellor, the Lord Treaſurer, and Two Chief Juſtices, the Caſe was thus; viz. The Plaintiff had declared againſt the Defendant as Executor of Edward Nichols, who was Executor of the Debtor. Executor of an *Executor de ſon Tort* not liable at Law.

The Defendant pleads, That the Debtor died inteſtate, and Adminiſtration of his Goods was granted to a Stranger, abſque hoc, that Edward Nichols was ever Executor, but doth not ſay, or ever adminiſtred as Executor, for in Truth he was Executor de ſon Tort.

The

The Plaintiff replies, That before the Adminiſtration granted to the Stranger, Edward Nichols poſſeſſed himſelf of divers Goods of the ſaid Debtor, and made the Defendant Executor, and died; and the Defendant demurred; and Judgment was given for the Plaintiff, but reverſed here; for an Executor of an Executor de ſon Tort is not liable at Law, though the Lord Chancellor ſaid, He would help the Plaintiff in Equity.

But here Adminiſtration of the Goods of the Debtor was granted before the Death of the Executor de ſon Tort, ſo his Executorſhip vaniſhed, and nothing ſhall ſurvive.

## *The Lady* Wyndham's *Caſe.*

If Flotſam come to Land, and is taken by him who hath no Title, the Action ſhall not be brought at the Common Law, and no Proceedings ſhall be thereon in the Court of Admiralty; for there is no need of Condemnation thereof as there is of Prizes: By the Opinion of the whole Court of Common Pleas.

## Roſe *verſus* Standen.

Action where miſconceived by the Plaintiff, and Verdict againſt him no Bar to a new Action.

In Accompt for Sugar and Indigo; the Defendant pleaded, That the Plaintiff brought an Indebitatus Aſſumpſit, a Quantum meruit, and an Inſimul computaſſet, for 100 l. due to him for Wares ſold; to which he pleaded, Non aſſumpſit; and that there was a Verdict againſt him; and then avers, That the Wares mentioned in that Action are the ſame with thoſe mentioned here in the Action of Accompt: The Plaintiff demurred, and it was ſaid for him, That he had brought his former Action on the Caſe too ſoon; for if no Accompt be ſtated, the Action on the Caſe on the Inſimul computaſſet will not lie, and ſo the former Verdict might be given againſt him for that Reaſon.

Ex parte Def. But on the Contrary, the Defendant ſhall not be twice troubled for the ſame Thing; and if the Verdict had been for the Plaintiff, that might have been pleaded in Bar to him in a new Action.

Curia. But the Court were of another Opinion, That this Plea was not good, and that if the Plaintiff had recovered, it could not have been pleaded in Bar to him; for if he miſconceives his Action, and a Verdict is againſt him, and then brings a proper Action, the Defendant cannot plead

2 Cro. 284.

that he was barred to bring such Action by a former Verdict, because where 'tis insufficient it shall not be pleaded in Bar; as in Debt upon Bond the Defendant pleaded another Action upon the same Bond, and the Jury found Non est factum; The Entry of the Verdict was, that the Defendant should recover Damages, & eat inde sine die, but not quod querens nil capiat per Breve, so no Judgment to bar him. 2 Cro. 284. Antea. Putt *and* Roster, Postea. Rosal *and* Lamper, Antea.

But pending one Action another cannot be brought, for they cannot be true.

If no Accompt be stated, the Action on the Case upon an Insimul computasset would not lie; the Insimul computasset implies an Accompt; and upon Non assumpsit pleaded, the Defendant might have given Payment in Evidence, and for that Reason the Jury might find for him. 'Tis true, he might have pleaded Plene computavit, which is the general Plea: But it may as well be presumed that the Verdict was against the Plaintiff, because the Action would not lie; and the Matter being in dubio, the Court will intend it against the Pleader, he not having averred to the Contrary, and so they held the Plea to be ill.

DE

# DE
# Termino Paſchæ,
## Anno 30 Car. II. in Communi Banco.

### Osborn *verſus* Wright.

ACtion on the Caſe for Words, viz. The Plaintiff declares that ſhe was unmarried, but about to marry one J. S. and that the Defendant, to hinder her Marriage, ſpoke theſe Words of her, viz. She is a Whore, a Common Whore, and N's Whore; per quod Maritagium amiſit. The Jury found the Defendant guilty of ſpeaking the Words, but that ſhe did not loſe her Marriage thereby; and it was moved in Arreſt of Judgment that theſe Words are not actionable, being only Scolding; and of that Opinion was all the Court, and Judgment was arreſted.

### Hambleton *verſus Juſtice* Scroggs *& alios, in Camera Scaccarii.*

Serjeant at Law, whether Priviledged to be ſued only in the *Common-Pleas.* 2 Levinz 129.

AN Aſſault and Battery was brought againſt the Defendants in the King's-Bench; to which one of them pleaded, that he was a Serjeant at Law, and ſo ought to have his Privilege to be ſued by Bill in the Common-Pleas, and in no other Court: To this Plea the Plaintiff demurred; and Judgment was given in my Lord Chief Juſtice Hale's Time, by the Opinion of him and the whole Court of King's-Bench, That a Serjeant at Law might be ſued there, and was not ſueable in the Court of Common-Pleas only.

2. That in this Action the Defendant ſhould not have his Privilege, becauſe it was brought againſt him and another.

And afterwards a Writ of Error was brought upon this Judgment, returnable before the Lord Chancellor and

Chief Juſtice of the King's-Bench and Common-Pleas, and the Erroꝛs were argued befoꝛe the Two Chief Juſtices at Serjeants-Inn in Chancery-Lane.

Mꝛ. Holt foꝛ the Plaintiff in the Writ of Erroꝛ, That a Serjeant at Law is to be ſued only in the Court of Common-Pleas, and not elſewhere, becauſe there is an abſolute Neceſſity of his Attendance there: He is ſwoꝛn, and no other Perſon can plead at that Bar; and thereꝛoꝛe if he ſhould be ſued in any other Court, it would be an Impediment to the Buſineſs of that Court, where not only the Officers but their Servants have Pꝛivilege. Ex parte Quer. Vaugh. 155.

In the 11th of E. 4. 2. there was ſome Diſcourſe about the Pꝛivilege of Serjeants at Law, where it was held that he is not to be ſued in that Court by Bill, but by Original; but either way he is to have his Pꝛivilege. So the Servant of an Officer is not to be ſued by Bill, but he is ſtill to have the Pꝛivilege of the Court, and ſo had Serjeant Hedley's Clerk in the Reign of King Charles the Firſt. Cro. Car. 84

The Serjeants receive a Kind of Induction to the Bar, and have a Place aſſigned them; and that they ought to have Pꝛivilege, the very Woꝛds of the Writ are obſervable, viz. (mentioning a Serjeant at Law) ex Officio incumbit in Curia illa.

And though it hath been ſaid and given as an Anſwer to that Caſe in Cro. Car. That where the Serjeant's Clerk was arreſted in an Inferioꝛ Court (as in that Caſe he was) there he ſhall have Pꝛivilege, but not againſt the other great Courts in Weſtminſter-Hall; this is a Difference never yet taken Notice of in any Book, noꝛ doth the Writ warrant this Diſtinction.

2. He ſhall have his Pꝛivilege though he be joined with another, becauſe the Action is joint and ſeveral, and the one may be found guilty and the other acquitted; and it would be an eaſy Way to ouſt a Man of his Pꝛivilege, if it might be done by joining him with another who hath none. 14 H. 4. 21.

But the Perſon with whom the Serjeant is joined may be ſued in the Common-Pleas likewiſe, ſo that he ſhall not hinder him from having Pꝛivilege who of Right ought to have it. 10 E. 4. 15.

Offley contra. As to the Firſt Point, the Court of King's-Bench agreed, That a Serjeant at Law ſhall always have the Pꝛivilege of the Court of Common-Pleas againſt all Inferioꝛ Courts, but not againſt the other Courts in Weſtminſter-Hall, foꝛ he may be ſued in any of them. Ex parte Def.

A Serjeant is not like the Common Officers of the Court, for they are to be attendant there, and no where elſe; but a Serjeant at Law is not confined to that Court alone, he may be aſſigned of Counſel in any other Court, and doth uſually put his Hand to Pleas, both in the King's-Bench and the Exchequer; but a Philazer or Attorney of that Court cannot practiſe in his own Name in any other.

All Caſes of Privilege ought to be taken ſtrictly: And that which was cited concerning the Privilege of a Serjeant's Clerk is not like this, becauſe the Arreſt was in an Inferior Court.

In the 11 E. 4. 2. b. The Chief Juſtice of the King's-Bench came to the Common-Pleas Bar, and told a Serjeant whom he had aſſigned for a Pauper, That if he would not come into that Court and plead for his Client, he would forejudge him; ſo that if he could be fetch'd out of the Common-Pleas and carried to the King's-Bench, he is not confined to that Court alone.

In the 5 H. 5. nu. 10. Complaint was made that the Subjects of the King were not well ſerved in his Courts; the Parliament thereupon ordered, That one Martin and others ſhould take upon them the Dignity of Serjeants at Law; ſo that it appears that their Buſineſs lies in other Courts, as well as in that of the Common-Pleas.

2 Rol. Abr. 275. pl. 4. 2. As to the Second Point: Here is a joint Action for any Thing that appears to the Contrary, and the Plaintiff may proceed againſt one in the King's-Bench, and therefore the other ſhall be ouſted of his Privilege (if he have any) in the Common-Pleas. Moor, 556. 20 H. 6. 32.

North, Chief Juſtice, ſaid, That he always took it to be an uncontroverted Point, That a Serjeant at Law ſhould be ſued only in the Court of Common-Pleas by Bill; he is bound by Oath to be there, and when he brings a Writ of Privilege, 'tis always out of that Court, and no other. Curia adviſare vult.

## The Attorney-General *verſus Sir* John Read. *In Scaccario.*

INformation. A Special Verdict was found: The Caſe was thus: viz.

Sir John Read, 1 Apr. 24 Car. 2. was by Sentence in the Spiritual Court divorced a Menſa & Thoro, and for Non-payment of Alimony was excommunicated.

Afterwards it was Enacted by the Statute of 25 Car. 2. cap. 2. That all and every Perſon or Perſons who ſhall have any Office, Civil or Military, ſhall take the Oaths of Supremacy and Allegiance, and receive the Sacrament (within the Time limited by the ſaid Act) or otherwiſe ſhall be adjudged *ipſo facto* incapable and diſabled by Law, or if he execute any Office after his Neglect or Refuſal to qualify himſelf within the Time therein appointed, (viz. Three Monthes) then he ſhall be diſabled to ſue in any Court, and ſhall forfeit the Sum of 500 l.

Sir John Read was made High-Sheriff of Hartfordſhire, 12 Novemb. 25 Car. 2. and being ſtill under the Sentence of Excommunication, he took upon him the Office, and executed it for 3 Months, viz. to the 12th Day of February afterwards, and then refuſed to ſerve any longer; the Judges came ſoon after to keep the Aſſiſes for that County, but there was no Sheriff there to attend them, and the Reaſon was, becauſe if he had executed the Office without taking the Oaths (the Time being now expired, wherein he ought to have taken the ſame), then he had ſubjected himſelf to the Forfeiture of 500 l. and he could not receive the Sacrament becauſe he was Excommunicated, and therefore ſuppoſed that after the 3 Monthes he was ipſo facto diſcharged by the aforeſaid Statute; and whether upon all this Matter the Defendant be guilty, was the Queſtion.

Disability by a Statute ought to be removed by the Party to enable himſelf to execute an Office.

2 Ven. 237, 238.

Ward and Sir William Jones the Attorney-General argued, that the Defendant was guilty.

1. The Oath and Sacrament are neceſſary Qualifications for all Sheriffs, becauſe the Act appoints theſe Things to be done, and the Penalty therein extends to thoſe who execute any Office after the Three Monthes, without doing the ſame, but not to ſuch who neglect to qualify themſelves.

And though it may be objected, that the Act gives no Penalty for not taking of the Oath, it only enjoins it to be done, and ſubjects the Perſon to the Forfeiture of 500 l. for

executing an Office after Three Months, that being not done; so that this is not to be punished by Information, it being no Offence at the Common Law; yet if an Act appoints a Thing to be done, the Transgressing of the Law is an Offence at the Common Law, and ought thus to be punished; and so it was adjudged in Castle's Case, 2 Cro. 643.

1 Roll. Abr. 251. 455. Suppose the Defendant had given Bond to perform a Thing, a Discharge by the Act of God, or by the Obligee, had been good, but the Obligor should never disable himself; and if it be so in private Contracts, much more in the Case of the King, because our Duty to him is of the highest Nature.

2. Therefore the Excommunication can be no Excuse to the Defendant: For though he might have been excused if he had been under a legal Disability, which he could in no wise prevent; yet here he was able, and had Time enough, and it was in his Power to have discharged himself from this Excommunication, and being bound by his Duty and Allegiance to the King to perform the Office, he ought to qualify himself for the Performance, and either to remove the Disability, or shew he had not Power to do it.

'Tis his Obstinacy that disables him; and 'tis absurd to think that this Excommunication, which was designed as a Punishment, should now be an Ease to him, to excuse him from executing this Office. Moor 121. Lacie's Case.

3. That the Defendant is punishable for this Neglect, otherwise the King would lose the Effect of his Subjects Service, if it should be in their Power to discharge themselves at Pleasure; an Act of Parliament cannot, and much less the Defendant himself by his own Act take away his Duty and Service which he oweth to the King: And therefore, though 'tis Enacted, That a Sheriff shall be only for one Year, yet it has been adjudged that the King by a Non obstante may dispense with that Statute, because otherwise he would be deprived of the Service of his Subjects. Antea.

If a Sheriff, when he is first admitted into his Office, refuses to take the Oath of his Office, he is finable, and so he ought here; if any Alteration be made by the King of that Oath, his Disobedience afterwards is punishable, though a Form of the Oath is prescribed by the Act of Parliament; and there is no other Way to punish the Defendant in this Case but by Information, for after the Three Months (in case he execute the Office not being qualified) the Act gives the Penalty to the Informer; and Cro. Car. 26.

if he ſhould not execute it, the Inconvenience would be great, becauſe 'tis an Office which concerneth the Adminiſtration of Juſtice, and neceſſary for the Management and Collection of the King's Revenue.

The Statute extends to Offices of Truſt as well as of Profit, and enjoins the Thing to be done, the Tranſgreſſion whereof is an Offence, as well at the Common Law as againſt the Statute, and ſo puniſhable by Information, and therefore they prayed Judgment againſt the Defendant.

Sawyer and Levinz contra; viz. They agræd, if the Subject be qualified he ought to accept the Office, but the Defendant was not ſo qualified, and therefore to be excuſed. But before they entered upon the Debate, whether this was an Offence or not, they took an Exception to the Form of the Information. Ex parte Def.

Viz. That it was not good, becauſe it did not conclude contra formam Statuti; for if the Offence be at the Common Law, and a new Penalty is given by the Statute, the Procædings ought to be either at the Common Law by way of Fine, or upon the Statute for the Penalty; but if the Offence be by the Statute, then it muſt be laid to be contra formam Statuti. Now if this was any Offence in the Defendant, it was becauſe he did not receive the Sacrament and take the Oath, which is an Offence againſt the Statute, and therefore ought to conclude contra formam Statuti, which is eſſential. Then as to the Subſtance;

1. The Information is inſufficient, for there is no Offence at all of which the Common Law doth take Notice; and though the Conſequences of the Thing done may be bad, yet no Man ſhall be puniſhed for that, becauſe thoſe only aggravate the Offence, if any; neither is this Information true, for it ſaith he refuſed abſque rationabili cauſa, but here was a reaſonable Cauſe: And though it may be objected, that it was only impotentia voluntatis; and that every Subject being diſabled, is to remove that Diſability to ſerve the King, this was denied; for a Man who is a Priſoner for Debt is not bound or compellable to be Sheriff, neither is a Man bound to purchaſe Lands to qualify himſelf to be either a Coroner or Juſtice of the Peace. By the Statute of 3 Jac. every Recuſant is diſabled; he may conform, but he is not bound to it, for if he ſubmits to the Penalty, 'tis as much as is required by Law. 'Tis true, a Subject is bound to ſerve the King in ſuch Capacity as he is in at the Time of the Service commanded, but he is not obliged to qualify himſelf to ſerve in every Capacity: Neither doth it appear in this Caſe, that

that the Defendant was able to remove this Incapacity, and that ſhould have been ſhewn on the other Side, and all Judges are to judge upon the Record.

The Intent of the Statute is, That if Perſons will not qualify themſelves, they ſhall not execute any Office, and it was made to keep Roman Catholicks out of Places, but not to force them to accept of Offices of Truſt in the Government; and it deſigns no Puniſhment for quitting, but for executing of a Place contrary to the Law; but if this be an Offence, this Information will not lie; and for that,

2. It was argued, That if a Thing be either commanded or forbidden by a Statute, the Tranſgreſſion in either Caſe is an Offence puniſhable by Information; but when an Act doth not generally command a Thing, but only ſub modo, the Party offending is puniſhable no otherwiſe than deſigned by that Law; as where the Statute of 18 H. 6. cap. 11. prohibits any Man from being a Juſtice of the Peace, unleſs he have 40 l. per An. and the Statute of 5 & 6 E. 6. cap. 16. which makes ſuch Bargains as are therein mentioned about buying of Offices void, if ſuch Office be forfeitable, then an Information will lie; but when 'tis ipſo facto void, as in both the former Caſes, then 'tis otherwiſe, becauſe the Puniſhment is executed by the Statute it ſelf; and therefore where the Avoidance is made by the Act, there is no Need of an Information.

25 H. 6. pl. 9. b. 7 H. 4. 5.

And the Objection of Impotentia voluntatis is not material to this Purpoſe, becauſe Simony, Buying of Offices, not ſubſcribing the 39 Articles, according to the Statute of the Queen; theſe are all voluntary Acts, yet no Information lies againſt ſuch Offenders, becauſe the Statutes execute the Puniſhment.

The Intent of the Parliament is here declared, the Diſability of the Perſon makes the Office void; void to all Intents, for the Right of Infants or Men in Priſon is not ſaved; ſo that admitting it to be an Offence if the Duty be not performed, yet if ſuch a Qualification be requiſite to make a Man to act in ſuch an Office, or perform ſuch a Duty, if that Qualification be wanting, the Party is only puniſhable by the Loſs of the Office.

The Act doth not diſtinguiſh betwixt Offices of Truſt and Profit: And as to the other Objection, viz. That 'tis in the Power of the Defendant to qualify himſelf, the ſame might as well be objected againſt all the Popiſh Recuſants, upon the Statute of 3 Jac. and if a Statute doth diſable Perſons, or abridge the King of their Services, there is no Injury done, becauſe the King himſelf

is Party to the Act; but if Miſchiefs were never ſo great, ſince they are introduced by a Law, they cannot be avoided till that Law is changed.

3. But admitting the Information to be good, and that this is an Offence for which it will lie, yet the Excommunication is a ſufficient Excuſe; it appears by the Verdict that the Defendant was abſolutely diſabled to be Sheriff, for if he is to take the Oath and receive the Sacrament in order to it, if he cannot be admitted to the Sacrament, as being under the Sentence of Excommunication, that is an Excuſe.

The Defendant is only argued into a Guilt, for the Jury have not found any; they do not ſay, That it was in his Power to yield Obedience, or that he might have enabled himſelf; they only find his Incapacity; and though it was a voluntary Act, which was the Cauſe of his Diſability, yet in ſuch Caſes the Law doth not look to Cauſes ſo remote. If a Man be in Priſon for Debt, it is his own Act for contracting it and not paying, but yet an Outlawry againſt him whilſt in Priſon, ſhall be reverſed, becauſe the immediate Cauſe, viz. the Impriſonment, and the Judgment was in invitum, and the Law looks no farther; and ſo Judgment was prayed for the Defendant.

But the Court were all of Opinion, that this Information would lie, and that the Defendant was puniſhable for not removing the Diſability, it being in his Power to get himſelf abſolved from the Excommunication: And ſo Judgment was given againſt him, and a Writ of Error brought, &c.

## Godfrey *verſus* Godfrey. *In Communi Banco.*

### Intrat' Hill' ult' Rot. 321.

Award of a leſſer Sum in Satisfaction of a greater, and good.

DEBT upon a Bond for Performance of an Award, in which the Arbitrators had taken Notice of 72 l. in Controverſy, and had awarded 50 l. in Satisfaction: The Defendant pleads Nullum fecerunt Arbitrium; the Plaintiff replies an Award, and ſets it forth and aſſigns a Breach; to which the Defendant demurred, becauſe it appeared by the Award that 72 l. was in Controverſy for Rent due, and that 50 l. was awarded in full Satisfaction of 72 l. and general Releaſes to be given; but it did not appear that any other Matter was in Controverſy between the Parties, though the Submiſſion was general; and Arbitrators may reduce incertain Things to a Certainty, but they cannot make a Debt certain to be leſs, except there were other Differences for which likewiſe this Releaſe was to be given. 10 H. 7. 4.

Curia.

But

But the whole Court were of Opinion that the Award was good, for that the Arbitrators might consider other Matters between the Parties; neither did it appear by the Award that the 72 l. was due, but in Demand only; and 'tis unreasonable for him to find fault with his own Case; for he alledges that he ought to pay 72 l. and complains because the other Party is contented with 50 l. and demands no more. Judgment for the Plaintiff.

## Wright *versus* Bull.

Condition where 'tis Disjunctive 'tis in the Election of the Party to have either.

DEBT upon a Bond for Payment of 40 l. The Condition whereof was, That if the Defendant should work out the said 40 *l.* at the usual Prices in Packing, when the Plaintiff should have Occasion for himself or his Friends to employ him therein, or otherwise shall pay the 40 *l.* then the Bond to be void.

The Defendant pleads, That he was always ready to have wrought out the 40 l. but that the Plaintiff did never employ him; and upon Demurrer the Plea was held ill, because the Defendant did not aver that the Plaintiff had any Occasion to make use of him; and for that it was at his Election either to have Work or Money, and not having imployed him, but brought his Action, that is a Request in Law; and so he hath determined his Election to have the Money; and Judgment was accordingly given for the Plaintiff.

Basket *and* Basket, Antea.

## Blackbourn *versus* Conset.

Place, where it shall be intended, tho' not laid in the Pleading.

IN Replevin, the Avowant pleads an Execution taken out, and that a Term for Years was extended, and an Assignment thereof made by the Sheriff, but alledges no Place where the Assignment was made: But upon Demurrer it was held good, for it shall be intended to be assigned where the Land doth lie.

## Hall *versus* Carter.

Bond to render himself a Prisoner, good.

IN an Action of Debt upon a Bond, the Defendant craves Oyer of the Condition, which was, That if another Person, (who was arrested at the Suit of the Plaintiff, and for whom the Defendant was now bound) should give such Security as the Plaintiff should approve of for the Payment of 90 l. to him, or should render his Body to Prison at the Return of the Writ, then the Obligation to be void.

Sid. 132. pl. 4.

The

The Defendant pleads the Statute of 23 H. 6. cap. 10. That this Bond was given pro caſimento & favore: And this Caſe coming to be argued upon a Demurrer, the Queſtion was, Whether ſuch Bond be within the Statute or not? And the Court were of Opinion that it was not.

If the Sheriff takes Bond in another Man's Name, to elude the Statute, ſuch Bond is void; but the Plaintiff may give Directions to the Officer to take ſuch Bond as this to himſelf; 'tis only an Expedient to prevent a new Arreſt, and the Agræment of the Plaintiff makes it good.

If a Capias be taken out againſt the Defendant, and a Third Perſon gives the Plaintiff a Bond, that the Defendant ſhall pay the Money, or render himſelf at the Return of the Writ; 'tis a good Bond, and not within the Statute, becauſe 'tis not by the Direction of the Officer, but by the Agræment of the Plaintiff, and there is no Law that makes the Agræment of the Parties void; and if the Bond was not taken by ſuch Agræment, it might have been traverſed. T. Jones 95.

But Juſtice Atkins doubted, becauſe a Bond to render himſelf a Priſoner is void. Bewfages's Caſe, 10 Co. But if it had bæn to pay the Money, or appear at the Return of the Writ, it had been good: But notwithſtanding Judgment was given for the Plaintiff.

## Shaxton *verſus* Shaxton.

THE Condition of a Bond was, That the Defendant ſhould ſave harmleſs Thomas Shaxton, and the Mortgaged Premiſſes, and ſhould pay the Intereſt for the principal Sum.

*Non damnificatus* not a good Plea, where the Perſon and Lands are to be indempnified. Antea, 165.

The Defendant pleads, That Thomas Shaxton non fuit damnificatus, for that the Defendant had paid the 120 l. principal Money, with all the Arrears of Intereſt due at ſuch a Day: And upon a Demurrer this was held no good Plea, becauſe the firſt Matter non damnificatus, goes to the Perſon, and not to the Premiſſes: And ſo Judgment was given for the Plaintiff.

## Anonymus.

After Acquittal for a Common Trespass an Action on the Case will lie. Sid. 465, 466. Antea.

THE Defendant was indicted for a Common Trespass, and acquitted; and now was Plaintiff in an Action on the Case against the Prosecutor: And by the Opinion of the Chief Justice the Action will lie for the Charges and Expences in defending the Prosecution, which the Acquittal proves to be false, and the Indicting him proves to be malicious; for if he had intended any Thing for his own Benefit or Recompence, he might have brought a Civil Action, and then if he had been found Not-Guilty, he would have had his Costs allowed.

Though the Prosecution be for a Trespass for which there is a probable Cause, yet after Acquittal it shall be accounted malicious; the Difference only is where the Indictment is for a Criminal Matter, but where 'tis for such a Thing for which a Civil Action will lie, the Party can have no Reason to prosecute an Indictment, it is only to put the Defendant to Charges, and to make him pay Fees to the Clerk of the Assises.

## Penrice *and* Wynn's *Case*.

*Habeas Corpus* may be granted in Civil Matters.

Antea.

SErjeant Maynard moved for a Habeas Corpus for them, being committed to the Poultry Compter by the Commissioners of Bankrupts, for refusing to be examined and sworn touching their Knowledge of the Bankrupt's Estate: The Process against them in this Court, was an Attachment of Privilege, which was a Civil Plea, and of which the Court had Jurisdiction, and therefore the Habeas Corpus must be granted. And the Chief Justice said, that it might be without Motion, because all the Habeas Corpus's in that Court were ad faciend' & recipiend' and they Issue of Course; but in the King's-Bench they are ad subjiciend' which are in Criminal Causes, and not to be granted without Motion. Then the Serjeant moved that the Sheriff might return his Writ, which was done, and being filed, he took Exceptions to the Return, by which the Ground of the Commitment appeared to be by Vertue of a Warrant under the Hands and Seals of the Commissioners, &c. which he said was ill for want of an Averment of their Refusal to come and be sworn; for it did not not appear that they did refuse, and they ought not to be committed without refusing, so that should have been positively averred, viz. That they did refuse, and still do; for if they are

willing at any Time, they ought to be diſcharged; and ſo they were, but were ordered to put in Bail upon the Attachment.

## Abbot *verſus* Rugely.

THE Plaintiff declared in an Action of Aſſault and Battery, to which the Defendant pleaded Non cul', and at the Aſſiſes a Plea was put in Puis darrein Continuance, and a Demurrer thereunto. The Court were clear of Opinion, That if the Plea had been iſſuable, it could not have been then tried, neither could the Demurrer be there argued, but muſt be certified up hither by the Judge of Aſſiſe, as part of the Record of Niſi prius. Yelv. 180. Hawkins *verſus* Moor.

Plea *Puis darrein continuance* muſt be certified as Part of the Record of *Niſi prius.*

## Ballard *verſus* Oddey.

IT was ruled in this Caſe, that to avoid a Security by Reaſon of Uſury, the Contract it ſelf muſt be uſurious, for if the Party takes afterwards more than is allowed, that will not make it ſo; ſo that if the Agreement of the Parties be honeſt, but made otherwiſe by the Miſtake of the Scrivener, yet 'tis not Uſury: As if a Mortgage be for 100 l. with a Proviſo to be void on Payment of 106 l. at the End of one Year, and no Covenant for the Mortgagor to take the Profits till Default be made in Payment, ſo that in Strictneſs the Mortgagee is intituled both to the Intereſt and Profits; yet if this was not expreſſed, the Agreement is not Uſury.

The Contract it ſelf muſt be uſurious to make it void. 1 Sand. 295. Mod. Rep. 69.

# DE

# Term. Sanctæ Trin.

## Anno 30 Car. II. in Communi Banco.

### The Caſe of one *Randal* and his Wife, an Adminiſtrator, &c.

Judgment may be avoided without a Writ of Error by a Plea, where the Party is a Stranger to it.

DEBT upon a Bond againſt the Defendant as Adminiſtrator: They plead a Judgment recovered againſt the Inteſtate in Hillary Term, 26 & 27 Car. 2. and that they had not Aſſets ultra. The Plaintiff replies, That there was an Action againſt the Inteſtate, but that he died before Judgment, and that after his Death Judgment was obtained, and kept on Foot per fraudem.

The Defendant traverſed the Fraud, but did not anſwer the Death of the Inteſtate; and upon a Demurrer, it was ſaid for the Plaintiff, that the Judgment was ill, and that he being a Stranger to it, could neither bring a Writ of Error or Deceit, and had no other Way to avoid it, but by Plea; and that 'tis put as a Rule, That where Judgment may be reverſed by a Writ of Error, the Party ſhall not be admitted to do it by Plea; but a Stranger to it muſt avoid it by Plea, becauſe he is no Party to the Judgment; as if a Scire facias be brought againſt the Bail, 'tis a good Plea for them to ſay, That the Principal was dead before Judgment given, by Way of exculing themſelves to bring in the Body; but 'tis not good to avoid the Judgment, becauſe 'tis againſt the Record, which muſt be avoided by Writ of Error. 1 Roll. Abr. 449, 742.

Cro. Eliz. 199.

The Court were of Opinion, That the Plaintiff might avoid the Judgment without a Writ of Error, eſpecially in this Caſe, where 'tis not only erroneous, but void.

## Hill *verſus* Thorn.

IN an Arbitrament, it was held by the Court, That if two Things be awarded, the one within, and the other not within the Submiſſion; the latter is void, and the Breach muſt be aſſigned only upon the firſt. Rules in an Award.

2. If there be a Submiſſion of a particular Difference, and there are other Things in Controverſy, if in ſuch Caſe a general Releaſe is awarded, 'tis ill, and it muſt be ſhewed on the other Side to avoid the Award for that Cauſe.

3. If the Submiſſion be of all Differences till the 10th Day of May, and a Releaſe awarded to be given of all Differences till the 12th Day of May, if there be no Differences between thoſe two Days, the Award is good; if any, it muſt be ſhewed in Pleading, otherwiſe the Court will never intend it. 3 Mod. 264. 1 Sand. 33. 1 Roll. Abr. 257.

4. That reciprocal Covenants cannot be pleaded one in Bar of another; and that in aſſigning of a Breach of Covenant, 'tis not neceſſary to aver Performance on the Plaintiff's Side. Smith *and* Shelbury, Antea.

## Staples *verſus* Alden.

DEBT upon a Bond conditioned, to deliver forty Pair of Shoes within a Month at Holborn-Bridge, to Henry Knight a Common Carrier to G. for the Uſe of the Obligee. Tender of Goods to the Man ſhall be a Tender to the Maſter.

The Defendant pleaded, That in all that Space of a Month Henry Knight did not come to London, but that ſuch a Day at Holborn-Bridge he delivered forty Pair of Shoes to A. G. the Carrier's Porter: To this Plea the Plaintiff demurred; for that the Condition being to do ſomething to a Stranger, the Defendant at his Peril ought to perform it; like the Caſe where the Action of Debt was brought upon a Bond conditioned, that the Defendant ſhould give ſuch a Releaſe as the Judge of the Prerogative Court ſhould think fit; the Defendant pleaded, that the Judge did not appoint any Releaſe, and it was adjudged no good Plea, becauſe the Obligation is on his Part, and he ought to tender a Releaſe to the Judge. Cro. Eliz. 716. 33 H. 6. 13. 4 H. 7. 4.

But on the other Side it was ſaid, That a Delivery to the Servant is a Delivery to the Maſter himſelf; and if Parcels of Goods are delivered to the Porter and loſt, an Action lies againſt the Maſter.

The

Curia. The Court (abſente North Chief Juſtice) held the Plea to be good, and that ſuch a Conſtruction was to be made as was according to the Intent of the Parties, and that a Delibery to the Man was a Delibery to the Maſter; whereupon Judgment was given for the Defendant.

## Gillmore *verſus Executor of* Shooter. *In Banco Regis.*

A new Act ſhall not take away an Action to which the Plaintiff was entituled at the Commencement of the Act. T. Jones 108. 2 Lev. 227. 29 Car. 2.

INdebitatus aſſumpſit. There was a Treaty of Marriage between the Plaintiff, who was of Kin to the Teſtator, and the Daughter of one Harris, with whom he afterwards had 2000 l. as the Marriage-Portion; and Mr. Shooter in his Life-time promiſed to give the Plaintiff as much, or to leave him worth ſo much by his Will.

This Promiſe was made before the 24th Day of June, before this Action brought; the Marriage took Effect, Harris paid the 2060 l. and Shooter died in September following, having made no Payment of the Money, or any Proviſion for the Plaintiff by his Will.

This Action was commenced after Shooter's Death, and upon the Trial, a Special Verdict was found upon the Act of Frauds and Perjuries, 29 Car. 2. which enacts, That from and after the 24th Day of *June*, in the Year 1677, no Action ſhall be brought to charge any Perſon upon any Agreement made in Conſideration of Marriage, &c. unleſs ſuch Agreement be in Writing, &c. And that this was a bare Promiſe without Writing.

And by Wyld and Jones (abſente Twiſden) Judgment was given for the Plaintiff; for it could not be preſumed, that the Act had a Retroſpect to take away an Action to which the Plaintiff was then intituled: for if a Will had been made before the 24th Day of June, and the Teſtator had died afterwards, yet the Will had been good, though it had not been in Purſuance of the Statute.

## After *verſus* Mazeen. *In C. B.*

IN Covenant, the Plaintiff declared upon an Indenture, in which the Defendant had covenanted that he was ſeiſed in Fæ, &c. and would fræ the Premiſſes from all Incumbrances, in which there was alſo another Covenant for quiet Enjoyment; and the Breach aſſigned was upon an Entry, and Eviction by another, and concludes, & ſic Conventionem ſuam prædictam fregit, in the Singular Number.

Breach aſſigned did relate to Three Covenants, the Declaration concludes, *& ſic fregit Conventionem*, and good.

And upon a Demurrer to the Declaration, Maynard Serjeant ſaid, That the Breach did relate to all the Three Covenants, and therefore the Concluſion was ill, becauſe he did not ſhew what Covenant in particular, and if he ſhould obtain a Judgment upon ſuch a Declaration, the Recovery could not be pleaded in Bar to another Action brought upon one of the other Covenants.

But Conyers for the Plaintiff ſaid, that Conventio is Nomen collectivum, and if Twenty Breaches had been aſſigned, he ſtill counts de placito quod teneat ei Conventionem inter eos fact': And of that Opinion was the Court; and that the Breach being of all Three Covenants, the Recovery in one would be a good Bar in any Action afterwards to be brought upon either of thoſe Covenants.

## Parrington *verſus* Lee.

INdebitatus aſſumpſit, for Money had and received to the Uſe of the Plaintiff, a Quantum meruit for Wares ſold, and an Inſimul computaſſet, *&c.*

Limitation of Perſonal Actions only extends to Account between Merchants. Mod. Rep. 268. 2 Sand. 125, 127. Pl. Com. 54.

The Defendant pleads the Statute of Limitations, (viz.) Non aſſumpſit infra ſex annos: The Plaintiff replied, That this Action was grounded on the Trade of Merchants, and brought againſt the Defendant as his Factor, &c. The Defendant rejoins, that this was not an Action of Account; and the Plaintiff demurred, for that this Statute was made in Reſtraint of the Common Law; and therefore is not to be favoured or extended by Equity, but to be taken ſtrictly; and that if a Man hath a double Remedy, he may take which he pleaſeth; and here the Plaintiff might have brought an Action of Account, or an Action on the Caſe grounded on an Account.

But

But Baldwyn Serjeant inſiſted, that the Declaration was not full enough, for the Plaintiff ought to ſet forth, That the Action did concern Merchants Accounts, and that the Replication did not help it.

The Court were of another Opinion; for that it need not be ſo ſet forth in the Declaration, becauſe he could not tell what the Defendant would plead, ſo that ſuppoſing him to be within the Saving of the Act, his Replication is good; and 'tis the uſual Way of Pleading, and no Departure, becauſe the Plea of the Defendant gives him Occaſion thus to reply. But the Saving extends only to Accounts between Merchants, their Factors, and Servants; and an Action on the Caſe will not lie againſt a Bailiff or Factor where Allowances and Deductions are to be made, unleſs the Account be adjuſted and ſtated, as it was reſolved in Sir Paul Neal's Caſe againſt his Bailiff.

Where the Account is once ſtated, as it was here, the Plaintiff muſt bring his Action within Six Years; but if it be adjuſted, and a following Account is added, in ſuch Caſe the Plaintiff ſhall not be barred by the Statute, becauſe 'tis a running Account: But if he ſhould not be barred here, then the Exception would extend to all Actions between Merchants and their Factors, as well as to Actions of Account, which was never intended, and therefore this Plea is good, and the Saving extends only to Actions of Account; whereupon Judgment was given for the Defendant.

Mod. Rep. 71.

## Aſtry *verſus* Ballard. *In Banco Regis.*

Sid. 107. Principals in Execution, the Bail are liable. 1 Ven. 315. T. Jones 75. 2 Lev. 195. 2 Cro. 320. 1 Roll. 897.

The Defendant became Bail for Six Perſons, againſt whom the Plaintiff got a Judgment, and two were put in Execution; the Plaintiff afterwards brought a Scire Facias againſt the Bail, who pleaded that two of the Principals were taken in Execution before the Scire Facias brought; and whether the Bail was not diſcharged thereby, was now the Queſtion.

It was agreed, that if Five had ſurrendred themſelves after Judgment, yet the Bail had been liable; but are not ſo, if the Plaintiff (as in this Caſe) hath once made his Election by ſuing out Execution againſt the Principals, and thereupon Two are taken and in Cuſtody. Before the Return of the Second Scire Facias, they have Liberty by the Law to bring in the Principals; but the Plaintiff having taken out Execution, he hath made it now im-

poſſible for the Bail to bring them in to render themſelves.

But Sympſon argued, that the Bail was not diſcharged; for he ought to bring in the other Four, or elſe he hath not perform'd his Recognizance; and ſo it was adjudged by the Court, for the Law expects a compleat Satisfaction. The like Reſolution was in this Court between Orlibear *and* Norris. Sid. 107.

## Steed *verſus* Perryer.

IN a Special Verdict in Ejectment, the Caſe was this, viz. Robert Perryer being ſeiſed in Fee of the Lands in Queſtion, had Iſſue two Sons, William his eldeſt, and Robert his youngeſt Son; and being ſo ſeiſed, he deviſes theſe Lands to his youngeſt Son Robert and his Heirs. Republication makes it a new Will.

Robert the Deviſee dies in the Life-time of his Father, and leaves Iſſue a Son named Robert, who had a Legacy deviſed to him by the ſame Will. Jones 135. 1 Ven. 341. Mod. Rep. 267. 2 Lev. 243. Raym. 408.

The Grandfather afterwards annexed a Codicil to his Will, (which was agreed to be a Republication) and then he expreſly publiſhes the Will de novo, and declared, that his Grandſon Robert ſhould have the Land as his Son Robert ſhould have enjoyed it, had he lived.

And whether the Grandſon, or the Heir at Law, had the better Title, was the Queſtion.

Pemberton and Maynard Serjeants argued for the Title of the Plaintiff (who was Heir at Law) That if a Deviſe be to S. and his Heirs, if S. die, living the Deviſor, the Heir ſhall take nothing, becauſe no Eſtate veſted in his Anceſtor; ſo if a Deviſe be to the Heirs of S. after his Deceaſe, the Heir ſhall take by Purchaſe, for he cannot take as Heir for the Reaſon aforeſaid.

By the Death of Robert the Son, the Deviſe to him and his Heirs was void, and the Annexing a Codicil and Republication of the Will cannot make that good which was void before; if it cannot make it good, then the Heir cannot take by Purchaſe, and by Deſcent he cannot take, for his Anceſtor had no Eſtate, and therefore he ſhall have none.

Beſides, this is not a good Will within the Statute, which requires it to be in Writing: Now the Deviſe by

the written Will was to the Son, and the Republication to the Grandson was by Words and not in Writing; so that if he cannot take by the Words of the Will, he is remediless, and that he cannot take as Heir, because his Ancestor died in the Life-time of the Testator. Moor 353. Cro. Eliz. 243.

Cro. Eliz. 422. Moor 353, 404.

Skipwith and Barrel on the other Side, That the new Publication makes it good, for it makes a new Will in Writing, and it shall take according to the Publication which makes it have the Effect of a new Will. 'Tis true, Deeds shall not be extended farther than the Intent and Meaning of the Parties at the Time of the Delivery, but Wills are to be expounded by another Rule; therefore though by the Death of the Son the Will was void, yet by the Republication it hath a new Life. 1 Roll. Abr. 618. 5 Co. 68. 8 Co. 125.

The Chief Justice, Windham and Atkins Justices, were of Opinion for the Grandson against the Heir at Law, viz. That the Republication made it a new Will, and the Grandson should take by the Name of Son: And Justice Atkins relied on the Case of Brett *and* Rigden in the Commentaries, where new purchased Lands passed by a Republication; but a Writ of Error being brought upon this Judgment in the King's-Bench, it was reversed.

## Anonymus. *In Banco Regis.*

MR. Sanders moved for a Prohibition to the Spiritual Court in the Case of the Children of one Collet and Mary his Wife, to stay Proceedings there upon a Libel against them; that the said Collet had married Anne, the Sister of the said Mary. They both appear and confess the Matter, upon which a Sentence of Divorce was to pass, whereas in Truth Collet was never married to Anne, but it was a Contrivance between him and his Wife to get themselves divorced, and the Marriage declared void ab initio, to defeat their Children of an Estate settled upon them in Marriage, with Remainders over, by bastardizing them, after they had been married and lived together 16 Years. The Reason why a Prohibition was prayed, was, because Marriage or no Marriage was to be tried in pais, for that the Inheritance and Freehold of Land were concerned in this Case.

The Court directed that they ſhould ſuggeſt this Matter, and that it was a Contrivance to obtain a Sentence of Divorce to defeat them of their Eſtate entailed on them, and then to move for a Prohibition. Curia.

## Smallwood *verſus* Brickhouſe.

THE Suggeſtion was, That B. being under the Age of ſixteen Years had made a Will, and that the Prerogative Court proceeded to the Proof of it; whereas by the Common Law a Perſon is not capable till 17 Years; and therefore a Prohibition was prayed. Spiritual Courts are proper to determine where a Perſon is capable of making a Will. Godolph. 276. Curia. T. Jones 210.

And that the Common Law hath determined the Time, my Lord Coke's Comment upon Littleton was cited, 1 Inſt. 89. b. where 'tis ſaid, That at 18 Years of Age he may make his Teſtament, and conſtitute Executors; and the Age of a Perſon is triable alſo in Pais.

But the Court ſaid, That the Proof of Wills, and the Validity of them, doth belong to the Eccleſiaſtical Court; and if they adjudge a Perſon capable, the Court will not intermeddle, for 'tis within their Juriſdiction to adjudge when a Perſon is of Age to make a Will; and ſometimes they allow Wills made by Perſons of 14 Years of Age, and the Common Law hath appointed no Time, it depends wholly on the Spiritual Law; and therefore a Prohibition was denied.

## Joan Bailie's *Caſe*.

NOTA. One Joan Baily being in Execution, the Plaintiff died inteſtate, and the Right of Adminiſtration came to her, and a Motion was made for a Habeas Corpus to bring her from the Compter into this Court; for that having adminiſtred to her Creditor, ſhe might be diſcharged; but it was denied, for ſhe could not be thus diſcharged, becauſe non conſtat de Perſona; neither can ſhe give a Warrant of Attorney to acknowledge Satisfaction, therefore let her renounce the Adminiſtration and get it granted to another, and then ſhe may be diſcharged by a Letter of Attorney from ſuch Adminiſtrator. Adminiſtration was committed to the Debtor in Execution.

## Anonymus.

*Mandamus.* MAndamus to ſwear one who was elected to be One of the Eight Men of Aſhburn Court. It was denied, becauſe it is incertain; for it ought ſpecially to be inſerted what the Office is, and what is the Place of One of the Eight Men of Aſhburn Court, that it may appear to the Court to be ſuch a Place for which a Mandamus doth lie; and though ſuch a Writ hath been granted for One of the approved Men of Guilford, yet it was ſpecially ſet forth what his Office was.

## Birch *verſus* Lingen. *Trin.* 34 *Car.* 2. *in B. R.*

Diſcontinuance where amendable.

JUdgment was obtained upon a Bond 25 Years ſince, and in one of the Continuances from one Term to another there was a Blank. The Executors of the Defendant now brought a Writ of Error; and the Plaintiff in the Action got a Rule to amend and inſert the Continuance, ſuggeſting to the Court, that it was a Judgment of a few Terms, and ſo aided by the Statute of 16 & 17 Car. 2. cap. 8.

Hughes Abr. tit. Coſts 480. 2 Sand. 289. Moor 710. Cro. Eliz. 320, 489, 553, 619. Cro. Jac. 211, 353, 528. Stile 339.

Upon this Rule the Plaintiff fills up the Blank, and the Record was certified, ſo filled up, into the Exchequer-Chamber.

And Mr. Pollexfen moved for the Defendant, that the Record might ſtand as it did at firſt, and that the Rule was got by a Trick and on a falſe Suggeſtion, it being a Judgment before the Reſtoration of this King, and a Diſcontinuance not amendable, for 'tis the Act of the Court; and for an Authority in the Point the Caſe of Friend *and* Baker was cited, where, after a Record certified, a Motion was made to amend it, becauſe Day was given over to the Parties from Eaſter to Michaelmas-Term, and ſo Trinity-Term left out, where by the Opinion of Roll Chief Juſtice, that the Giving of a Day more than is neceſſary is no Diſcontinuance; but where a Day is wanting, 'tis otherwiſe.

But Sanders for the Plaintiff ſaid, that this was only a Miſpriſion of the Clerk, and no Diſcontinuance, but amendable: The Clerks commonly leave Blanks in the Venire's, and if they neglect to fill them up, 'tis only a Miſpriſion, and amendable by the Court; and the Record being now filled up by the Rule of the Court, ought not to be razed to make an Error.

The Chief Justice was of Opinion, That this was not a Discontinuance, but an insufficient Continuance, and an Omission of the Clerk only, who if he had filled up this Blank himself without Rule, it could not afterwards be set aside.

But Justice Jones was of another Opinion, That it was such a Misprision of the Clerk, as was not amendable by the Statute of H. 6. since it was not the same Term, and all the Procædings being in the Breast of the Court only during the Term, it ought not to be altered, but left in Blank as it was; for where Judgment is entred for the Plaintiff, the Court may, upon just Cause, alter it the same Term for the Defendant, but not of another Term, the whole Term being but one Day in Law: And though the Writ of Error be returned into the Exchequer, that will make no Alteration, for the Record it self remains still here, and 'tis only a Transcript that is removed thither. Sed adjornatur.

## Warren *and* Arthur.

TRespass for breaking his Close. The Defendants plead, That the Place where were, &c. the Lands of one Martin, who made a Lease thereof to the Plaintiff, and did thereby except the Trees growing on the same: In which Lease the Plaintiff did covenant with the said Martin, his Heirs and Assigns, that he and they from Time to Time, during the said Lease, should have Liberty and full Power to fell the said Trees, and root them up, repairing the Hedges where they did grow. That the said Martin granted some of the Trees to the Defendant, by Vertue whereof, he and the rest of his Servants did cut them down, which is the same Breaking of the Close of which the Plaintiff complains. To which Plea, Mr. Pollexfen did demur for the Insufficiency, because the Defendant did not shew, that upon cutting down the Trees he did repair the Hedges, as by the Agreement ought to have been done; for this being a limited and qualified Power, ought to be set forth at large; and that it was a Power only annexed to the Reversion, and not assignable to any one else, and so the Defendant hath wholly failed in his Plea; he might have justified under Martin, but not in any of their own Rights.

Power, where 'tis coupled with an Interest, is assignable. T. Jones 205.

But

But the Court were of Opinion, That an Action doth lie in this Case, both against the Lessor and his Assignæ, acting under his Power; and they agreed that a bare Power was not assignable; but where 'tis coupled with an Interest, it may be assigned, and here was an Interest annexed to the Power; for the Lessor might sever the Trees from the Reversion. Whereupon Judgment was given for the Defendant.

## Scoble *versus* Skelton.

Prescription must be alledg'd with a Seisin in Fee.

THE Plaintiff declared, That he was seised of a Tenement called East, and the Defendant of another Tenement called West Travallock; and that he and all those whose Estate he had, did use to fetch Pot-Water from the Defendant's Close, &c. Issue was taken upon this Prescription, and a Verdict for the Plaintiff; and Mr. Pollexfen moved in Arrest of Judgment, That the Declaration did set forth generally that he was seised, and it did not appear it was in Fæ; for if it be for Life only, then the Action doth not lie, because a Prescription cannot be annexed to an Estate for Life.

Tremain insisted, That the Declaration was sufficient, and certain enough, for when the Plaintiff doth alledge that he was seised generally, it shall be intended a Seisin in Fee, especially after Verdict.

But the Court held the Declaration to be defective in Substance, because a Prescription cannot be annexed to any Thing but an Estate in Fee, and therefore 'tis not helped after Verdict. The Judgment was reversed.

## Putt *versus* Roster.

Raim. 472 A Recovery in Trespass, good Plea in Bar to Action of Trover. 3 Mod. 1.

TRespass for taking of his Cattle: The Defendant justifies for an Herriot, and upon a Demurrer had Judgment.

The Plaintiff did afterwards bring an Action of Trover and Conversion for the same Cattle, and the Defendant pleaded the former Judgment in Trespass, in Bar to this Action of Trover, and the Plaintiff demurred.

Serjeant Maynard argued, That the Plea was not good, becauſe Treſpaſs and Trover are diſtinct Actions, and one may be where the other is not; as, if an Infant give Goods to one, an Action of Trover doth lie to recover them, but Treſpaſs will not: So if Goods be delivered to another, and he refuſe to deliver them upon Demand, Trover, but not Treſpaſs, will lie; and therefore theſe being different Actions, a Recovery in one ſhall be no Bar to the other.

A Formedon brought in the Deſcender, and Judgment thereon, is not pleadable in Bar to a Formedon in Remainder.

There is a great Difference between a Bar to the Action, and to the Right; as where an Adminiſtrator ſues, not knowing that he was made Executor, and Judgment againſt him; and he afterwards proved the Will, and brought an Action as Executor; the former Judgment had againſt him as Adminiſtrator, ſhall not be a Bar to this new Action, becauſe 'tis not a Bar to the Right, for by miſconceiving his Action, the former abated. 5 Co. 53. 6 Co. 37. a. Cro. El. 667. Co. Ent. 38. b 2 Cro. 15. pl. 20. Antea.

But Mr. Holt argued, That theſe were Actions of the ſame Nature, and therefore Judgment in one was a good Plea in Bar to the other. Treſpaſs or Trover lies for taking or carrying away the Goods of another, and when he hath made his Election which to bring, a Recovery there ſhall be a perpetual Bar to the other.

In an Appeal of Mayhem, the Defendant pleaded a former Recovery in an Action of Aſſault and Battery, and held good; tho' one is of a higher Nature than the other. 4 Co. 39.

But the Court were of Opinion, That an Action of Trover doth lie where a Treſpaſs doth not, and if the Plaintiff hath miſtaken his Action, that ſhall be no Bar to him. Curia. Roſe *and* Standen. Antea.

As to the Caſe put of the Mayhem, that doth not agree with this, becauſe there can be no Mayhem without an Aſſault, but there may be a Trover without a Treſpaſs; and though the Appeal of Mayhem be of a higher Nature than the Aſſault, becauſe it doth ſuppoſe quod felonice Mayhemiavit, yet the Plaintiff can only recover Damages in both. Rozal *and* Lampen, Antea.

If a Man bring Treſpaſs for the Taking of a Horſe, and is barred in that Action, yet if he can get the Horſe in his Poſſeſſion, the Defendant in the Treſpaſs can have no Remedy, becauſe notwithſtanding ſuch Recovery the Property is ſtill in the Plaintiff.

The Defendant in this Caſe hath juſtified the Taking of the Cattle for an Herriot, and by the Demurrer the Juſtifica-

ſtification is confeſſed to be true in Fact; now by the Taking for a Herriot, the Property of the Goods was altered; and wherever the Property is determined in Treſpaſs, an Action of Trover will never lie for the ſame, but 'tis a good Plea in Bar; and ſo it was adjudged here.

## James *verſus* Trollop.

Preſcription for a *Modus* good.

ERror of a Judgment in the Common-Pleas on an Action upon a Prohibition, where the Plaintiff did ſuggeſt, That William late Prior of Norbury in Staffordſhire, was ſeiſed of the ſaid Manor and of the Tythes thereof ſimul & ſemel, as of a Portion of Tythes, &c.

That the ſaid Prior 25 H. 1. granted the ſame Manor and Tythes to William Fitzherbert and his Heirs, rendring Rent: That the ſaid Fitzherbert did enter and was ſeiſed, and held it diſcharged of Tythes; that his Heirs afterwards granted two Hides of Land, Part of the ſaid Manor, to S. with the Tythes, at 5 s. Rent; and ſo draws down a Title by Deſcent for 300 Years to F. who being ſeiſed, deviſed the ſame to Dorothy James, (under whom the Plaintiff in the Prohibition claimed) and then concludes, That Fitzherbert and all thoſe whoſe Eſtate, &c. did pay the ſaid Rent to the ſaid Prior, which ſince the Diſſolution was paid to the King and his Aſſigns, in Diſcharge of all Tythes, &c.

The Defendant having craved Oyer of the Deed, demurred to the Suggeſtion; and Judgment was given for the Plaintiff in the Common-Pleas.

And it was now ſaid for the Plaintiff in the Error, That it doth not appear by the Pleadings, whether the Plaintiff in the Prohibition would diſcharge himſelf by a Preſcription in non decimando, or in Modo decimandi; for the Grant from the Prior being the Foundation of his Title, he could not thereby be diſcharged, becauſe a Deed before Memory cannot be pleaded, unleſs it hath been allowed in a Court of Eyre, or ſome Court of Record ſince Memory; and this Deed being dated in the Reign of King Henry the I. which was 65 Years before the Time of Memory by the Common Law, that beginning in the Reign of Richard the I. whatever is before that Time cannot be tried by Law; if it had been allowed in Eyre, or in ſome of the Courts of Record, it may be pleaded, but no Uſage in pais can confirm it.

1. But ſuppoſing the Deed to be good, the Plaintiff hath alledged a Grant of a Portion of Tythes which he cannot have; for at the Common Law a Lay-man was not capable of Tythes in prender, for no one had Capacity to take or receive them, ſave only Spiritual Perſons: For which Reaſons a Lay-man could not preſcribe in non decimando, but in modo decimandi he might, becauſe there is ſtill an Annual Recompence in Satisfaction thereof. Jones 369. 2 Co. 49.

2. 'Tis not alledged, That the place where, &c. was Parcel of the Demeſns of the Manor, therefore for what appears it might have been always in Tenancy: And tho' a Preſcription to a Modus by the Lord for himſelf and all his Tenants, is good, becauſe it might have a lawful Beginning; for the Lands at firſt might be all in his Hands before it was a Manor, and ſo much paid for the Tythes thereof; yet ſuch a Preſcription by a Tenant is not good. Cro. Eliz. 599.

3. He hath alledged Payment to the Prior, and afterwards to the King, and ſo would infer a Modus, to which he hath not poſitively preſcribed, but by an old Deed upon Payment of 5 s. to all thoſe whoſe Eſtates, &c. And this will not do, for unleſs the Modus doth go to the Perſon who by Law ought to have Tythes, or unleſs it be for his Benefit, 'tis not good; as where it was alledged that he ought to be diſcharged, becauſe Time out of Memory he employed all the Profits of the Land for the Repairs of the Body of the Church, and to find Neceſſaries, &c. this was not a good Modus, becauſe 'tis no Recompence for the Parſon. 1 Roll. Abr. 649. placito 8.

But it was ſaid by Saunders for the Plaintiff in the Prohibition, That by the Suggeſtion there was a good Title alledged to be diſcharged of Tythes; for 'tis ſet forth, that the Prior had a Portion of Tythes, and the Lands ſimul & ſemel, and being a Corporation they might preſcribe for Tythes in prender, and the Tythes being well in them, they may well grant it to Fitzherbert paying 5 s. and conſtant Payment being alledged ever ſince, 'tis a good Title.

As to the Deed, 'tis true, 'tis dated before the Time of Memory; but yet 'tis pleadable becauſe 'tis a private Deed, and ſo need not be allowed in Eyre or in Courts of Record; for ſuch as are not to be pleaded unleſs allowed there, are only Grants of Franchiſes and Liberties from the King, but the Confeſſion of the Deed to be beyond Memory, and the conſtant Payment of 5 s. is a ſufficient Title to the Plaintiff if the Deed is not pleadable; and if it is, then 'tis a good Diſcharge that way.

And as to the Objection, That the Modus is payable to a wrong Person; there are many such which are not paid to the Parson of the Parish, but to Lay-men: But in this Case it doth appear that there was a Modus in the Prior, which being received till it came to the Crown, 'tis good, although now paid to others; so that for that Reason the Spiritual Court ought to be prohibited. And of that Opinion was all the Court; for if a Modus be payable to him who hath the Right of the Tythes, though it be not to the Parson of the Parish, 'tis well enough, especially where the Plaintiff (as here) alledgeth it to be Portio Decimarum belonging to the Prior, so that it cannot be said that the Parson hath not quid pro quo, for he had nothing at first.

This Composition was made with the Prior, and the Plaintiff is only to shew Payment to him, and to those who have his Right.

And as to the Date of the Deed, 'tis pleadable though Time out of Memory, because 'tis a private Deed; but Grants of Franchises and Liberties must be allowed in Eyre; and so is my Lord Rolls to be understood in his Abridgment: Whereupon Judgment was affirmed.

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