The THIRD PART OF Modern Reports,

BEING A

COLLECTION

OF SEVERAL

SPECIAL CASES,

IN THE

COURT

OF

King's-Bench:

In the Laſt Years of the Reign of K. *Charles* II. In the Reign of K. *James* II. And in the Two Firſt Years of K. *William* and Q. *Mary*.

TOGETHER WITH

The RESOLUTIONS and JUDGMENTS thereupon.

The Third Edition.

With the Addition of a great Number of new References never before printed.

Indignor quicquam reprehendi, non quia craſsè
Compoſitum, illepideve putetur, ſed quia nuper.
HOR. Epiſt. ii. 1.

Carefully Collected by a Learned Hand.

In the *SAVOY:*

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer* Eſq;) for T. Ward in the *Inner Temple-Lane.*

MDCCXXV.

TO THE PROFESSORS OF THE Common Law OF ENGLAND.

GENTLEMEN,

ALL Human Laws are either Natural or Civil.

The Law of Nature, which is alſo the Moral Law, is at all Times and in all Places the ſame, and ſo will always continue.

By Civil Laws, I mean ſuch as are eſtabliſhed by Human Policy, which with us are either Cuſtoms or Statutes; and theſe have alſo ſome Reſemblance to Natural Laws, becauſe they are for the moſt Part introduced by the concurrent Reaſon of Men; and Reaſon is the Law of Nature.

Cuſtoms are made by Time and Uſage, and do thereby obtain the Force of Laws in particular Places

and Nations; but no otherwiſe than upon Suppoſition that they were reaſonable at the Beginning. To theſe may be added ſuch Laws which are uſually called *Reſponſa Prudentum*, which, together with Cuſtoms, make a great Part of our Municipal Laws.

And becauſe 'tis impoſſible that future Evils ſhould be foreſeen by the Wiſdom of Mankind, ſo as to prevent them; therefore 'tis very reaſonable that poſitive Laws ſhould be inſtituted by the Legiſlative Power, which we call *Statutes*; and thoſe are either Commands or Prohibitions, always enacted upon ſome preſent Emergencies, and may be altered, or repealed according as the Manners of Men change, or as the Conjuncture of Affairs require for the publick Good.

I do not find this Nation was governed by any ſettled Laws from the Time of *William* called *the Conqueror*, 'till 9 *H.* 3. but by the irregular Power of the *Norman* King, and of thoſe who immediately ſucceeded him.

'Tis true, he ſwore to preſerve *approbatas & antiquas Leges Angliæ*; but 'tis as true, that the ſame Force which compelled our Forefathers to ſubmit, did likewiſe exact their Obedience to the Cuſtoms of *Normandy*, ſome of which we retain to this very Day.

It was then a Term of Reproach to be called *an Engliſhman*, as if that Denomination imported to be a Slave. This made the Leſſor Barons (that is, the Freeholders, or thoſe which had ſuch Lordſhips which are now called *Court-Barons*) take up Arms to regain their ancient Rights, and by that Means they obtained a Grant of their old Laws from ſome of

of those Kings, which was called *Magna Charta Libertatum*; but living in a tumultuous Age, they did never quietly enjoy those Liberties, for notwithstanding that Charter, many Infringements were made upon them, which they continued in Arms to defend, insomuch that in the seventeenth Year of King *John* they delivered to that King a Schedule of their ancient Customs in Writing, desiring that he would establish them by another Grant, which was done accordingly.

But this Charter was as little observed as the former; for the *Norman* Customs did still interfere with St. *Edward*'s Laws, and the People were miserably divided by those Innovations 'till *Anno* 9 *H.* 3. the Great Charter was established by *Authority of Parliament.*

From that Time those ancient Laws and Customs were had again in Repute; they were revived by that Grant, which was only declaratory of them; and because a more exact Obedience and Conformity might be given to them for the future, therefore did his Successor, the good King *Edward* I. encourage the Lawyers in his Time to reduce them into Order and Writing, which was done accordingly about the Middle of his Reign by *John Breton*, not the Bishop of *Hereford*, but a Judge of the *King's-Bench*; for, as Mr. *Selden* has observed, the Bishop of that Name died *Anno* 3 *E.* 1. And in that Book, which is now called *Breton*, the Statute of *W.* 2. is cited, which was made 13 *E.* 1. and therefore it could not be penned by the Bishop, unless he could quote a Statute which was not made 'till above ten Years after his Death.

 This

This is one of the first Systems extant of our Laws. 'Tis true, the Book call'd *The Mirror of Justice* was written before; but many Additions were made to it in this King's Reign by *Andrew Horn*, a learned Man in that Age.

There was likewise a small Tract then written by Sir *Ralph Hengham*, Lord Chief Justice of the *Common Pleas*, which only treats of Essoins and Defaults in Writs of Right, Writs of Assize and Dower, and therefore cannot be called a Body of our Laws.

I must admit that two such Books were written by the Lord Chief Justice *Glanvil* and Justice *Bracton*, the one in the Reign of *Henry the Second*, and the other in the Time of *Henry the Third*, but not one more of that Nature almost in the Space of two hundred Years; for I do not think the Book which the Lord Chancellor *Fortescue* wrote in the Reign of King *Henry the Sixth*, can be properly called *a System of Law*: It was published by him for these Purposes; first, to obviate the Design of two great Favourites, the Dukes of *Exeter* and *Suffolk*, who had used some Endeavours to introduce the Imperial Law, and therefore he shewed the Excellency of the Common Law above that: and in the next Place, it was intended to soften the warlike Temper of the young Prince *Edward*, by inclining him to the Study of those Laws by which he was to govern his People, and to instruct him in some Occurences therein.

The Abridgment by Baron *Statham* and the Year-Books are for the most Part made up with Cases then depending in the several Courts at *Westminster*, and with the Opinions and Resolutions of Judges,

 which

which I rather call *Responsa Prudentum* than *Systems of Law.*

The next Attempt of that Kind was made by Justice *Littleton* in the Seventh Year of *Edward the Fourth*, who hath taught succeeding Ages with great Judgment and Learning in his Profession; but 'tis now two hundred and thirty Years since he wrote, and many Alterations have been made in the Law since his Time.

I only mention these Things to shew the Necessity of new Books, and that the old Volumes are not so useful now as formerly, because many of the great Titles, of which they were composed, are now quite disused: They are mentioned by my Lord *Hale*, in his Preface to the Lord Chief Justice *Roll's* Abridgment, which I shall not repeat; and those very Titles make the greatest Part of Justice *Littleton's* Tenures.

But amongst all the old Tenures and Customs, I admire that of *Borough-English* should still remain amongst us: 'Tis a Custom contrary to the positive Laws of God, and which inverts the very Order of Nature: It was introduced amongst us in a barbarous Age, and by a very wicked and adulterous Practice after this Manner, *viz.*

The Lords of certain Lands which were held of them in *Villenage*, did usually lie with their Tenants Wives the first Night after Marriage: This Usage was continued after those very Lands were purchased by Freemen, who in Time obtained this Custom on Purpose that their eldest Sons (who might be their Lord's Bastards) should be incapable to inherit their Estates.

I could never yet find any tolerable Reaſon for the Suport or Continuance of this Cuſtom; but the Reaſon of it, which was given by a learned Lawyer, is, becauſe the youngeſt is leaſt able to defend himſelf; certainly he could never mean Ability of Body, becauſe 'tis frequently ſeen that the youngeſt Son is the Champion of the Family; and if he intended Ability in Eſtate, I would fain know what the elder Brother hath to defend himſelf, when by this unnatural Cuſtom the youngeſt is entitled to the whole.

I am not ſetting up for a Reformer of the Law, or the Abuſes of it; 'tis not a Work for a ſingle Perſon, but rather for a Committee of able and skilful Men of that Profeſſion appointed by the Government.

Neither will I object againſt the Practice of it as heretofore in the Year 1654. it hath been done, *viz.* That great Part conſiſts in known and apparent Untruths: That a *Common Recovery* ought not to be ſuffered in a Chriſtian Nation, becauſe 'tis *Fictio Juris*, which is an Abuſe of the Law: That when 'tis ſuffered at the Bar by the Tenant and Demandant, there is ſcarce a true Word in all the *Colloquium* amongſt the Serjeants; and that therefore an Eſtate Tail may more righteouſly be diſcontinued by a Feoffment with Livery than by the Statute *de Donis*.

This was the Language of thoſe Times: They found Fault likewiſe with that wicked Proceſs of *Latitat*, that it was framed upon a ſuppoſed Falſehood, by ſuggeſting of a Bill of *Middleſex*, ſued out which is never actually done; and that the Defendant could not be taken there, becauſe he is

ſculking about in another County, which is ſeldom or never true, and preſently afterwards he is *in Cuſtodia Mareſcalli*, which is as falſe as the reſt; and that *John Doe* and *Richard Roe* are Pledges *de Proſequendo*, when there are no ſuch Men in Nature, theſe Things, and many more I could name of the like Nature, I eſteem as trivial Matters, for no Injury is done to any Body by ſuch Formalities.

But when there is Danger of Corruption in that which was originally intended for the great Preſervative of our Liberties, I mean in Trials by ordinary Juries, it may be worth a great deal of Pains and Study to propoſe ſome effectual Means to prevent it, which is the chief End of this Preface, that you may at ſome Time employ your Thoughts in ſo uſeful a Piece of Service to your Country.

I ſhall only give you a ſhort Hiſtory of ſuch Trials, which is as followeth, *viz.*

There are Opinions, that ſuch Trials were had in this Nation by a Jury of Twelve Men long before the Time of the *Engliſh Saxons*, though the Writers in thoſe Ages give no Account of this Matter.

This is collected from that great Eſteem the *Chaldeans* had for the Number 12, becauſe of ſo many Signs in the *Zodiack*, thoſe People applying themſelves chiefly to the Study of Aſtrology.

That from them this Number came to the *Ægyptians*, and ſo to *Greece*, where *Mars* himſelf was tried for a Murder by a Jury of that Number, and acquitted by an Equallity of Votes, which is the firſt Trial mentioned in Hiſtory by a Jury of Twelve.

That the *Greeks* frequenting this Iſland, to export our Tin, became acquainted with the Natives, and in Proceſs of Time cohabited with them, who being a more polite People, did introduce this Way of Trials here; and 'tis very probable that ſome of our Cuſtoms came from them, becauſe ſome of our Law-Terms, as *Chirographer*, *Protonotary*, and many more, are derived from their Language.

After the Conqueſt of *Greece* by the *Romans*, new Laws were inſtituted by them to govern this Nation, which was then a Province to the Conquerors; and tho' ſuch Trials were then diſuſed, yet they had that Number in ſeveral ſubordinate Forms of their Adminiſtration.

Afterwards when that great Empire declined, when the *Britains* were forſaken by them, and left to the Depredations of the *Pagan Saxons*, then were other Trials introduced by that barbarous People, which was by *Battle* in doubtful Caſes, and when that could not be joined, then Purgations by *Ordeal* were allowed; Trials very agreeable to the uncultivated Temper of thoſe People.

Thus it continued 'till about Two hundred Years before the *Norman* Conqueſt; and then *Ethelbert*, an *Engliſh Saxon* King, received Chriſtianity, and by his Example the Diſpoſitions of the People were qualified into a more civil and peaceable Deportment; then were thoſe Trials for the moſt Part laid aſide, and that good King being at *Wantage*, (now a Market-Town in *Berkſhire*) did there by the Advice of his Counſel ordain, That Trials ſhould be had by Juries conſiſting of Twelve Men; which Law doth ſtill continue.

But notwithſtanding ſuch were then and are ſtill the beſt and moſt effectual Methods to diſcover the Truth, yet *Ordeals* were uſed here for above one Hundred and fifty Years after the Conqueſt; and then about the Beginning of the Reign of *H.* 3. were aboliſhed by Act of Parliament.

But Combats cantinued here 'till *6 Car.* 1. ſo difficult are the *Engliſh* to part with any ancient Uſage of their Anceſtors, tho' in no wiſe ſuitable to them who live in a more polite and learned Age.

Juries being thus confined to the Number twelve, it was afterwards enacted by the Statute of 2 *H.* 5. That all Jurors returned for Trials of Iſſues, *&c.* ſhould have 40 *s. per Annum.*

This Law continued for the Space of one Hundred and ninety Years, or thereabouts, and then the Wiſdom of the Nation conſidering that to be a very mean Eſtate for the Support of a Jury-man, a farther Proviſion was made by a Statute *Anno* 27 *Eliz.* That ſuch Jurors ſhould have 4 *l. per Annum.*

And thus the Law ſtood for above an Hundred Years, in all which Time this Kingdom hath been growing in Riches, its Trade is now extended to moſt Parts of the World. And as that hath been enlarged, ſo the Price of our Lands, the Value of our Rents, of our natural Commodities, and of all our Manufactures, have wonderfully encreaſed, ſo that a Man of 4 *l. per Annum* is now in ſo mean a Condition of Life, that he is no longer to be entruſted with the Tryal of an ordinary Cauſe, and therefore by the Statute of 4 *&* 5 *Willielmi & Mariæ*, ſuch Jurors are to have 10 *l. per Annum.*

Now upon a moderate Computation of the Price of Provisions and other Necessaries in 2 *H.* 5. and how they encreased in Value from that Time 'till the Queen's Reign, it may be reasonably affirmed, that 40 *s.* *per Annum* about the Time when that King lived, would bear an equal Proportion to 40 *l.* a Year in her Reign; and if so, it may as reasonably be said, that 4 *l.* *per Annum* in her Days would almost bear the like Proportion to 80 *l.* *per Annum* now, because of the vast Encrease of Riches by Commerce, and otherwise, in this last Age; and such an Estate doth now qualify a Man to be of the Grand Jury.

The 40 *s.* *per Annum* in King *H*'s Reign was esteemed a sufficient Estate to supply all the common Necessities for Life, Wheat being then sold for 12 *d.* *per* Quarter, and good *Gascoign* Wine for 40 *s.* *per* Tun. It was an Age when 20 Marks *per Annum* was a very good Allowance to maintain a Student at the *Inns of Court*, but too great a Charge for a Commoner to bear; and therefore the Lord Chancellor *Fortescue* tells us, That none but the Sons of Noblemen *in Hospitiis illis Leges addiscebant.*

The Jurors in those Days were all Knights, but are now mean and illiterate Persons; for 'tis a very poor Estate which qualifies them for that Service. How can Matters of Fact, which often requires great Examination, be tried by Men of such narrow Capacities which are generally found amongst Men of 10 *l.* *per Annum*, for so it will be so long as the Degrees of Fortune make such a vast Inequality amongst us.

Experience teacheth us, that Men of ſuch low Fortunes, and whoſe Education is generally amongſt the Beaſts of the Plow, have not the ſame Senſe of Honour and Virtue with Men of more elevated Qualities and Converſation; there muſt be Danger of Subornation and Perjury among ſuch Jurors: And what will the villanous Judgment in Attaint ſignify? I mean in reſpect to their Eſtates, *viz. That their Goods be confiſcate, their Lands and Poſſeſſions ſeiſed into the King's Hands, their Houſes demoliſhed, their Woods felled, and their Meadows plowed:* This is a very dreadful Sentence to a Man of a good Eſtate, which by the very Form of this old Judgment every Juror was ſuppoſed to have; but 'tis an empty Sound to a Man of 10 *l. per Annum*, who cannot have all thoſe Poſſeſſions, and but a very ſmall Proportion of either.

It may be therefore thought neceſſary, that a farther Proviſion be made, That none ſhould be impanelled to try ſuch Iſſues but Men of 40 *l. per Annum*, or at leaſt ſuch as like the Jurors in Attaint, *qui multa majora habent Patrimonia*, than what will qualify a Petty Juror at this Day.

Gentlemen,

The following Collection is the Product of your Labours: It was borrowed from you at the Bar, and 'tis but juſt to reſtore it.

I know Men have generally very faint Inclinations to approve any Writings beſide their own, and ſeldom declare in Favour of a Book till they hear what

Succeſs it has in the World; and even then are biaſs'd by the Multitude, who very often condemn without Reading, or read without Underſtanding.

I have heard it often objected (though I am ſtill to learn upon what Attempt), That we have too many Printed Books of the Law already, and that it was more certain and intelligible when fewer Volumes of it were publiſhed.

I muſt confeſs, ſome of the late Reports are collected with very little Judgment.

But ſtill there is a Neceſſity of new Books, tho' not of ſuch; for I would feign know how any Lawyer can now be able to adviſe his Client with the Help and Direction only of the Old Books; 'Tis true, we have but few of them; but 'tis becauſe in former Ages all Cauſes (where the Thing in Demand did not exceed 40 *s.*) were tried either in the County Court, in the Hundred Court, or in the Court Baron of the Manor: In thoſe Days the great Courts of Record at *Weſtminſter* were not ſo full of Suitors as now.

When *Bracton* wrote, the Juſtices in *Eyre* (who had the ſame Power with our Juſtices of Aſſiſe) went their Circuits but once in ſeven Years; and a long Time afterwards, even in the Reign of King *Henry the Eighth*, the Judges would often riſe from the Bench in Term-time without hearing a Motion, or trying of a Cauſe; and I think the Practice did not much encreaſe till this laſt Age; for *Anno* 10 *Eliz.* there was but one Serjeant at the *Common Pleas* Bar for a whole Term together, and that was Serjeant *Bendloes*; and I do not read that he had any

Buſineſs there; Nay at that Time the Court of *Chancery* had no greater Share of Practice than the Courts of the Common Law; for in the Two and twentieth Year of King *Henry the Eighth*, Sir *Thomas Moor* being then Lord Chancellor, did uſually read all the Bills which were exhibited into that Court; but Buſineſs is now ſo much encreaſed, that all the Council can ſcare find Time enough to read the Briefs of ſuch Bills which are filed every Term.

But the Law hath now its Reſidence in *Weſtminſter-Hall*, moſt Cauſes of Value are there determined, and the great Number of Country Attornies in our Days, who (according to my Lord *Coke*'s Opinion) by daily multiplying Suits have ſo wonderfully encreaſed the Buſineſs of thoſe Courts, that it ſeems very neceſſary that the judicial Determinations there ſhould by new Books be tranſmitted to future Ages.

And tho' ſome Caſes in this Collection, which were adjudged in the late Reign, may not have the Authority of Precedents, becauſe they taſte a little of the Times wherein the Adminiſtration of Juſtice was not ſo nicely regarded, as the Diſpenſation of ſuch Things which were then thought Political Rights, yet the Reader will find ſome good Arguments of Learned Men then at the Bar who endeavoured to ſupport our ſinking Laws.

I do acknowledge, that if Men were juſt, honeſt and impartial to themſelves and others, there would be no Occaſion for Books of this Nature; and becauſe they are not ſo, I will not make an Apology for the Publiſhing of this. I think the Book (being done

done with ſo much Care) may be of good Uſe to the Profeſſors of the Law; but ſubmit it to your Judgments. I confeſs, I am led by my Profeſſion to Affairs of this Nature, though my Circumſtances diſingage me from the Suſpicion of being an Author.

Vale.

A

TABLE

OF THE

CASES

Contained in the THIRD PART of

Modern Reports.

A.

ALdridge *versus* Duke, 110
Ashcomb *versus* Inhabitants Hundred de Eltham, 287
Ayres *versus* Huntington, 251

B.

BAxter's *Case*, 68
Baldwyn *versus* Flower, 120
Ball *versus* Cock, 140
Barker *Mil. versus* Damer, 336
Barnes *versus* Eggard, 39
Batscomb's *Case*, 265
Beak *versus* Tyrrwhite, 194
Banson *versus* Offley, 121
Bishops, *their Case*, 212
Bisse *versus* Harcourt, 281
Blaxton *versus* Stone, 123
Boyle *versus* Boyle, 164
Boson *versus* Sandford, 321
Bowyer *versus* Lenthal, 190
Bradburn *versus* Kennerdale, 318
Brason *versus* Deane, 39
Brett *versus* Whitchcott, 96
Bridgham *versus* Frontee, 94

Broad

Broad *versus* Piper, 268
Burgh's *Case*, 67

C.

CAlthrop *versus* Axtel, 168
Capel *versus* Saltonstal, 249
Carter *versus* Dowrish, 226
Chapman *versus* Lamphire, 155
Clarke *versus* Hoskins, 79
Claxton *versus* Swift, 86
Coghil *versus* Freelove, 325
Cole *versus* Knight, 277
Cross *versus* Garnett, 261

D.

DAvies's *Case*, 246
Dawling *versus* Venman, 108
Dixon *versus* Robinson, 107
Dobson *versus* Thornigrove, 112
Doe *versus* Dawson, 274
Dorrington *versus* Edwyn, 56

E.

ECCleston *versus* Speke, 258
Evans *versus* Crocker, 198

F.

FItzgerald *versus* Villiers, 236
Fisher *versus* Wrenn, 250
Franshaw *versus* Bradshaw, 235
Friend *versus* Bouchier, 81

G.

GRandison *Lord*, *versus Countess of* Dover, 23
Grantham, *Mil. his Case*, 120
Godfrey *versus* Eversden, 264
Gold *versus* Strode, 324
Goring *versus* Deering, 156

H.

HAcket *versus* Herne, 134
Hall *versus* Wybank, 311
Hamson, *Serjeant*, *his Case*, 89
Hanchet *versus* Thelwell, 104
Harman *versus* Harman, 115
Harrison *versus* Austin, 237
Harrison *versus* Heyward, 295
Hebblethwait *versus* Palmes, 48
Hexam *versus* Coniers, 238
Heyward *versus* Guppee, 191
Hicks *versus* Gore, 84
Hyley *versus* Hyley, 228
Hinton *versus* Roffey, 35
Hitchins *versus* Bassett, 203
Hobbs, *qui tam*, *versus* Young, 313
Hoile *versus* Clerke, 218
Holcomb *versus* Petit, 113
Holloway's *Case*, 42
Horners Company *versus* Barlow 158

I.

JAckson *versus* Warren, 78
Jefferies *Mil. versus* Watkyns, 161
Jennings *versus* Hankeys, 114
Joyner *versus* Pritchard, 103

K.

KEllow *versus* Rowden, 253
King *versus* Dilliston, 221
Knight *versus* Cole, 277
Knight *Mil' Case*, 117
Kingston *versus* Herbert, 119

The King *ver.*
- Ayloff, 72
- Armstrong *Mil'* 47
- Atkyns *Mil'* 3
- Barns, 42
- Baxter, 68
- Beale, 124
- Bunny, 238
- Cony *&* *al.* 37
- Colson *&* *al.* 72
- Dangerfield, 68
- Darby, 139
- Fairfax, 269
- G-----l, 97
- Griffith, 201
- Grimes *&* *al.* 220
- Hetherfel, 80
- Hinton *&* *al.* 122
- Hockenhal, 167
- Inhabitants of *Malden*,
- Johnson, 241
- Kinsmill, 199
- Lenthal, 143
- Marsh *&* *al.* 66
- Plowright *&* *al.* 94
- Rosewell, 52
- Saloway, 100
- Sellars, 167
- Silcox, 280
- Sparks, 78
- Warden *of the* Fleet, 335

L.

LAngford *versus* Webber, 132
Lambert *versus* Thurston, 275
Lea *versus* Libb, 262
Leigh's *Case*. 332
Lechmere *versus* Thorowgood, 236
Lewkner *versus* Mountague, 216
Lidcott *versus* Willows, 229
Lock *versus* Norborne, 141
Lutwich *versus* Piggot, 268

M.

MAcclesfield *Earl*, 41
Malloon *versus* Fitzgerald, 21
Marsh *versus* Cutler, 41
Mason *versus* Beldham, 73
Mather *versus* Mills, 252
Matthews *versus* Cary, 137
Mayor and Commonalty of *Norwich* *versus* Johnson, 90
Merchants Adventurers *versus* Rebow, 126
Mordant *versus* Thorold, 281
Moss *versus* Archer, 135

N.

NEwton *&* *al.* *versus* Stubbs, 71
Newton *Mil'* *versus* Creswick, 165
Newton *versus* Trigg, 327
Norwich Mayor, *&c.* *versus* Johnson 90

O.

OBrian *versus* Ram, 170
Okel *versus* Hodgkinson, 99
Osborn *versus* Steward, 230

P.

PAine *versus* Partrich, 289
Palmer *versus* Allicock, 58
Panton *versus* Earl of *Bath*, 227
Parkinson's *Case*, 265
Pawley *versus* Ludlow, 87
Peak *versus* Mather, 103
Perkins *versus* Titus, 132
Pit *versus* Brereton, 70
Plimouth Countess *versus* Throgmorton, 153
Pool *versus* Trumbull, 56
Price *versus* Davies, 152
Prince's *Case*, 295
Proctor *versus* Burdet, 69
Prodgers *versus* Frazier, 43
Proud *versus* Piper, 268
Prowse *versus* Wilcox, 163
Putt *versus* Rawsterne, 1

R.

REves *versus* Phelpes, 264
Reeves *versus* Winnington, 45
Roberts *versus* Pain, 67
Rodney *versus* Strode, 101
Roe *versus* Clargis *Mil.* 29
Rowsby *versus* Manning, 330

S.

SAvier *versus* Lenthall, 273
Shipley *versus* Chappel, 232
Shotter *versus* Friend, 283
Shuttleworth *versus* Garnet, 239
Smith *versus* Goodier, 36
Smith *versus* Peirce, 195

T.

TAyler *versus* Brindley, 136
Thirsby *versus* Helbott, 272
Thompson *versus* Leach, 296
Idem versus eundem, 301
Tippet *versus* Hawkey, 263

U.

UPton *versus* Dawkin, 97

W.

WHitehal *versus* Squire, 276
Wytham *Mil' versus* Dutton *Mil.* 159
Woodward's *Case*, 211

Y.

YArmouth Earl *versus* Dorrel, 75
Young *versus* Inhabitants of *Tottenham*, 258

DE

Term. Sancti Mich.

Anno 34 Car. II. in Banco Regis, 1682.

Sir *Francis Pemberton* Chief Justice.
Sir *Thomas Jones*, Sir *William Dolben*, Sir *Thomas Raymond*, } Justices.

Putt *versus* Rawstern *Mil.*

AN Action of Trespass was formerly brought for taking of Goods, &c. and upon not guilty pleaded, the Defendant had a Verdict.

Trespass is no Bar to Trover for the same Goods. 2 Mod. 318. Raymond 472.

The same Plaintiff now brought Trover against the same Defendant for those Goods.

The Defendant pleads in Bar the Judgment in the former Action of Trespass; and upon a Demurrer, the Question was;

Whether a Judgment in Trespass vi & Armis may be pleaded in Bar to an Action of Trover for the same Goods?

This Case was argued by Mr. Saunders for the Plaintiff; and by Mr. Pollexfen for the Defendant.

And to prove that it was no Bar, a Case was cited to be adjudged in the Common Pleas in the 20th Year of King James, which was an Action of Trover and Conversion of one Hundred Sheep: The Defendant pleaded a former Judgment in Trespass brought against him, quare cepit & abduxit those Sheep, and that the Plantiff in that Action recovered 2 d. Damages, and that both Actions were for the same Thing.

Lacon *versus* Bernard. Cro. Car. 35. Hutt. 81. Stile 202.

The Plaintiff replied, That the two Pence Damages were recovered for the Chasing, and not for the Value of the Cattle; and upon a Demurrer had Judgment: For the Smalness of the Damages implies it was for the Chasing, and it shall therefore be intended that he had his Cattle again, and that the Conversion was afterwards.

Ferrer's Case, 6 Co. 7. Cro. Eliz. 676. Co. Ent. 39. Cro Jac. 15.

My Lord Coke in Ferrers's Case tells us, that a Recovery by Verdict, Confession, or upon a Demurrer in a personal Action is a good Bar to an Action of the like Nature, and for the same Thing; but that must be understood where the same Evidence will maintain both the Actions.

Justice Croke reports the same Case to be ended by Arbitration; but that it was the Opinion of my Lord Anderson and Justice Glanvil, that Trover and Trespass are Actions of different Natures, and one may be brought where the other cannot be maintained; as upon a Demand and Denial Trover will lie, but not Trespass vi & armis, because the Taking was not tortious.

And therefore it may be well intended that when the Plaintiff brought Trespass he was mistaken in that Action; and being in the wrong, was barred: But that will be no Bar where a right Action is brought; as if I deliver a Bond to another for Advice, who refusing to re-deliver it, I bring an Action of Trespass, and am barred either by Verdict or Demurrer, yet I may bring Detinue.

Pro Def.

Trespass and Detinue are not the same Actions, and therefore a Judgment in one shall be no Bar to the other; but where two Actions are brought for one Thing to be recovered, in such Case a Recovery in one shall be a Bar to the other.

There is no substantial Difference between Trespass and Trover; for the Disposing of the Goods in the one Case is the same with the Conversion in the other, the Taking vi & armis and likewise the Conversion are both tortious, and therefore either Action may be well brought.

But for the Reasons given by the Plaintiff's Counsel, he had Judgment by the Opinion of the Chief Justice and the other two Judges, Jones and Raymond; of which Justice Dolben did very much doubt.

Dominus

Dominus Rex *versus Sir* Robert Atkins *Knight of the* Bath, *& al'.*

AN Indictment was found at the Quarter-Sessions held for the County of the City of Bristol, 4 Octob. 33 Car. 2. against Sir Robert Atkins Knight of the Bath, and Recorder and Senior Alderman of the said City, Sir John Knight Alderman, John Lawford Alderman, and Joseph Creswick Alderman; setting forth. The County of the City of *Bristol.*

1. That King Henry the Seventh, by his Charter dated 17 Decemb. 15 Regni sui, granted to the Mayor and Commonalty of the Town of Bristol (the now City of Bristol being then a Town) and to their Successors, That if any shall procure, abet or maintain any Debate and Discord upon the Election of the Mayor, or other Minister, he shall be punished instantly by the Mayor and two Aldermen, to be chosen and named by the Mayor, after the Quantity and Quality of his Offence, according to the Laws and Customs of the Realm.

2. That according to the Privileges granted by Queen Elizabeth to the Mayor and Commonalty of the said City, and their Successors, by Charter dated 28 June 23d of her Reign: After which Time (as the Indictment sets forth, the said Town was made a City) there have been, or ought to have been, from the Time of the making the said Charter, twelve Aldermen, whereof the Recorder was to be, and now is, one.

3. That according to the Privileges, so as aforesaid granted, by all the Time aforesaid (which is from the Time of the Charter) after the Death of every Alderman, the Mayor and the rest of the surviving Aldermen, & eorum major Pars ad Summonitionem of the said Mayor, being called together, have accustomed to choose another Person of the circumspect Citizens to be an Alderman in the Place of him so deceased; and the Mayor and Aldermen (by the same Privileges so granted) have been, and ought to be, Justices of the Peace for the said City.

4. That continually after the Time of the said Charter of Queen *Elizabeth*, the Recorder and the rest of the Aldermen, were and ought to be of the Privy Council (de privato Concilio) of the Mayor, in particular Cases concerning the Government of the City, whensoever the Mayor shall call them together.

5. And such Privy Council (by all the Time aforesaid, which still is from the said Charter of Queen Elizabeth) have not accustomed,

customed, nor ought not to be called together to transact any Business belonging to that Council, unless by the Summons and in the Presence of the Mayor.

That after the Death of one Sir John Lloyd, being at his Death an Alderman of the said City, the said Sir Robert Atkins then being Recorder, Sir John Knight, John Lawford Esquire, and Joseph Creswick, being all Aldermen then of the City, and free Burgesses of the City, to make Debate and Discord upon the Election of an Alderman in the Place of the Alderman so dead, 8 March, 33 Car. 2. in the Parish and Ward of St. Andrew within the said City, did conspire to hold a Privy Council of the Aldermen of the said City, and therein to choose an Alderman sine Summonitione, & in Absentia, & contra Voluntatem Richardi Hart Militis, then being Mayor of the City. And in Pursuance of their said wicked Conspiracy, the Day and Year aforesaid, entred by Force and Arms into the Tolzey, and in the Chamber of the Council of the Mayor and Commonalty of the said City, commonly called The Council-House, and there riotously, *&c.* did assemble, and the same Day and Year they the said four Aldermen, una cum aliis Aldermannis, (which must be two more Aldermen at the least) which makes six, (and there were but five more in all then in Being, taking the Mayor in) the said rest of the Aldermen, not knowing their Purposes, held a Privy Council of Aldermen, and then and there as much as in them lay, chose Thomas Day for an Alderman in the Place of Sir John Lloyd, sine aliqua Summonitione per prædictum Richardum Hart, then Mayor, to meet, and in his Absence, and against his Will.

And they farther caused to be entred in the Common Council Book the said Election, as an Order of the Privy Council; in which Book the Acts of the Mayor and Aldermen in their Privy Council are commonly written; from whence great Discord hath risen, &c.

Which Indictment was tryed at the Assises at Bristol, by Nisi Prius, and the Defendants found guilty; and thereupon Sir Robert Atkins, one of the Defendants (having then lately, before this Case, been one of the Judges of the Common Pleas, but then discharged of his Place after eight Years Sitting there secure) came into the Court of King's Bench, and in Arrest of Judgment argued his own Case, not as Counsel, nor at the Bar, but in the Court in his Cloak, having a Chair set for him by the Order of the Lord Chief Justice, and said as followeth;

1. The

1. The Indictment in the first Place mentions the Letters Patents of King H. 7. made to the Mayor and Commonalty of Bristol, that the Mayor with two Aldermen (such as he should choose) should by their Discretions, according to Law, punish such as should make Debate and Discord at the Elections of Officers.

They have not pursued this Course against us, but gone the ordinary Way of Indiament, and therefore I shall not need to speak to it.

2. The Indiament in the next Place proceeds to mention Letters Patents of Queen Elizabeth, granted to the Mayor and Commonalty in the 23d Year of her Reign, which provides, That there shall be twelve Aldermen, and how upon the Death or Removal of an Alderman a new one should be chosen, that is, by the Mayor and the surviving Aldermen, and the greater Number of them, being call'd together (as the Indiament suggests) by the Summons of the Mayor.

The whole Indictment, and the Offence we are charged with, being grounded upon these Letters Patents, I shall apply my self to speak to it; for our Crime is in the undue Electing of an Alderman, namely not being summoned together for that Purpose by the Mayor, and doing it in his Absence.

I must desire the Court to observe in what Manner the Mention of these Letters Patents is introduced.

The Matter and Question before us is concerning the Election of an Alderman for the City of Bristol, which concerns the very Being, and Succession, and Continuance of the Corporation: Nothing can more nearly concern it.

The Defects I observe in the Frame of this Indictment are these:

1. It does not so much as say or alledge, that Bristol is antiqua Villa, or antiqua Civitas, or that there was, or yet is, any Corporation at all there, nor what it does consist of, (if there be any) nor by what Name they are called; whether there ought to be a Mayor or not; whether their Corporation be by Charter, or Prescription.

And this Court cannot judicially take Notice that there is any Corporation there, or what it is, unless it had been shewn.

Now if there be no Corporation, and no Mayor of right, then our Meeting to choose an Alderman without his Summons, and in his Absence, is no undue nor irregular Proceeding: It cannot appear to the Court whether the Mayor's Summons and Presence at the Election be necessary or not.

Now in all legal Proceedings that any Way concern a Corporation, it is constantly averr'd and alledged that there is a Corporation, and what it is, and how erected; and the least that can be in any Case is, to say that it is antiqua Villa, or antiqua Civitas, where the Corporation extends to a Town or City which make any Prescription, or set forth any Custom.

Thus we find it in the Case of the City of York, Dyer 279. plac' 10. in the Case of a Custom of Foreign bought and Foreign sold, They prescribe in being a Corporation. So in Latche's Rep. 229. Harris's Case.

In James Baggs's Case, 11 Co. f. 94. A Case of a Writ of Restitution to restore a Capital Burgess to his Place and Office of a Capital Burgess in Plimouth; the Writ was directed to the Mayor and Commonalty of Plimouth; the very Words of the Writ suppose a Corporation, and shew what their Name is.

The Return thereupon by the Mayor and Commonalty is,

That Queen Elizabeth granted to the Mayor and Commonalty, that the Mayor and Recorder should be Justices of the Peace, and that James Baggs was a Capital Burgess, and did misdemean himself towards the Mayor, and thereupon he was disfranchised.

In the printed Margin of that Case, (which I suppose is my Lord Coke's own Opinion) it is said, that in their Return they first ought to prescribe, That there hath been a Corporation of a Mayor and Commonalty Time out of the Memory of Man; and not to begin with the Mention of a Grant made to a Corporation, as the Indictment does in our Case; and not shew the Original and Erecting of it, either by Prescription or Charter. And Mr. Trotman, (a learned Man) in his Abridging of James Baggs's Case, bids his Reader observe this Marginal Note.

Yet in that Case the Return was but in Answer to the Writ of Restitution, which Writ it self admitted there was a Corporation, and directs the Writ to them by Name; yet by the Opinion there, it was a Defect in the Return not to shew that they were by Prescription.

And if it be necessary upon a Return of a Writ of Restitution to set forth how they came to be incorporated; to which Return there can be no Traverse taken, nor no Pleading to it, as has been held by some; how much more in such a Case as ours of an Indictment, which must be traversed and pleaded to, and therefore ought to be more exact.

That was in a Case of removing of a chief Member, (a Capital Burgess of a Corporation); ours is in a Case of the choosing in of a chief Member (an Alderman) into a Corporation; so that ours is much resembling that Case in that Respect. 2. Ano-

2. Another Thing wherein the Indictment is faulty, is this, viz. In the Manner of Introducing the Mention of these Letters Patents of Queen Elizabeth, upon which the Indictment is grounded, and upon the Construction of which the Case depends.

The Indictment does not say positively and directly that Queen Elizabeth made or granted any Letters Patents to the Mayor and Commonalty of Bristol, That there should be twelve Aldermen, and for the appointing how they should be chosen; (upon which our Case arises) nor does it so much as say (continetur) which would not have been enough neither, but it introduces the Mention of those Letters Patents no otherwise than by these Words, viz. Secundum Privilegia concessa per Literas Patentes, &c. There were or ought to be twelve Aldermen Et secundum eadem Privilegia sic ut prefertur concessa per totum tempus prædictum, after the Death of an Alderman, the Mayor and the surviving Aldermen, & eorum major pars ad summonitionem ejusdem Majoris convocati eligerunt & eligere consueverunt, &c.

Now this is no positive and direct Shewing that there ought to be any Aldermen, nor how they should be chosen; but it is no more than the Opinion and Conceit of the Jury that found the Indictment upon their Perusal of the Letters Patents, which were produced in Evidence to them; the Jury take it by way of Collection out of a Record, of which they are no proper Judges.

And this being in an Indictment which is the King's Declaration, and ought to be very exact and certain, and which is in a criminal Proceeding to which the Parties must plead, and if convict, are liable to Fine and Imprisonment; the Law is more curious in this, than where Parties do agree civiliter.

That all criminal Proceedings must be very exact and certain, is proved by this, (viz.) None of the Statutes of Jeofails would ever help them but by express Words except and exclude them from the Benefit of them.

It is said in Long's Case, 5 Co. 120, 121. That, If in Declarations between Party and Party for Lands or Goods, there must be great Certainty express'd *a fortiori*, says that Case, must it be so in Indictments, which are the King's Counts or Declarations to which the Party shall answer, they ought to be full and not taken by Intendment, or to be by Way of Argument; so it is held in Leeche's Case, Cro. Jac. 167. and in Sir William Fitz-William's Case, Cro. Jac. 19, 20.

Object.

Object. If it be objected, That the Indiament is but the Finding of a Jury, who are the Lay Gentz, (as we call them) and they know not the Forms of Law.

Ans. The Fact indeed is found by the Jury, but the constant Course is to have the Jury consent to mend the Form, and the King's Counsel are advised with in the drawing of it, and after 'tis found; and sometimes the Judges peruse it.

The Indiament proceeds on, and says, That continually after that Time, (which must refer to the Date of the Letters Patents of Queen Elizabeth) the Recorder and the rest of the Aldermen were and ought to be de Privato Concilio.

(I have been Recorder there above these One and twenty Years, and never knew my self to be a Privy Councellor till now.)

But the Indiament (unhappily) says, de Privato Concilio Majoris; there the Word Majoris (as big as it is) is but Terminus diminuens, it makes us but Privy Counsellors to the Mayor. But this is a Mistake too; for the Recorder and Aldermen are not a Privy Council to the Mayor, but the Mayor and they are a Council to the City. The like to this too appears in the printed Margin of James Bagg's Case.

The Clerk who drew this Indictment, or the Counsel, who ever it was, thought they could not exalt the Mayor of Bristol high enough, unless they made him a Prince, and furnished him with a Privy Council, and to fill the Kingdom again with a great many Reguli, or Petty-Kings, as it was amongst the Britons before the Coming of the Romans.

It is Part of the Misdemeanour charged upon James Baggs, that he did Ironically say to the Mayor of Plimouth, You are some Prince, are you not? Now to say it to a Mayor in good Earnest, as this Indictment does, I take to be much worse.

3. The Indictment having made the Recorder and Aldermen to be of Mr. Mayor's Privy Council, it goes on and lays it down for Law or Usage, That by all the Time aforesaid (which is still from the Date of the Patent of Queen Elizabeth) such Privy Council have not accustomed, nor ought not to be called together, to transact any Business that belongs to the Council (we must suppose the Choosing an Alderman is such Business) unless by the Summons and in the Presence of the Mayor.

But upon what Ground does the Indiament lay this down for a Rule? Is it because the Letters Patents so direct? If so, I

agree

agree it is a clear Case, for the Letters Patents that create a Corporation may mould and frame, and form its own Creature as it pleases.

But then the Indictment ought to have alledged it positively, that the Letters Patents do so provide, which it does not; but the Indictment speaks it by a kind of Implication and Uncertainty, but not positively, nor directly: It says, that continually after the Time of the Charter, they have not accustomed to meet without the Mayor's Summons, and in his Presence.

It may be they rely upon the Usage and Custom for it. This can be no legal Custom or Prescription, for we know the Head and Original of it, which is but from the 23d Year of Queen Elizabeth; so that 'tis not like the River Nile.

If they say the Usage shall interpret the Charter.

I answer: Usage may expound very antient Charters, where the Words are obsolete and obscure, and may bear several Senses: But this Charter has not so much as ambiguous Words, nor any Thing that can bear such a Construction.

But at last we shall be told, That the Common Law does operate with the Charter, and requires the Mayor's Summons and Presence to the Choice of an Alderman, and also in all such like Cases.

This is now the only Point to be spoken to, and I shall apply my self to it.

I think it will be granted, That the Mayor has no Negative Voice in the Election of an Alderman, (as great a Prince, and as absolute as the Indictment will make him;) He has but one single Voice, and if the Majority of the Votes be against his Vote, the Majority must carry it against the Mayor.

The Words of the Charter do no more require the Mayor's Summons and Presence, than it does that of the senior Alderman.

The Mayor is named in the Grant, out of Necessity, it being Part of the Name of the Corporation to whom the Grant must be made. He is named out of Conformity too, he many times being none of the Aldermen, and therefore could not be included in the naming of Aldermen, but must therefore be named by himself. And besides, I agree it is due to him out of Reverence. They usually say, He represents the King, but that is but a Notion, and a Compliment to him: He has no more Power than an Alderman, who is a Justice, and a Judge of the Gaol-Delivery as well as the Mayor.

If the Charter had intended, That there can be no chusing of an Alderman but by the Summons of the Mayor, and in his

Presence, it would surely have made him of the Quorum, in that Clause that provides for the Election of an Alderman; but that it does not: The only Quorum is not of the Sort of Persons, but of the Majority of the Electors, major pars eorum (having mentioned before, the Mayor and Aldermen.)

Nay, there is something to be observed out of the Charter it self, which proves that the Queen intended no such Thing; and that is, there are other Clauses in the same Charter to other Purposes, that do expressly appoint Quorums, and the Mayor and Recorder are made to be of the Quorum, which proves, That where it is not so expressed, the Mayor himself is not of the Quorum; and this indeed led us to that Opinion and Construction, that we proceeded to make our Election upon it: A Charter in one Clause of it, is best expounded from other Clauses in the same Charter.

In the Clause that gives them Power of Goal-Delivery, the Mayor and Recorder are both of the Quorum.

So in the Swearing of a new Alderman, it is expressly provided, that it shall be done before the Mayor and Recorder both.

In the Clause that gives them Power to try Felons, and to keep a Sessions of the Peace, it appears by the express Words, That it may be done in the Mayor's Absence and without him; for there the Quorum for that Purpose is, The Mayor and Recorder, or one of them. So that a Sessions may be held without the Mayor; yet I would never do it if I could prevail with the Mayor to join with us, as we earnestly endeavoured Time after Time to do in the Case before you, for the Chusing of an Alderman, but he utterly refus'd us at four several Times, at some good Distance of Time.

Object. If it be said, that the Power to elect an Alderman is given to the Mayor and Aldermen, or the major Part of them; and so the Mayor by himself is particularly and expressly named by the Name of his Office; and therefore is of the Quorum without any other express Making of a Quorum.

Resp. This I have already spoken to; (viz.) upon what Account he is so named, and it could not be otherwise.

But that this does not so make him of the Quorum in it, is manifest by this, that those other Clauses where there are express Quorums of Persons, tho' the Mayor be there likewise mentioned in the Beginning of the Clauses, yet he is repeated over again, when they come to make him of the Quorum: This shews the Naming him before by his Office did not do it; if it

did, the Naming of him again in the Quorum will be a Tautology, and a vain Repetition.

But perhaps it will be said, It belongs to the Office of a Mayor at the Common Law, to summon the Corporation (and amongst the rest the Aldermen) when he sees there is Occasion, and he must as Mayor be present among them, or nothing can be done.

Let us examine the Truth of this.

Those that advis'd the Indictment were not of this Opinion; and I heard it was said at the Trial, that it was drawn with good Advice; for the Indictment it self challenges this Right to the Mayor upon another Ground.

It would intimate as if the Words of the Charter gave it him, as I have already observed: which says, that secundum Privilegia concessa est: therefore they thought it was not his Due at the Common Law.

1. For his Name of Mayor, that imports no such Thing: He is Major, that is, the Greater, the more Eminent; this notes his Pre-eminence in Respect and Reverence, but gives him little more of Power than what the rest of the Aldermen have.

The like Office among the old Romans was the Prætor, which (as Minsheu says) comes from Præ-itor, a Præ-eundo; he does præire, or præcedere, or præsidere. He goes first, and sits uppermost, but it gives him no more Power. But the Mayor in our Case would neither lead nor drive.

But if there can be no Election of an Alderman without his Summons and Presence, and if he be wilful, (as the Mayor in our Case was) he is not only Major Maximus, but Dominus fac totum, (as the vulgar Saying is) or Dominus faciens totum.

The Twelve Aldermen without him will be but so many Cyphers: The Mayor will be the Great Figure, and the Aldermen will signifie only in Conjunction with him. We may then say of every Alderman as the one Grecian Captain said of the other of Ulysses, Nihil est Diomede remoto.

Mr. Mayor will be that which the Logicians call, Causa sine qua non, quæ per se nihil facit, sed tantum esse aliquid sine qua reliquæ causæ non faciunt. So much for his Name and Title.

Then for the Office it self. That does not require his Summons nor Presence in all the Meetings of the Aldermen; for the Business of the Corporation, it is not incident nor essential to his Office of Mayor by the Common Law.

The Common Law looks upon him as the Head or Chief of a Corporation; but he is no Officer of the Common Law, to whom the Common Law limits or prescribes any Duty, as it does to a Judge, a Sheriff, a Conservator of the Peace, a Coroner, or a Constable: These are all Offices at the Common Law, and the Common Law instructs them in their Power and Duty.

But the Mayor being the Head of a Corporation, and a Corporation having its Essence by Charter or Prescription (which presupposes a Charter) he has no Power but what the Charter expressly gives him. The Common Law takes no farther Notice of him.

Let us examine the Ground and Nature of a Corporation, and there we shall find the true Nature and Office of a Mayor, or any other Head, (for 'tis all one).

The true Ground and Original of Corporations in Cities and great Towns is this: Those are generally the Staples of Trade and Merchandize; and Trade (as is said in the Case of the City of *London*, 8 Co. 125. a.) cannot be maintained without Order and Government. And therefore the King, for the Publick Good, may erect Gildam Mercatoriam, a Fraternity or Society, or Incorporation of Merchants, to the end that good Order and Rule shall be by them observ'd, for the Encrease and Advancement of Trade and Merchandizing.

Suppose the King should by his Charter incorporate a Town, by the Name of Mayor and twelve Aldermen, and should not set out their Duty and Office:

What Power would the Law give them in that Case? They would have no Power as Conservators of the Peace, or as Justices of the Peace: They could neither fine or imprison. If they should take upon them to meddle in these Matters, without express Power given them by the Words of the Charter, it would be Sutor ultra Crepidam.

Therefore Charters usually add these Powers by express Clauses to those Purposes, and make the Mayor a Justice of Peace, or a Judge of Gaol-Delivery: But then he acts in those Powers not Quatenus Major, nor eo Nomine, but because of the express Power given him, as it might have done to any other Man.

The Uniting the Powers in one Person does not confound the several and different Capacities of that Person.

That the Charter gives the only Rule in these Cases, and that a Corporation is a meer Creature of the Charters that does constitute it, and gives it its Being; and therefore the Bounds and Limits of its working appears by this:

Suppose that neither this nor any other Charter had given to this Corporation of Bristol any Power to choose a new Mayor or new Aldermen upon the Death of the old, they could then have made no new Election, but when the Mayor and Aldermen had died, the Corporation had been dissolved. The Charter that gives them their Being, must provide for their Continuance and Succession.

Thus it is held in the Case of the Corporation of *Dungannon* in *Ireland*, in those Reports that go by the Name of the Lord Coke's 12 Rep. 120, 121. So that the Charter must provide for an Election in order to a Succession, or otherwise the Law will not help them.

And though the Mayor is the more Eminent and Excellent, and ought to have greater Respect and Reverence, yet the subject Matter that we are upon is to be considered in the Nature of it, viz. The Election of an Alderman. It is not a Matter of Interest, or of Privilege, or of Power, for then the Mayor ought to be preferred in it. But it is Matter of Duty and Labour, and Trust and Trouble. It is Officium, not Dominium, to choose an Alderman. It is rather a Burthen than a Power or Authority; as is said in the Mayor of Oxford's Case in Latche's Rep. 231.

But then it will be ask'd, That if it depend upon the Charter, and not upon the Common Law, Who shall appoint the Time of Election if the Charter be silent in it, as here it seems to be? This will be a great Defect, and so there will be no Meeting, nor no Election, and so the Corporation will expire.

To this I answer, That the Charter does provide for it, for those whose Duty it is to make an Election, it is their Duty to agree to meet for that Purpose, and to appoint the Time, or else they do not discharge their Duty. They break their Oath, and are punishable for their Omission, and may forfeit their Charter by it.

Now I do not deny but it is the Duty of the Mayor, and it is the equal Duty of the Aldermen, to see a Time be appointed for an Election.

And as the Mayor is the Chief in Pre-eminence, so it aggravates his Neglect if he refuses it: But his Neglect of his Duty will not excuse the rest of the Electors for the not doing of their Duty, and the performing of their Oaths.

If it be said, What if they do not agree upon the Time, but are divided.

I answer. Whoever can carry an Election when they are met and chuse, shall also govern in the Time of Meeting, if there be any Difference about it; and that is not the Mayor, but the major pars eorum, &c.

Now this agrees with the Rule of the Law in the like Cases.

In a Commission of the Peace to try Felonies, &c. and to hold a Court of Quarter-Sessions, Who shall issue out the Summons, and appoint the Time?

Answ. Those that constitute the Court, and are to exercise the Power, must issue out the Summons. If Twenty Justices of the Peace, not having one of the Quorum amongst them, should issue out a Summons for a General Quarter-Sessions, it would be void; for twenty Justices of the Peace cannot hold such a Sessions, if there be not one of the Quorum among them: Nor can the Custos Rotulorum alone do it, though he is commonly most eminent.

Thus is it in the Commission of Gaol-Delivery, and of Oyer and Terminer. We may see the Forms of them in Crompt. Jurisd. of Courts, f. 121, 125. The express Words of their Commission, for appointing Time and Place, Ad certum Diem quem vos tres, vel duo vestrum, (Quorum vos A. B. & C. D. unum esse volumus) ad hoc provederitis.

And therefore there was no need of any more express Provision in the Charter for a Summons for an Election of an Alderman, or the Appointing of a Time.

In the next Place, for the Necessity of the Mayor's being present, as well as their Meeting by his Summons, I see no Reason for it.

It is true, there is a Case in Print that seems to make for it, tho' I never yet heard it so much as mentioned, either at the Trial (for I was not there) or throughout the whole Case; yet it is fit for me to take Notice of it, for I make no Doubt but before we have done we shall hear of it. It is in Serjeant Rolls's Abridgment, Part I. Tit. Corporation, fol. 513, 514. Case, 5, 6, 7. between Hicks and the Borough of Launceston in Cornwal.

Resolved per Curiam (which were only Two Judges, viz. the Chief Justice Richardson and Justice Croke, no other of the Judges being there.)

That if a Corporation consists of a Mayor and eight Aldermen, with a Clause in the Patent, That if any of the Aldermen die, that then the Mayor and the rest of the Aldermen within eight Days after shall elect another; tho' it be not limited that they or the greater Number of them may elect, yet the greater Number of them may elect.

And if the Mayor, at the Time of the Death of an Alderman, be absent at London 'till after the eight Days, and the rest of the Aldermen within eight Days come to the Deputy-Mayor, and require him to make an Assembly of them, to elect another within the eight Days, and he refuse, and upon that the greater Number of the Aldermen meet without the Mayor or his Deputy, and elect an Alderman, that it is a void Election, for the Mayor ought to be present at it, by the Words of the Grant.

This seems to be a stronger Case than ours, for there is a certain Time limited by which they must make their Election, viz. eight Days.

I first observe, That this Case (as far as I can find) was not a Case depending by any Suit or Action; for in that Case it is said, That a Writ was granted to make a new Election of an Alderman. So that I suppose it was upon a Motion only: I have a Copy of the Rules which shews it to be so, (as I take it).

Then it does not appear to be upon an Argument, for had it been so, two Judges (I presume) would not have determined it, but have put it off 'till the Court had been full, (as usually they do) therefore it was not so solemn, nor has not so great Authority.

But take it as it is.

The Time of eight Days being limited, by which the Election was to be made, makes the Case never a whit the stronger; for there the Judges declare, That there may be an Election after the eight Days, and the Limiting that Time was to quicken them.

Then observe the Ground those two Judges went upon; they do not say it ought to be so at the Common Law, as doubtless they would, had they thought that the Common Law would have ruled it; for if the Common Law serves for it, it was idle to resort to any other Ground.

But the Judges in the Case of Launceston say, that the Mayor must be present at the Election, by the Words of the Grant. So that they went by that Rule which I have urged, which is the Words of the Grant: 'Tis the Charter only must give the Rule, as I have argued all this while.

Now what the Words of the Charter were, in the Case of Launceston, does not appear in the Report of that Case. Perhaps there was an express Provision in the Charter, requiring the Meeting of the Aldermen by the Summons of the Mayor, and in his Presence; which if so, then there is no Disputing against it.

And

And the Drawer of the Indictment against us has so drawn it, as if the Charter in our Case did so require it too. But there is nothing to that Purpose; nay, as I have observed, there are concomitant Clauses that give another Construction, and argue to the contrary. Therefore the Case of Launceston differs from ours.

But there is another Thing wherein the Case of Launceston and ours differ.

I am no Enemy to the Government I live under; if any Man think otherwise of me, I care not, because I cannot govern another Man's Thoughts.

I do agree that this Sovereign Court of the King's Bench, as is resolv'd in James Baggs's Case, hath a Super-intendency, and a special Authority in Cases of this Nature, which more concern Matter of Government, and the publick Peace and Order, than any Man's private Right and Property.

And in such Cases this Court governs it self much by the Circumstances of the Case.

Now let us mind the Circumstances of the Case reported by Sergeant Rolls, and of our Case, and let them be compar'd, and there will be a very wide Difference between them. And therein I dare Appeal to any rational unbias'd Man in the World, for the Innocency of our Proceedings in the whole Matter.

The Mayor in the Case of Launceston, happen'd to be in London at the Death of the Alderman, (to supply whose Place there needed the Election). He was not in the Town that was to chuse, whereof he was Mayor, when the Election was made.

The Aldermen were under an Apprehension that they should be guilty of a great Omission and neglect of their Duty, and perhaps had some Thought of their being under an Oath too, and that they might be liable to Punishment, if they did not chuse within the eight Days prescrib'd by their Charter; nay, 'tis likely they thought they could make no Choice at all, if they did it not within the eight Days: Though all this was but their Mistake of the Law, yet it was very pardonable in them.

The Judges in their Resolution upon that Case, rectify that Mistake, and a new Election is thereupon ordered by this Court.

The Mayor there was not wilfully absent, for he was at London when the Alderman died: He was at a very great Distance from his Town too, viz. Launceston, about 200 Miles, as I take it; so that he could hardly hear of the Death of the Alderman in

the eight Days Time, and go down thither before the End of the eight Days, there was no great Necessity of an Election so soon. And the Aldermen had done what they did out of a Zeal for the Publick; though it were a Zeal without Knowledge.

But I do not find that the void Election, and the Aldermens Meeting about it, was held a Riot or an unlawful Assembly.

No, they were not so much as blam'd for what they did; nay, sure they were rather to be commended for their just Intentions.

But our Case was quite another Thing.

And all our Circumstances, and the very plain Words of our Charter that appoints the Manner of our Election, we had, to our great Charge, and upon good Advice, drawn up in a special Plea; (for the Question truly arises upon the Words of the Charter, and the Construction of them.) How it happen'd I cannot tell, but a Judge ruled us to plead Not Guilty; our chargeable special Plea came in a little too late.

It was a Matter of Record, and of Law, and fitter to be determin'd by the Judges than by a Jury.

But these in Truth were our Circumstances, as I shall briefly relate them, and I am ready to make out the Truth of them.

An Alderman of Bristol, tho' chosen, yet cannot officiate 'till he be sworn; he cannot be sworn (by the express Words of the Charter) but before the Mayor and Recorder both.

I being the Recorder of Bristol, happen'd to be there some Time before the Day of chusing Members to the Oxford Parliament not long after Sir John Loyd's Death: I was indeed invited thither.

Sir Richard Hart the then Mayor, and all of us (I think not one Alderman absent) were then meet in the Council-Chamber, the usual Place for that Purpose: We had nothing else to do.

It was mov'd that we might then make Choice of a new Alderman, while not only Mr. Mayor was present, but while the Recorder was there too: So that the Party chosen might instantly have been sworn and enter'd upon his Charge; for they have their distinct Wards: And the Recorder many Times comes not thither in a Year or two; for I live forty Miles from them, and I seldom tarry above two Nights at a Gaol-Delivery; but then (as it fell out) I was there upon another Occasion.

None oppos'd it but Mr Mayor, and he did it upon a Ceremony and Complement, as he pretended, because Sir John Lloyd (as he said) was not yet buried.

Out of Respect to Mr. Mayor, we did forbear.

Some good Time after, and after Sir John Loyd had been buried, I happen'd unexpectedly to be there again; and Mr. Mayor was earnestly pressed again then to go to an Election upon the former Reason, that the new Alderman might presently be sworn.

Mr. Mayor still refused; I do not remember but all the rest were very willing to have gone to an Election.

We did the second Time forbear, tho' I think we were all there (I am sure a great Number).

I tarried then four or five Days, it was at the Election to Parliament, the Poll lasted six Days; but I left them at the Poll. I was not fond of being chosen.

The Evening (as I take it) before I went away, we were again upon the Place, and the Mayor with us, and he was again press'd to it, but wilfully went away, and we still forbore.

But that Night some of us sign'd a Writing, desiring Mr. Mayor to join with us, and we declar'd in it, if he did not joyn, we would proceed without him, being the major Pars.

This shews we had no Design to chuse in his Absence; nay, it plainly appear'd, that the Design was on the Mayor's Part, for he knew I could not stay, and he was desirous to chuse in the Absence of some of us, that he might carry the Election against the Person next in Course to be chosen, and every Way qualified (viz. Alderman Day).

I consulted the Charter, and found it as I have now observ'd upon it, and was clearly of Opinion, for the Reasons I have offer'd, that in such Circumstances the major Part might chuse.

We gave Notice to the Mayor and all the Aldermen then in Town, and tho' the Government is most miserably divided, yet in this Business there was nothing of Faction, and the different Parties were not engag'd; only the Mayor had his Design. For we were six Aldermen at the Choice: Sir Robert Cann, an intimate Friend of the Mayor's, being lame of the Gout, sent us an Excuse, but would approve of our Choice

Another of our Number, one of our six, is a zealous Man of Mr. Mayor's Way; yet not taking that to be now concern'd, joined with us, and voted the same Way. We were six, and this appears by the Indiament, and we were unanimous in the Person we chose.

No other Person was so much as nam'd, nor I believe thought on by any Body, unless by Mr. Mayor; there were but four Aldermen more in Being, for Mr. Mayor was none.

And the Person chosen was not only next in Course, but every Way qualifi'd; has a great Estate (worth three or four of some of the Aldermen) no Tang of a Fanatick, a constant Churchman,

he had but one great Fault; he gave his Vote at the Election to Parliament for my self and Sir John Knight, against Mr. Mayor and Sir Tho. Earl.

The Person is not sworn to this Day, nor does desire the Office, but rather declines it, being fit for it: He should have been Mayor this Year in Course, but is put by it, and he is contented.

There has been another since chosen in his Place, by the Votes of five only (Sir Richard Hart the Mayor being one. I am sure they are not major Pars.

And for this Choice by six, who are Justices of the Peace as well as Mr. Mayor, and the other four, we who are four of six, are all indicted for a Riot upon the Account of this Election. And this Indictment is found before Mr. Mayor, our Fellow Justice, and four more at the most; so that five, who are the lesser Number, exercise their Authority over those that were six in Number when they acted, which six were as much Justices of the Peace as they five.

It is observable, that tho' we were six of us, and all unanimous in our Election, yet they have politickly indicted but four of us, and left two out, because it would have been too gross and palpable, if six Justices of Peace should have been indicted before a lesser Number of their Brother Justices.

But had they indicted all six, it would then plainly have appeared too that the Choice had been made by the greater Part, which they wisely thought to conceal; but yet it does appear in their very Indictment (though darkly couch'd in it), for it says that we four being Recorder and Aldermen, Cum aliis Aldermannis, did chuse the Alderman; that Word (Aldermannis) being in the Plural Number, must be two more at least.

If it shall be adjudged that we cannot chuse an Alderman, but by the Mayor's Summons, and in his Presence, these Mischiefs will follow.

That he will wholly govern and dispose of Elections at his single Will and Pleasure; for he that can order the Time as he pleases, and forbear to summon the Electors till he sees his own Opportunity and Advantage, tho' often desired to go on upon it, and refuses to do it Time after Time, till such as will not comply with him be out of the Way, (as the Recorder is very seldom there, and tarries but a Night or two, and then is in a Hurry of Business, and most of the Aldermen are often at their Country Houses) the Mayor will cast the Choice upon whom he thinks fit, as in this Case he has done. This Mayor and

four Aldermen have rejected the Choice made by six, and of the Person that was next in Course, and every Way qualified: And yet the Charter thought not fit to trust any fewer than the Mayor and the whole Bench of Aldermen, in a Matter of this Importance to the City.

If it be said, That in case the Mayor unreasonably defer it, we may complain to this Court, viz. the King's Bench, and have a Mandamus, or apply our selves to the King and Counsel to compel him to proceed to an Election.

Who will be at so great a Charge and Trouble? And that Course is not so speedy, it may chance to be in a Vacation; but let it be as speedy as can be, the Mayor in the mean Time has obtain'd his Ends, and gain'd his Opportunity, and done his Work, as the Mayor in our Case did; where the Mayor and four more (but five in all) being minor Pars, have controll'd the Choice made by the major Pars.

If it shall be said, That if the major Pars be present, and join in Voting to an Election, tho' they divide in the Person, yet the major Pars so met shall make a good Election, and in Law it shall be the Choice of all present.

That I must deny, for the Words of the Charter are, That the major Pars superviventium, shall make the Choice, that is, as I understand it, agree in their Votes or Voices in the Party chosen, and so it was in the Choice that we six made. This agrees with the Rules of the Common Law, in Elections and Leases to be made by Corporations. Dyer 247. plac. 74. and Sir John Davies Rep. 47. And this agrees with the Statute of 33 H. 8. cap. 27.

But if this should not be Law (as I take it is) yet the subsequent Election of an Alderman, made by the Mayor and four Aldermen more, cannot be good; for though the Mayor and seven Aldermen were present at it, yet three of them did not join in going then to an Election; for they had join'd with us before in our Choice, and therefore oppos'd any after Election to be made.

But they have gotten a Conceit among them at Bristol, that what is done in a Man's Presence, where his Presence is requir'd by their Charter, tho' he dissent and oppose what it done, is yet legally done.

As in the Case of the Swearing of an Alderman, by the express Words of the Charter it cannot be done but before the Mayor and Recorder both. This Sir Richard Hart was duly chosen an Alderman long ago, but not sworn until the last Gaol-Delivery

when we were going to try the Felons. I being present, they thought that sufficient to satisfy the Charter, and in a tumultuous Manner, with an hideous Noise, they cried out to swear him, and this was not the usual Place neither for it. I oppos'd the Swearing of him, and I will justify it, that he was utterly unfit to be sworn, by something that happen'd since his being elected an Alderman; they would not hear me, but resolv'd to proceed to swear him, because I was present with the Mayor. Thereupon I withdrew, and in my Absence they went on to swear him, and he now acts as an Alderman, and as a Justice of Peace, under this Colour.

If no Election of an Alderman can be made but in the Mayor's Presence, it will be in the Power of one single Person (if he be obstinate and wilful) to forfeit the Charter. For if he find the Aldermen like to chuse contrary to his Mind, he need but withdraw, and all the rest are insignificant Persons, and so there shall be no Election in any reasonable Time, and thereby the Liberties forfeited.

If this absolute Power allow'd to Mayors may serve a politick Turn for once, it may do as much Mischief another Time; for he may be of a contrary and cross Humour to what may be desir'd. And he is not a Person nominated by any superior Power to that Place, or impos'd upon the Corporation, but chosen from amongst themselves, and chosen by themselves: But tho' they chuse him, yet it is not safe to trust all the Liberties of the City in the Breast of one Man; for one Man may easily change and be wrought upon, where many cannot. It is better to trust Twelve than One.

The Right of Election is a very tender Thing, and it is a Maxim at the Common Law, and strengthened by several Acts of Parliament, That Elections should be free.

By the Stat. of *Westm.* the 1st, in the Time of that Wise and Excellent King *Edward* the 1st, It is enacted, That Elections be free. And it forbids under a grievous Penalty (those are the Words) that nul haut home, no great Man (such as every Mayor is in his Sphere) shall disturb to make free Election.

Sir Edward Coke, in his 2 Inst. f. 169. in his Exposition of that Statute, says it extends to all Sorts of Elections, and agrees with the Maxim of the Common Law.

Now if the Mayor shall at three several Times refuse the Advice and Desire of the Aldermen, and knowing that they can make no Choice without him, refuse to join with them till he sees his own Time and Advantage, he will have his own Choice, do what they can;

can; for before they can complain of him (which is a Work of Time, and Charge, and Trouble) he will have done his Work, and so prevent them.

And then where is the Freedom of Election?

This could never appear more plainly than in this Case of ours, where the Election by the Majority is set aside, and the Choice made by a lesser Number, and in Effect by Mr. Mayor only, is that which carries it. It plainly appears that we had no sinister Design to do any Thing without the Mayor, for we did all we could to get him to join with us, and he thrice denied us; but it as plainly appears that the Mayor had a Design in refusing to do it till some of us must be gone, and then to steal an Election behind our Backs, by a lesser Number, when he had the Advantage.

After all that I have said I do agree, that had eleven Aldermen of us gone about an Election without so much as desiring the Mayor to join with us, or it may be upon once or twice being refused; or when the Mayor had been occasionally absent; or had it any Way appeared that we meant a Surprise in it; or had we made a Choice subject to the least Exception, and had he not obstinately gone away from us, being in Person upon the Place, without so much as giving us the least Reason for his Refusal, I should have held my Tongue, and not have concern'd my self any farther in it. I hope it sufficiently appears, that I have been no Enemy to Government and Order.

But to chose an Alderman was our Duty, and we were under an Oath to do our Duty, and we did but discharge our Trust.

I may (I think) save my self the Labour of arguing, that however, if we were mistaken in the Construction of the Charter, and in the Point of Law in the making of our Election, yet here is no Riot in the Case (for we are indicted for a Riot) for a Riot is the doing of an unlawful Act with Force and Violence; neither are we an unlawful Assembly, for that is, where there is an Intent to do an unlawful Act, but still with Force and Violence; but they go away without doing it, as appears by Poulton de Pace Reg. & Regin. f. 25.

And in case the Election we made be adjudged duly made, then the Pretence of a Riot vanishes of it self, as is held in Eden's Case, Cro. Eliz. 697. If the Indictment be void for the principal Matter, which in the Case there was an unlawful Entry against the Statute of 8 H. 6. where the Statute was mis-recited, they were not allowed in that Case to stand upon the Riot.

I have but a short Word more.

I have been the Recorder of Bristol these one and twenty Years, longer I think than any Man can be remembered. I have sworn all the Aldermen that are now upon the Bench, in my Time, and many more who are now dead. I can say it without Vanity, 'till the Time of this unhappy Election of Members to the Oxford Parliament (which I sought not) I had the good Will of all Sides, even of this Mr. Mayor, who was Sir Richard Hart; for I never would join with any Party, but did all I could, when I came amongst them, to join them together and unite them: For ever since they grew rich and full of Trade and Knighthood, too much Sail and too little Ballast, they have been miserably divided.

And unless this Court (to whom I think it properly belongs upon Complaint in such Cases) will examine their Disorders, and command Peace and Order to be observed in our Proceedings, I cannot safely attend there any more, nor hold any Goal-Delivery.

I submit what I have said to the Court.

Whereupon the Court arrested the Judgment.

Lord Grandison *versus Countess of* Dover.

Where an Administration once granted ought not to be repealed.

IN a Prohibition the Case was: Charles Heveningham died intestate, leaving an only Sister Abigal, then an Infant. the Countess of Dover, who was her Great Grandmother, came into the Prerogative Court, and prayed to be assigned her Guardian Ex Officio, which was granted, and thereupon she obtained Administration durante minore Ætate.

Afterwards my Lord Grandison brought a Prohibition, suggesting that the Court had granted Administration upon a Surprise, and being Grandfather to the Children, and so nearer of Kindred, prayed that Administration might be committed to him.

The Lady replied, That it was obtained after great Deliberation, and without any Surprise; and upon a Demurrer the Question was, Whether this Administration was well granted to the Lady?

It was argued now by Dr. Master for the Plaintiff, and afterwards by a Common Lawyer on the same Side, in Hillary-Term following. And by Dr. Reines and Sir William Williams for the Defendant.

The Civilian argued, that the Father of both the Children died intestate, and that their Mother administred, and afterwards made

made a Will, of which she appointed my Lord to be Executor, and thereby committed the Infant to his Custody; which being in Fact true, the Curatorship of the Living Child, by the Civil Law draws to it the Administration of the Estate of the dead Child.

12 Car. 2. cap. 24.

There is a Statute Law, which impowers the Father by Deed or Will to dispose the Custody of his Child under Age, to any in Possession or Remainder, who may take the Profits of his Lands, and possess himself of the said Infant's personal Estate, and bring Actions in Relation thereunto, as a Guardian in Socage might have done. And wherever a Father or † Mother has made such a Disposition, a Judge cannot assign a Guardian.

† *Quære* of the Mother.

The Spiritual Courts have Power to repeal this Administration granted to my Lady Dover; the Right is not in Question, for whoever has it reaps no Advantage, because 'tis for the Benefit of the Infant; the Contest is, Who ought to be admitted by the Spiritual Court to administer?

It cannot be denied but that the Great Grandmother is a Degree more remote than the Grandfather: If therefore that Court hath entrusted one who ought not to have Administration, they have an undoubted Power in such Case to make an Alteration.

If my Lord had been Administrator, it had been agreeable to the Common Law, for he is Guardian in Socage durante minore Ætate.

Econtra.

Econtra. It was said, That my Lord was really indebted to the Estate of the Infant intestate, and therefore as this Case is, the Spiritual Court ought not to repeal the Administration once granted, for 'tis for the Benefit of the Infant.

'Tis not material who shall be Administrator, for he who is so durante minore Ætate, hath no Power over the Estate; he is only a Curator in the Civil Law, which is in the Nature of a Bayliff in our Law, who hath only Power to sell bona peritura.

Probate of Wills did not originally belong to the Spiritual Courts de Jure, they had that Authority per Consensum Regis & Magnatum: And as those Courts had not original Jurisdiction in such Cases, so they had no Power to grant Administration, 'till enabled by the Statute of Edw. 3. For before that Time, the Kings of England by their proper Officers solebant capere Bona Intestatorum in Manus suas.

31 Ed. 3. cap. 11.

'Tis plain that the Ordinary had no Power by the Common Law over an Intestate's Estate, for he could not maintain an Action to recover any Part of it: Now if the Law had given him a Power over the Goods; it would likewise have given him an Authority or Remedy to recover them.

An Action would have lain against him at the Common Law, and by the Statute of Edw. 1. which was made in Affirmance thereof, if he had possessed himself of such Goods, and refused to pay the Debts. 13. E. 1. cap. 19.

Then since he hath no original Power in this Case, and this being a special Kind of Administration, when he hath once executed that Power he shall not repeal it; and the Court enclined to that Opinion. Vid. 9 Rep. Henslow's Case.

DE
Term. Sancti Mich.

Anno 35 Car. II. in Banco Regis, 1683.

Roe *versus Sir* Thomas Clargis.

Papist is actionable. Raymond 482. 3 Levinz 30.

IN a Writ of Error, upon a Judgment in the Common Pleas, in an Action upon the Case, wherein the Plaintiff declar'd, That the King had made him one of his Privy Council in *Ireland*, and that he was a Deputy Lieutenant of the County of *Middlesex*, and had serv'd in several Parliaments for the Borough of Christ-Church in Hampshire; and that the King having summon'd a Parliament to meet at Westminster, he did stand to be a Member of that Burrough, and that the Defendant Roe did then speak these Words of him, Viz. He (meaning the Plaintiff) is a Papist. Upon a Tryal there was a Verdict and a Judgment for the Plaintiff.

This Case was argued by Sir Francis Winnington for the Plaintiff in the Errors, and by Mr. Roger North for the Defendant.

The Questions were these:

1. Whether the Words abstracted from the Offices set forth in this Declaration were actionable or not?

2. Whether they are actionable as joined to those Capacities?

The Council for the Plaintiff in the Errors, held the Negative in both Points.

1. The Word Papist is not defin'd either by the Common Law, or the Statutes of this Realm; for from the first of the Queen to the 25 Car. 2. it is not to be found what a Papist is.

There are several Statutes between those Times which provide against the Jurisdiction of the Pope, and which inflict particular Punishments upon committing Offences therein prohibited, but none of those Laws give any Definition of a Papist.

If by a Papist is meant him who embraces the Doctrine of the Pope, it was punishable before the Reformation to be of a contrary Opinion: Now in the vulgar Acceptation of the Word, a Man may hold the same Opinion with the Church of *Rome*, and yet not profess the Popish Religion, so as to bring himself in Danger of any of the Penalties in these Laws.

There was never yet an Indictment against a Person for being a Papist, but many have been indicted upon the Breach of those Laws made against Recusants, by which they incurred the Penalties thereby appointed.

In Michaelmas, 27 H. 8. an Action on the Case was brought in the Common Pleas, for calling of the Plaintiff Heretick, and Willoughby the King's Serjeant argued, That the Action would not lie, because the Word did import a Spiritual Matter, of which the Temporal Courts had no Knowledge; and of that Opinion were the Chief Justice *Fitzherbert* and Justice *Shelly*: The same may be said in this Case, that the Word Papist relates to something which is Spiritual, of which this Court hath no Cognizance. 27 H. 8. 14. B.

Words which are actionable must immediately injure the Person of whom they are spoken, either in his Profession, or bring him in Danger of some Punishment; as to call an Attorney Bribing Knave, which are adjectively spoken, yet it is an Injury done to him in his Profession. Hob. 8.

It was said at the Trial in the Common Pleas, That 'tis actionable to call a Man Papist at this Time, though it might not be so at another Time. This seems to be a very vain Assertion, for tho' the Times may alter, the Law is still the same.

It would be a very great Inconvenience, if Men should be deterr'd by Actions to call another Man a Papist, for this would be an Encouragement to Popery, and a Check upon the Protestant Religion, to punish the Professors thereof, for saying a Man is a Papist, who is really so both in his Judgment and Profession.

But admitting the Word to be actionable, 'tis not so before Condition, for 'tis very improperly used, and of no Signification or Discredit before that Time. Not actionable to call a Man Papist. Cro. Eliz. 191.

2. These Words are not actionable as coupled with his Offices, because he hath alledged no particular Damage or Loss, and his Offices are only Honorary, and of no Profit, and therefore he could receive no Damage by speaking these Words, if true, when they in no sort relate to his Offices, and are too remote to be applied to them.

Econtra. 1. The Words are actionable in themselves, for they scandalize the Plaintiff in his Raputation, and may be a Means to bring him to corporal Punishment; for by several Acts of Parliament many Punishments are inflicted upon Popish Recusants, which is the same Thing with a Papist: They are disabled from holding any Office or Imployment in the Kingdom; they are not to come into the King's Presence, or within five Miles of the City of London; and the Calling of him Papist subjects him to the Danger of being indicted for a Traitor, for the Words are Synonimous.

When H. 8. took upon him the Supremacy which the Pope had unlawfully usurped, there were several Papists in those Days who called themselves Roman Catholicks, that they might be distinguished from those who bore Allegiance to their lawful King; which general Appellation was afterwards changed into the Word Papist, so that both signify the same Thing.

The Objection, that tho' Times change, the Law is still the same, may receive this Answer, That when the Force of Words is changed with the Times, those Words should be actionable now, which were not so at another Time. As for Example; the proper and genuine Signification of the Word Knave is a Servant, but now the Times have altered the Sense of that Word, and made it to be a Term of Reproach; so that 'tis actionable to call an Attorney Knave, who is but a Servant to his Client.

1. Then as to the Objection that the Word Papist is not defined in our Law. There is a Statute which disables a Man from having any Office whatsoever, who shall affirm the King to be a Papist, that is, a Person who endeavours to introduce Popery.

13 Car. 2. cap. 1.

2. But if the Word Papist is not actionable of it self, yet as coupled with his Offices 'tis otherwise, and the Plaintiff may well maintain this Action. And of that Opinion was all the Court: So the Judgment was affirmed.

Mallon *versus* Fitzgerald.

Where an Estate Tail shall not be determined for want of Notice of a Proviso to determine it.

ERror of a Judgment in Ireland, for Lands in the County of Waterford. The Case upon the Special Verdict was this: John Fitzgerald was seised in Fee of the Lands in question, who had Issue Katharine his only Daughter: He by Lease and Release made a Settlement of those Lands upon the Earl of Ossory, and other Trustees therein named, and their Heirs, to the Use of himself for Life, and after his Decease, to the Use of his

his Daughter Katharine in Tail; Provided that she married with the Consent of the said Earl and the Trustees, or the major Part of them, or their Heirs, some worthy Person of the Family and Name of *Fitzgerald*, or who should take upon him that Name immediately after the Marriage; but if not, then the said Earl should appoint and raise a Portion out of the said Lands for the Maintenance of the said *Katharine*, with a Remainder to *Lætitia* in Tail.

John Fitzgerald died, his Daughter being then but two Years old. She afterwards at the Age of Fourteen had Notice of this Settlement, but not by the Direction of the Trustees. That on the 20th of March, in the 16th Year of her Age, she married with the Plaintiff, *Edward Villiers*, Esq; without the Consent of the Trustees, or the major Part of them, and that her Husband, Mr. *Villiers*, did not take upon him the Name of *Fitzgerald* after the said Marriage. That Lætitia the Aunt was married to Franklyn, who likewise did not take upon him the Name of Fitzgerald.

1. The Questions were, Whether the Estate limited to Katharine be forfeited, without Notice given to her of the Settlement by the Trustees themselves?

2. Whether her Estate be not determined by her marrying Mr. Villiers without their Consent?

And it was argued, That the Estate Tail was determined.

And first as to the Point of Notice: 'Tis not necessary to be given to the Daughter, because the Father had not made it in the Settlement. He might dispose of his Estate at his Pleasure; and having made particular Limitations of it, there is no Room now for the Law to interpose, to supply the Defect of Notice in the Deed. And to this Purpose the Mayor of London's Case was cited; which was, That

George Monox devised certain Houses to his Executors in Trust, and their Heirs, upon Condition to pay Money to several charitable Uses, which if not performed, then he devised them over to his Heir in Tail, upon the same Conditions, and if not performed by him, then to the * Mayor and Commonalty of London. The Trusts were not performed by the first Devisees. A Stranger entered and levied a Fine, with Proclamations, and five Years passed. Then the Mayor of London brought his Action, supposing he had a Right of Entry for the Non-performance of the Trusts, but was barr'd by the Fine, although it was argued for him, that he had not Notice of the Devise or Breach of the Trust till after the Fine levied; which shews that Notice was

Cro. Car. 576. *Idem*, Jones 452.

* The Devise to him was void, because it was a Possibility upon a Possibility.

was not necessary, for if it had been so when his Title accrewed, he could not have been barred by the Fine.

As Katharine the Daughter takes Notice what Estate she hath in the Land, so as to pursue a proper Remedy to recover it, so she ought to take Notice of the Limitations in the Settlement, and hath the same Means to acquaint her self with the one as with the other; and the same likewise as her Aunt had to know the Remainder.

2 Cro 432. Hob. 51. Jones 207. Pop. 164.

Suppose a Promise is made to indemnify another from all Bonds which he should enter into for a third Person, and then an Action is brought against him, wherein the Plaintiff declared that he was bound accordingly, and not saved harmless, but doth not shew that he gave Notice of his being bound, yet the Plaintiff should recover.

2 Cro. 56.

As to the Case of a Copyholder having Three Sons, who surrendred to the Use of his Will, and then devised to his middle Son in Fee, upon Condition to pay Legacies to his Sisters at full Age, which were not paid. Now tho' it was adjudged that his Estate was not determined upon the Non-Performance of this Condition, without an actual Demand and Denial, and that he was not bound to take Notice of the full Age of his Sisters; yet this is not an Authority which can any wise prevail in this Case, because 'tis a * Condition to pay Legacies, which is a Thing in its Nature not to be paid without a Demand, which implies Notice.

* If the Devise had been to the eldest Son, then it had been a Limitation annexed to his Estate, and not a Condition, because if it had been a Condition, it would have descended upon the Heir, who could not be sued for the Breach.

In all Cases where Conditions are annexed to Estates to pay Money, there Notice is necessary; but where Estates are limited upon Performance of collateral Acts, 'tis not necessary: And this has been held the constant Difference.

† So is Fry and Porter's Case, which was this: The Earl of Newport had two Daughters, and he devised Newport-House to the Daughter of his eldest Daughter in Tail, which she had by the Earl of Banbury; Provided, and upon Condition that she marry with the Consent of her Mother and two other Trustees, or the major Part of them; if not, or if she should die without Issue, then he devised the said House to George Porter in Fee, who was the Son of his youngest Daughter, and who had married one Thomas Porter without her Father's Consent.

† 1 Ventr. 199. Rep. Canc. 140. Sid. Poph. 104.

The Lady Ann Knowles, the first Devisee, married Fry, without the Consent of her Grandmother or Trustees, and it was adjudged against her upon Point of Notice, that it was not necessary, because her Grandfather had not appointed any Person to give Notice; he might have imposed any Terms or Conditions

tions upon his own Estate, and all Parties concerned had the same Means to inform themselves of such Conditions.

The third Resolution in Frances's Case, comes nearest to this now in Question, it was in Replevin, the Defendant avowed the taking Damage Feasant. The Plaintiff pleaded in Bar to the Avowry, that R. Frances was seized in Fee of the Place where, &c. and devised it to John (who was his eldest Son) for sixty Years, if he so long lived, Remainder to Thomas for Life, and that John made a Lease to the Plaintiff for a Year. The Defendant replied, that after the Devise R. Frances made a Feoffment in Fee of the same Lands amongst others, to the Use of himself for Life. Then as to the other Lands to divers Uses contained in the Deed; but as to those Lands in which the Distress was taken, to the same Uses as in the Will, in which Conveyance there was this Proviso, That if *John* should disturb his Executors in the quiet Enjoyment, *&c.* or if he shall not suffer them to carry away the Goods in his House, then the Uses limited to him should be void: He did hinder the Executors to carry away the Goods, yet it was adjudged that he should keep his Estate, because being a Stranger to the Feoffment, he shall not lose it without Notice of the Proviso. 8 Co.

But in Answer to that Case, Notice was not the principal Matter of that Judgment, it turned upon a Point in Pleading, for the Avowant had not shewed any special Act of Disturbance, and a bare Denial without doing any more was held to be no Breach of the Condition.

Some other Authorities may be cited to prove Notice necessary, as where Tenant for Life of a Manor to which an Advowson was appendant did in the Year 1594. present Durston, who neglecting to read the Articles was deprived nine Years afterwards by the Ordinary at the Suit of the Patron who presented him, who also died two Years after the Deprivation; then the Queen presented by Lapse, whose Presentee was inducted, and six Years afterwards Durston died, after whose Death he in Remainder presented Green; now though the Patron was a Party to the Suit of Deprivation, and thereby had sufficient Notice that the Church was vacant, yet it was adjudged that a Lapse should not incur but only after Notice given by the Ordinary himself, and not by any other Person whatsoever. *Green's* Case, 6 Co. 24.

But this Case may receive this Answer, viz. That Notice had not been necessary at Law, but it was provided by a particular Act of Parliament, That no Title by Lapse shall accrue upon any Deprivation, but after six Months Notice thereof given by the Ordinary himself to the Patron. 13 Eliz. cap. 12.

'Tis

'Tis true the Law is very tender in devesting the Rights of the Subject; but where an Estate is created by the Act of the Party, and restrained by particular Limitations without any Appointment of Notice, there the Law will not add Notice and make it necessary, because the Person who made such a Disposition of his Estate might have given it upon what Conditions he pleased.

Therefore it may seem hard that this Estate should be determined by the Neglect or Omission of the Trustees to give Notice of this Proviso; but 'tis apparent that it was the Intent of the Father it should be so; for by this Limitation the Estate is bound in the Hands of an Infant; the Reason is, because there is a Privity between an Heir and an Ancestor, and therefore the Heir is bound to take Notice of such Conditions which his Ancestor hath imposed on the Estate.

2. This Estate is determined by the Marriage of the Daughter with Mr. Villiers, because there is an express Limitation in the Deed, for that very Purpose she is enjoyned to marry a Fitzgerald, or one who shall take upon him that Name, which is still more extensive, and she having neglected to do the one, and her Husband having refused to do the other, the Aunt in Remainder shall take Advantage of this Non-performance.

1 Ventr. 202. Owen 112. Goldsb. 152. Lit. Sect. 723. 2 Co. 70.

And 'tis this Remainder over which makes it a Limitation; for if it had been a Condition, then the Intent of the Father had been utterly defeated; for none but the Heir at Law can enter for the Breach of a Condition, and such was Katharine in this Case.

The Proviso in this Deed depends upon another Sentence immediately going before, to which it hath Reference, and then by the express Resolution in Cromwel's Case, 'tis a Limitation or Qualification of the Estate, and not a Condition, which Estate is now determined without Entry or Claim.

Econtra.

It was argued, that in this Case three Things are to be considered:

1. The Nature of the Proviso.

2. That Notice is absolutely necessary.

3. That the Notice given was not sufficient, being not such as is required by Law.

As to the 1st. The very Nature of this Proviso is condemned by the Civil Law, and because it works the Destruction of Estates, it hath never been favoured at the Common Law.

All Conditions to restrain Marriage generally are held void by both Laws, so likewise are such which restrain People from marrying without the Consent of particular Persons; because they may impose such hard Terms before they give their Consent,

sent, may hinder the Marriage it self, and therefore a bare Request of such, without their subsequent Assent, has been always allowed to preserve the Estate.

2. And which was the principal Point, Notice in this Case is absolutely necessary, both by the Intent of the Father, and by the Construction of the Law.

There are three Things of which the Law makes an equal Interpretation, viz. Uses, Wills, and Acts of Parliament, in which, if the Intention of the Parties and of the Law-makers can be discerned, the Cases which severally fall under the Direction of either shall be governed by the Intention, without Respect to the disagreeing Words, nay, sometimes the Law will supply the Defect of Words themselves.

The Books are full of Authorities, where Constructions have been made of Acts of Parliament according to the Intent of the Makers, and not according to the Letter of the Law.

As in Eyston and Stud's Case in the Commentaries, where the Husband and Wife levied a Fine of the Lands of the Wife, and declared their Uses to their Heirs in Tail, the Remainder to the Heirs of the Wife; they had Issue, and the Husband died; the Widow married a second Husband, and he and his Wife join in a second Fine, and declared the Uses thereof to themselves for Life, the Remainder to the Husband and his Heirs for sixty Years, the Remainder in Tail to their Issue, the Remainder to the Heirs of the Wife; the Issue of the first Husband entered, supposing the Estate had been forfeited by the Statute of H. 7. which enacts, That if a Woman hath an Estate in Dower or in Tail jointly with her Husband, or to her self of the Inheritance or Purchase of him, and she doth either sole or with another Husband discontinue, it shall be void, and he in the Remainder may enter.

Plowd. Com. 2 pt. 463.

11 H. 7. c. 20.

Now this Case was directly within the Words of the Statute, for the Woman had an Estate Tail in Possession jointly with her first Husband, which she had discontinued by joining in the Fine with her second Husband; but yet it was adjudged no Forfeiture, because it was not within the Intent of the Statute to restrain Women to dispose of their own Estates, but only such as came from the Husband.

So here Uses are in the Nature of private Laws, and must be governed by the like Intention of the Parties. Now 'tis not to be supposed that the Father did intend to disinherit his only Daughter and Heir without Notice of this Settlement, therefore though he had not appointed any Person in particular to give her Notice, yet it must of Necessity be presumed that

his Intention was, that she should have the Estate unless she had refused upon Notice to comply with those Conditions imposed upon her.

Now the Daughter being Heir at Law, and so having a good Title by Descent, if there be any Conveyance made by her Ancestor to defeat that Title, and to which she is a Stranger, she ought by the Rules of Law and Reason to have Notice of it, and so is the express Resolution in Frances's Case, where the Devise and the Feoffment were both made to the Heir at Law: And the Reason why in Fry and Porter's Case Notice was not held necessary, was because the Devise was to a Grandaughter, who was not Heir at Law; for the Earl of Newport had three Sons then living, and therefore the Parties whom it concerned had the same Means to inform themselves upon what Conditions they were to have the Estate.

3. The Notice here given was not sufficient; for as the Ordinary himself in Green's Case ought to have given the Patron Notice of the Deprivation before a Lapse should incur, so the Trustees here ought to give the Daughter Notice of this Proviso before she shall lose her Estate for Non-performance of the Conditions on which she should take it, especially since the Notice she had of this Proviso was not certain; for 'tis said she had Notice not to marry without the Consent of the Trustees, but 'tis not shewed who they are, or how she should apply her self to them.

Besides there is something in this Proviso which the finding in the Verdict will not supply, for it may be literally true that the Daughter married without the Consent of the Trustees, and yet no Breach of the Condition, because the Proviso is to restrain her from marrying without the Consent of them or their Heirs; now it was not found that the Feoffees were then living, and if they were dead, their Consent cannot be required, and she might have the Consent of their Heirs.

Mr. Franklyn, who was the Husband of Lætitia, the Aunt in Remainder, hath likewise forfeited that Estate which he hath, or may have, in Right of his Wife (if she had any Right) by not taking upon him the Name of Fitzgerald; for if the Father would have disinherited his Daughter for Non-performance of this Proviso, a fortiori he shall be intended to disinherit his Sister for making frustrate his Desire in the Settlement of his Estate.

In Easter-Term following Judgment was given, That the Estate Tail was not determined for want of Notice according to the Resolution in Frances's Case.

Hinton

Hinton *versus* Roffey.

AN Action of Debt was brought against the Defendant, who pleaded the Statute of Usury, but did not shew any particular Agreement, only in general that he was indebted to the Plaintiff in a Sum not exceeding 180 l. neither did he set forth when the Interest of the Money did commence, and on what Day it became due: And upon a Demurrer it was objected, that this Plea was too general, because the Defendant ought to shew in particular what the Sum was in which he was indebted, and how much the Plaintiff took above 6 l. per Cent. for if the Certainty thereof did not appear, there could be no Fact applied to it.

In pleading the Statute of Usury, the Agreement and the Sum taken must be set out. 12 Car. 2. c. 13.

But on the other Side it was alledged, that it was not material to shew the certain Sum which the Plaintiff took above 6 l. per Cent. and therefore not necessary to set forth the particular Agreement between them; for having pleaded and made a substantial Averment to bring his Case within it, 'tis well enough without shewing how much he took above six in the Hundred. And this Case was compared to Debt against an Administrator, who pleaded in Bar a Judgment, &c. and that he had fully administred, and had not Assets præterquam Bona, &c. non attingen. to 5 l. and upon Demurrer this was held a good Plea; for though in Strictness of Pleading the Defendant ought to have shewed the certain Value of the Goods, and not to have said non attingen. to 5 l. yet the Substance sufficiently appears that he had not more than 5 l. to satisfie a Debt of an 100 l. for which that Action was brought.

Econtra.

Moon *versus* Andrews. Hob. 133.

Jefferies Chief Justice and the Court gave Judgment for the Plaintiff, because the Defendant ought to have set forth the Agreement, and to apply it to the Sum in the Declaration.

Smith *versus* Goodier.

Attornment must be proved where an Ejectment is brought for a Manor, Parcel in Rent and Services, &c.

IN Ejectment for the Manor of Heythorpe: Upon Not guilty pleaded, there was a Trial at Bar by an Oxfordshire Jury.

The Title of the Lessor of the Plaintiff was, That Edmund Goodier Esquire was seized in Fee of the said Manor, Part in Demesnes, some Part in Leases for Years with Rent reserved, and some Part in Services, and being so seized made a Feoffment in Fee to Sir John Robinson and Sir William Rider, and their Heirs in Trust for Sir Robert Masham: This Deed was dated in 1647. and the Consideration was 5000 l. paid to Goodier. There was a Letter of Attorney of the same Date with the Deed and Livery and Seisin endorsed.

Lit. Sect. 553. 1 Roll. Abr. 293.

Serjeant Maynard, who was of Council for the Defendant, put the Plaintiff to prove an Attorney of the Tenants; for having declared for a Manor, Parcel in Rents and Services, those would not pass without an Attornment; and of this Opinion was the whole Court, but the Plaintiff would not prove an Attornment.

The Defendant made a Title under the Marriage Settlement of the said Goodier, who in 17 Jacobi married Elizabeth Mees, and then he settled the said Manor upon himself for Life, and upon his Issue in Tail Male, and that the Defendant was the Heir in Tail.

Evidence of a fraudulent Settlement.

But on the other Side it was insisted that this Settlement was fraudulent against the Purchaser, and that it could not be thought otherwise, because both the Original and Counterpart were found in Mr. Goodier's Study after his Death; and because he had made Oath before a Master in Chancery, that there was no Incumbrance upon the Estate, which Affidavit was produced in Court, but not suffered to be read but as a Note or Letter, unless the Plaintiff would produce a Witness to swear that he was present when the Oath was taken before the Master.

And an Objection was made to the Settlement it self, which recited, That whereas a Marriage was intended to be had between the said *Edmund Goodier* and *Elizabeth Mees*, now in Consideration thereof, and of a Portion, he conveyed the said Manor to the Feoffees, to the Use of himself for Life, and after his Decease to the Use of the said Elizabeth for Life, but doth not say, from and after the Solemnization of the said Marriage; so that

if she had not married Mr. Goodier, yet after his Decease she would have enjoyed the Estate for Life. Upon the whole Matter the Jury found for the Defendant.

Dominus Rex *versus* Coney *and* Obrian.

THE Defendants were convicted for the Murder of Mr. Tyrrwhite and Mr. Forster in a Duel, and now pleaded their Pardon, in which there was a Clause Non obstante the Statute of Ed. 3. which appoints him that hath a Pardon of Felony to find Sureties for his good Behaviour before it shall be allowed; and another Non obstante to the Statute of R. 2. which enacts, That if the Offence be not specified in the Pardon it shall not be allowed.

Murder was pardoned by the Name *Felonica Interfectio*, and held good. 10 E. 3. c. 3. 13 R. 2. c. 1.

Now the Word Murdrum was not in this Pardon, the Offence was expressed by these general Words, Felonica Interfectione; and whether it did extend to pardon Murder was the Question. T. Jones 56.

Mr. Astry, the Clerk of the Crown, informed the Court that one Alexander Montgomery of Eglington pleaded the like Pardon for Murder, but it was held insufficient, and the Court gave him Time to get his Pardon amended, which was done likewise in this Case.

The Defendants came again on another Day, and Counsel being allowed to plead for them, insisted that the Pardon was good, and that the Murder was sufficiently pardoned by these Words, That it is the Power of the King to pardon by general Words, and his Intent did plainly appear to pardon the Defendants.

That the Murder of a Person is rightly expressed by felonious killing, tho' not so properly as by the Word Murdrum it self, the Omission of which Word will not make the Pardon void.

And to prove this he cited the Sheriff of Norfolk's Case, who was indebted to the King during the Time he was Sheriff, and was pardoned by the Name of J. W. Esquire (who was the same Person) de omnibus debitis & computis, &c. Afterwards he was charged in the Exchequer for 100 l. where he pleaded this Pardon, and it was held good, though he was not named Sheriff, and so not pardoned by the Name of his Office; yet the King's Intention appearing in his Charter, and having pardoned him by his right Name, that was sufficient, and in that Case the King himself was concerned in Point of Interest. 2 R. 3. 7. a.

The

More 752. *Lucas*'s Case, 8 Co. 18. 3 Inst. 234.

The Books all agree, that before the Statute of R. 2. the King might pardon Murder by the Word Felony; now this Prerogative being incident to the Crown, and inseparable from the Person of the King, was not designed to be wholly restrained by that Act; for the Parliament only intended that by specifying the Offence in the Pardon the King should be rightly informed of the Nature of it, and when he understands it to be Murder he would not grant a Pardon.

Stamf. 101.

But admitting his Power to be restrained by that Statute, yet a Non Obstante is a Dispensation of it, and therefore this Pardon ought to be allowed.

The Pardon was held good by the whole Court; and Jefferies the Chief Justice said, That he had proposed this Case to all the Judges of England, and they were all of the same Opinion, and that he remembred Dudley's Case, where a Pardon in general Words was allowed.

Sid. 366.

DE
Term. Sancti Hill.

Anno 35 Car. II. in Banco Regis, 168$\frac{3}{4}$.

Brason *versus* Dean.

A Covenant upon a Charter-Party for the Freight of a Ship. The Defendant pleaded, that the Ship was loaded with French Goods prohibited by Law to be imported; and upon Demurrer Judgment was given for the Plaintiff; for the Court were all of Opinion, That if the Thing to be done was lawful at the Time when the Defendant did enter into the Covenant, though it was afterwards prohibited by Act of Parliament, yet the Covenant is binding.

A Thing lawful to be done, when the Party did covenant to do it, and afterwards prohibited, the Covenant is binding.

Barnes *versus* Edgard.

Trespass for breaking his Close and impounding of his Cattle: Upon Not guilty pleaded the Plaintiff had a Verdict, but Damages under 40 s. Whereupon Mr. Livesay, the Secondary, refused to tax full Costs, alledging it to be within the Statute of 22 & 23 Car. 2. by which 'tis enacted, That in all Actions of Trespass, Assault and Battery, and other personal Actions wherein the Judge shall not certify upon the Back of the Record, that a Battery was proved, or the Freehold or Title of the Land chiefly in Question, if the Jury find the Damages under 40 s. the Plaintiff shall recover no more Costs than Damages.

Where Damages are under 40 s. the Plaintiff must have ordinary Costs. 22 & 23 Car. 2. cap. 9.

Mr. Pollexfen moved for Costs, alledging that this Act doth not extend to all Trespasses, but only to such where the Free-

hold of the Land is in Question. If the Action had been for a Trespass in Breaking his Close, and Damages given under 40 s. there might not have been full Costs; but here is another Count for impounding the Cattle, of which the Defendant is found guilty, and therefore must have his Costs.

Smith *versus* Batterton. Raym. 487. Jones 232.

The like Case was adjudged in this Court in Hillary Term last, which was Trespass for breaking and flinging down Stalls in the Market-Place: The Plaintiff had a Verdict and 2 d. Damages, and upon a Debate whether he should have full Costs, the Court were of Opinion that it was not within that Statute, because the Title could not come in Question upon the Destruction of a Chattel. In the principal Case the Plaintiff had ordinary Costs.

DE
Termino Paſchæ,
Anno 36 Car. II. in Banco Regis, 1684.

Marſh *verſus* Cutler.

THE Plaintiff obtained a Judgment in an Hundred Court for 58 s. and 4 d. and brought an Action of Debt upon that Judgment in this Court for 58 s. only, and did not ſhew that the 4 d. was diſcharged, and upon Nul tiel Record pleaded, and a Demurrer to that Plea, the Declaration was held to be naught for that very Reaſon; for if a Debt upon a Specialty be demanded, the Declaration muſt be for the whole Sum; if for leſs, you muſt ſhew how the other was ſatisfied.

If Debt be brought upon a Specialty for Part of the Sum, the Plaintiff muſt ſhew how the other is diſcharged. 2 Cro. 498, 499, 529, 530.

The Earl of Macclesfield's *Caſe.*

THE Plaintiff brought an Action upon the Statute de Scandalis Magnatum againſt Sir Thomas Groſvenor, for that he being Foreman of the Grand Jury in Cheſhire, ſpoke theſe Words of the Plaintiff, viz. That he was a tedious Man, and a Promoter of Sedition and tedious Addreſſes.

Special Bail denied in a *Scandalum Magnatum*

The Plaintiff deſired that the Defendant might put in Special Bail; but the Court would not grant it, and ſaid it was a diſcretionary Thing, and not to be demanded of Right: It was denied to the Duke of Norfolk, unleſs Oath made of the Words ſpoken, and therefore the Court ordered Common Bail to be filed.

Holloway's *Case*.

HE was taken at Nevis in the West-Indies, and brought over hither, and now appeared in Custody at the Bar, being outlawed for High-Treason in the late Conspiracy.

Sir Samuel Astry, Clerk of the Crown, read the Indictment upon which he was outlawed, and the King by his Attorney-General consented that the Outlawry should be reversed, (which could not have been done without such Consent) and that he might come to his Trial; but he having nothing to alledge in his Defence, other than that he had made an ingenuous Confession to the King, and hoped that he might deserve Mercy, the Court made a Rule for his Execution to be on Wednesday following, and did not pronounce any Sentence against him, and he was executed accordingly.

Dominus Rex *versus* Barnes & *al'*.

THE Defendant Barnes and others were excommunicated for not coming to their Parish-Churches, who pleaded the Statute of 5 Eliz. which inflicts pecuniary Penalties for not appearing upon the Capias, but enacts, That if the excommunicate Person have not a sufficient Addition according to the Statute of 1 *H.* 5. or if in the *Significavit* it be not contained that the Excommunication proceeds upon several Causes in that Statute mentioned, and amongst the rest, for refusing to come to Divine Service, he shall not incur the Penalties.

5 Eliz. c. 23.

1 H. 5. c. 5.

Now Mr. Pollexfen made these Objections:

1. The Defendant was excommunicated for not coming to his Parish-Church, which is not required by this Statute, for if he doth not refuse to hear Divine Service in any Church, the Penalties are saved.

2. The Statute of Additions requires, That the Condition and Dwelling-place of the Defendant shall be inserted, which was not done in this Case, for they are excommunicated by the Names of A. B. Mercator', B. C. Scissor', & E. F. de Parochia, &c. which last Addition of the Parish shall refer to him only last mentioned, and not to all the rest; and so it was always ruled in Indictments.

Attorney-General contra.

The Statute of 5 Eliz. is grounded upon that of 1 of the Queen, which enjoins every Person to resort to his Parish-Church, or (upon Lett thereof) to some other, or to forfeit 12 d. every Sunday and Holiday, to be levied by the Churchwardens there for the Use of the Poor.

Now though the Parish is not named in this Act, yet the Law must be interpreted as it was then.

2. The Word Parish goes to all, so 'tis in Informations for Riots. And by Astry Clerk of the Crown, 'tis always so in Significavits: *Tamen quære.*

Curia. If the Defendant had pleaded below or here, that he had heard Divine Service in any other Church, though not in his own Parish, the Penalties should not have went out, but being now incurred, there is no Remedy; and the Word Parish goes to all preceding.

Prodgers *versus* Frazier.

The Grant of the Custody of an Ideot passeth an Interest to the Executor of the Grantee.

IN Trespass the Defendant pleaded, That before the Time of the Trespass supposed to be committed, Bridget Dennis was seised in Fee of the Lands in Question, who by a Writ de Ideota inquirendo, was found to be an Ideot, not having any lucid Intervals per spatium octo annorum, &c. by Vertue whereof the King was entitled who granted the Custody to Sir Alexander Frazier, who died, and that the Defendant Mary Frazier was his Executrix.

The Plaintiff replied, and confessed the Ideocy, but that the King granted the Custody of the Ideot to the Plaintiff: And upon this Replication the Defendant demurred.

In this Case, it was agreed by the Counsel on both Sides, That the King by his Prerogative hath the sole Interest in him of granting the Estate of an Ideot to whom he pleaseth, without any Account: But 'tis otherwise in case of a Lunatick; for there the Grantee shall have nothing to his own Use, but must put in Security to account to the Lunatick if ever he comes to be capable, or else to his Executors or Administrators. Vide Frances's Case, in Moor, Fol. 4.

But the Questions that did arise in this Case were:

1. That there was not sufficient Title found for the King; for by the Inquisition the Ideot was found to be so per spatium octo annorum, &c. which is incertain, because before that Time she might have lucida intervalla, and then she cannot be an Ideot

without being naturally so, therefore the Jury ought to have found her an Ideot a Nativitate, for that is the only Matter which vests an Interest in the King.

But it was answered and agreed by the Court, That the finding her to be an Ideot was sufficient without the Addition of any other Words, and therefore per spatium octo annorum shall be Surplusage; for in this Case Words are not so much to be regarded as the Reason of the Law, which doth not allow of Ideocy otherwise than a Nativitate.

But supposing a seeming Incertainty in this Office found, yet it being said generally, that she was an Ideot, the subsequent Words shall not hurt, because the general Finding shall be taken in that Sense which is most for the Advantage of the King.

Dyer 155. b. 161. b. 306. b. As for Example: It was found by Office, that a Person died seised of two Manors, and that he held one of the Queen by Knights-Service generally, and the other of a Mesne Lord in Chivalry, which is the same Tenure: Now it was held that the first general Finding shall be intended Knights-Service in Capite, because it was most for the King's Benefit, that he might thereby be entitled to the Wardship of the Heir, who was found to be under Age.

2. Whether the Grant of the Custody of an Ideot will pass any Interest to the Executor of the Grantee, because such a Grant carries a Trust with it, and the King may have some Knowledge and Consideration of the Grantee, but not of his Executor.

To which it was answered, That here was an Interest coupled with a Trust, as in the Case of Wardship formerly, which always went to the Executor of the Grantee, and which was of greater Consideration in the Law than the Feeding or Cloathing of an Ideot; and of that Opinion was the Court, that the King had a good Title to dispose of both the Ward and the Ideot, one till he was of Age, and the other during his Ideocy.

Judgment for the Defendant.

DE
Term. Sanctæ Trin.
Ann 36 Car. II. in Banco Regis, 1684.

Reeves *versus* Winnington.

THE Testator was a Citizen and Freeman of *London*, and being seised in Fee of a Messuage, &c. and likewise possessed of a considerable personal Estate, made his Will, in which there was this Clause, viz.

A Devise of all his Estate passed a Fee.

I hear that *John Reeves* is enquiring after my Death; but I am resolved to give him nothing but what his Father hath given him by Will. I give all my Estate to my Wife, *&c.*

The Question was, Whether by these Words the Devisee had an Estate for Life or in Fee in the Messuage?

It was argued, That she had only an Estate for Life, because the Words (All my Estate) cannot be construed to pass a Fee, for it doth not appear what Estate was intended; and Words in a Will, which go to disinherit an Heir, must be plain and apparent.

A Devise was in these Words, viz. I give all to my Mother, all to my Mother, and it was adjudged that a Fee did not pass, which is as strong a Case as this; for by the Word (All) it must be intended All that was in his Power to give, which is as comprehensive as if he had said All my Estate.

Sid. 191. Bowman *versus* Milbank.

'Tis true, it hath been adjudged, That where a Man devised his whole Estate to his Wife, paying his Debts and Legacies, that the Word Estate there passed a Fee, because it was for the Benefit of the Creditors, there being not personal Assets sufficient to pay all the Debts.

Kerman *and* Johnson, Stile 281. 1 Rol. Abr. 834. Cro. Car. 447.

But

But that is not found in this Case, therefore the Word Estate being doubtful, and which will admit of a double Construction, shall not be intended to pass a Fee.

Contra. Mr. Pollexfen contra. The first Part of this Sentence consists in negative Words, and those which are subsequent explain the Intention of the Testator, viz. That John Reeves should take nothing by the Will.

The Word Estate doth comprehend the whole in which the Owner hath either an Interest or Property, like a Release of all Actions, which is a good Discharge as well of real as personal Actions.

In common Understanding it carries an Interest in the Land, and then 'tis the same as if he had devised all his Fee-Simple Estate.

In the Case of Bowman and Milbank it was adjudged, That a Fee-Simple did not pass by the Particle All, because it was a relative Word, and had no Substantive joined with it, and therefore it might have been intended, All his Cattle, All his Goods, or All his personal Estate, for which Incertainty it was held void; yet Justice Twisden in that Case, said, That it was adjudged, that if a Man promise to give half his Estate to his Daughter in Marriage, that the Lands as well as the Goods are included.

3 Keb. 245. Mod. Rep. 100. The Testator devised all his Tenant-right Estate held of such a Manor, and this being found specially, the Question was, Whether any more passed than an Estate for Life, because he did not mention what Estate he intended; but it was held that the Devisee had a Fee-Simple, because the Words were as comprehensive as if he had devised all his Inheritance, and by these Words a Fee-Simple would pass.

Curia. It plainly appears, That the Testator intended nothing for John Reeves, therefore he can take nothing by this Will, and that the Devisee hath an Estate in Fee-Simple, for the Words (All my Estate) are sufficient to pass the same.

Rex *versus Sir* Thomas Armstrong.

Saturday June 14th.

THE Defendant was outlawed for High-Treason, and being taken at Leyden in Holland, was brought into England; and being now at the Bar, he desired that he might have Leave of the Court to reverse the Outlawry, and be tried by Vertue of the Statute of Ed. 6. which enacts, That if the Party within one Year after the Outlawry or Judgment thereupon, shall yield himself to the Chief Justice of *England*, and offer to traverse the Indictment upon which he was outlawed, he shall be admitted to such Traverse, and being acquitted, shall be discharged of the Outlawry. 5 & 6 E. 6. cap. 11.

He alledged, that it was not a Year since he was outlawed, and therefore desired the Benefit of this Law.

But it was denied, because he had not rendered himself according to the Statute, but was apprehended and brought before the Chief Justice; whereupon a Rule was made for his Execution at Tyburn, which was done accordingly.

DE

DE
Term. Sancti Mich.

Anno 36 Car. II. in Banco Regis, 1684.

Hebblethwaite *versus* Palmes. Mich. 36 Car. II. in *B. R. Rot.* 448.

Possession is a sufficient Cause to maintain an Action against a wrong Doer. 3 Levinz 133. Shower 64.

AN Action on the Case was brought in the Common Pleas, for diverting of a Watercourse. The Declaration was, That the Defendant, Primo Augusti, &c. injuste & malitiose, did break down an ancient Dam upon the River Darwent, by which he did divert magnam partem aquæ ab antiquo & solito cursu erga molendinum ipsius quer', &c. ad dampnum, &c.

The Defendant pleaded, That before the said Breach made, he was seised in Fee of an ancient Mill, and of six Acres of Land adjoining, upon which the said Dam was erected, Time out of Mind, to turn the Water to his said Mill, which Dam was always repaired and maintained by the Defendant, and the Tenants of the said Land: That his Mill was casually burnt, and he not intending to re-build it, suffered the Dam to be broken down, and converted the Timber to his own Use, being upon his own Soil, prout ei bene licuit, &c.

The Plaintiff replied, that by the Breaking of the Dam the Water was diverted from his Mill, &c.

The Defendant rejoined, and justified his Plea, and traversed that the Mill of the Plaintiff was an ancient Mill.

And upon a Demurrer to this Rejoinder Judgment was given for the Plaintiff, and a Writ of Error now brought to reverse that Judgment: And for the Defendant in the Action it was argued:

1. That the Declaration is not good, because the Plaintiff had not set forth that his Mill was an antient Mill,

2. Because he had not entitled himself to the Watercourse.

3. That the Plea was good in Bar to this Action, because the Defendant had sufficiently justified having a Right to the Land upon which the Dam was erected, and always repaired it.

As to the first Point, it hath been the constant Course for many Years in such Actions to set forth the Antiquity of the Thing, either in express Terms, or in Words which amount to it.

In 8 Eliz. such an Action was brought, Quod defendens divertit multum aquæ cursum per levationem & constructionem Wæræ, &c. per quod multum aquæ quæ ad molendium (of the Plaintiff) currere consuevit econtra recurrit. Dyer 248. B.

Which Word (consuevit) doth imply, that it was an ancient Mill, for otherwise the Water could not be accustomed to run to it.

Anno 25 Eliz. the like Action was brought, wherein the Plaintiff declared, Quod cum molendinum quoddam ab antiquo fuit erectum, whereof he was seised, and the Defendant erected a new Mill, per quod cursus aquæ præd' coarctatus fuit. 1 Leon. 273. Russel *versus* Handford.

And eighteen Years afterwards was Lutterell's Case in this Court, wherein the Plaintiff shewed, that he was seised of two old and ruinous Fulling-Mills, and that Time out of Mind, magna pars aquæ cujusdam rivoli did run from a certain Place to the said Mills, and that during all that Time there had been a certain Bank to keep the Current of the said Water within its Bounds, &c. That the Plaintiff did pull down those old Mills, and erected two new Mills, and the Defendant digged down the Bank, &c. 4 Co. 86.

The like Action happened 14 Car. I. it was for diverting an ancient Watercourse, qui currere consuevisset & debuisset to the Plaintiff's Mill. Cro. Car. 499. Palm. 290.

In all which Cases, though there are various Ways of declaring, yet they all shew, that the constant Course was to alledge that the Mills were ancient, for 'tis that which entitles the Party to his Action. 1 Rol. Abr. 107.

'Tis for this Reason also that if two Men have contiguous Houses, and one stops the other's Lights, if they are not ancient, an Action will not lie for stopping of them up.

There may be some seeming Difference between a Right to a Watercourse, and to Lights in a Window, for no Man can prescribe to Light quatenus such, because 'tis of common Right to all Men, and cannot be claimed but as annexed to a particular Thing or Purpose.

A Watercourse may be claimed to several Purposes, but Water is of as universal Use and Benefit to Mankind as Light;

and therefore no particular Man hath a Right to either, but as belonging to an ancient House or running to an ancient Mill, or for some other ancient Use.

Cro. Car. 575. Sands *versus* Trefusis.

Anno 15 Car. I. The Plaintiff Sands declared, That he was seised in Fee of a Mill, and had a Watercourse running thro' the Defendant's Lands to the said Mill, and that he stopped it up: There was a Demurrer to this Declaration, and the same Objection as now was then taken to it, (viz.) That he had not shewed that it was an ancient Mill. And tho' the Court seemed to over-rule that Objection, yet no Judgment was given.

1 Leon. 247. *id.* 1 Rol. Abr. 104.

The Case of Sly and Mordant was there cited, (which is reported by Mr. Leonard) and is this, viz. That the Plaintiff was seised in Fee of certain Lands, &c. and the Defendant had stopped a Watercourse, by which his Land was drowned: It was adjudged, that the Action would lie for this Injury; but that is no Authority to support this Declaration.

2. The Plaintiff hath not entitled himself to this Watercourse, either by Prescription, or that the Water debuit vel consuevit currere to his Mill, for so is the Pleading in Lutterell's Case, and in all other Cases before cited.

3. Therefore the Plea in Bar is good, the Defendant having sufficiently justified his Right; and the Plaintiff having not prescribed to it, here can be no Trespass done, and so concluded that Judgment ought to be reversed.

Ex Parte Quer.

This Case depends upon the Declaration; for the Plea in Bar is only argumentative; 'tis no direct Answer to it, and the Replication and Rejoinder are not material.

The Plaintiff hath a good Cause of Action, for it cannot be denied, but where an Injury is done to another, and Damages ensue, 'tis sufficient to maintain an Action of Trespass, or upon the Case.

'Tis plain, that an Injury was done to the Plaintiff, and the Damage is as manifest, by diverting of the Watercourse, and the Loss of his Mill; and the Fact is laid to be injuste & malitiose.

The Defendant gives no Reason why he injured him, but only that he had no Use of the Water, because his Mill was burnt.

Roll. 339. 394. Palm. 290.

This is an Action brought by the Plaintiff upon his Possession against a wrong Doer, in which it is not necessary to be so particular as where one prescribes for a Right.

* Bracton, lib. 4. cap. 32.

A Man may have a Watercourse by * Grant as well as by Prescription; and in such Case he need not set forth any particular

use of the Water, as that it ought to run to his Mill; neither is it absolutely necessary to mention the Mill, for that is only to inform the Court of the Damages.

In the printed Entries there are many Forms of Declarations, without any Prescription, or setting forth that the Mill was ancient; as where an Action was brought against the Defendant, De placito quare Vi & Armis Stagnum Molendini ipsius (the Plaintiff) fregit, and this was only upon the Possession. Rast. Ent. 9. B.

The Case in Dyer is a good Authority to support this Action, for 'tis as general as this, viz. for diverting a Watercourse, per Constructionem Wæræ, and doth not shew where it was erected, or what Title he had to it. Antea.

So where the Action was for disturbing the Plaintiff, in collecting of Toll, and doth not shew what Title he had to it, either by Prescription or Grant; but declared only that he was seised in Fee of a Manor and Fair, and held good: And it was the Opinion of my Lord Hobart, That a Declaration for breaking down of a Bank generally includentem Aquam, running to the Plaintiff's Mill, was good. 2 Cro. 43. Dent *vers.* Oliver. *Nota*, This was after Verdict. Hob. 193. Biccot *versus* Ward.

The Authorities cited on the other Side, do rather maintain this Way of Pleading than the contrary, for those Cases are wherein the Plaintiff declared, that the Water currere consuevit & debuisset to the Plaintiff's Mill, Time out of Mind, which Words are of the same Signification as if he had shewed it to be an ancient Mill; and that agrees in Substance with this Case, for the Water cannot be diverted ab antiquo & solito Cursu, if the Mill was not ancient. Cro. Car. 499.

The Word solet implies Antiquity: The Writ De Secta ad Molendinum is quam ad illud facere debet & solet: And it was the Opinion of a * learned Judge, that the Words currere consuevit & solebat, did supply a Prescription or Custom. Reg. 153. * Justice *Doderidge* in *Surry* and Piggot's Case, Pop. 171.

Thus it was in an Assise of Nusance, wherein the Plaintiff set forth, that he had a Fountain of Water currentem usque ad Rotam Molendini, &c. and that the Defendant divertit Cursum Aquæ, and this was held good. 27 Assise *placito* 8. Br. Prescription 49. Rast. Entr. 441. Tit. Nusance.

The Cases of stopping up of Lights and diverting of Water-courses are not parallel; the Prescription to Lights must be ratione Loci; and therefore if a Man will erect a new House, and a Stranger will stop the Lights, 'tis an Injury done, and the Action may be maintained upon the Possession.

Lutterel's Case was grounded upon the Possession; for upon the Plaintiff Cottell's own shewing the Prescription was gone, because he set forth, that he had pulled down the old Mills, and

WILLIAM LIBRARY

that the Defendant Lutterel diverted the Water from running to those Mills which the Plaintiff newly built.

All which prove that a Prescription goes to the Right, but a Possession is sufficient to support an Action against a Tort fesor.

Slackman *vers.* West. Palmer 387. 2 Cro. 673.

Lastly in the Case of a Common or a Rent, which cannot pass without Deed, if the Plaintiff shews a Que Estate he must produce the Deed by which it was granted; but where he prescribes for a Way, he may set forth his Estate without shewing how he came by it, because 'tis but a Conveyance to the Action, which is grounded upon the Disturbance done to the Possession.

Cur. The Word solet implies Antiquity, and will amount to a Prescription; and solitus Cursus Aquæ running to a Mill, makes the Mill to be ancient; for if it be newly erected, there cannot be solitus Cursus Aquæ towards the Mill: For which Reasons the Judgment in the Original Action was affirmed in Hillary-Term, Primo Willielmi: But the Chief Justice was of Opinion, that if the Cause had been tried upon such a Declaration, that the Plaintiff ought to prove his Prescription, or else he must be Nonsuit.

Anonymous.

ONE was indicted for drinking of an Health to the Pious Memory of Stephen Colledge, who was executed at Oxford for High Treason. He was fined 1000 l. and had Sentence to stand in the Pillory, and was ordered to find Sureties for his good Behaviour.

Rex *versus* Rosewel.

THE Defendant was a Non-conformist Minister, and indicted for High Treason, in preaching of these Words, viz. Why do the People (*innuendo* the People of England) make a flocking to the King (*innuendo Carolum Secundum,*) under Pretence of curing the King's-Evil, which the King cannot do; but we are the Priests and Prophets to whom they ought to flock, who by our Prayers can heal them.

We have had two wicked Kings now together (*innuendo Carolum Primum, & Carolum Secundum*) who have suffered Popery to be introduced under their Noses, whom I can liken to none but wicked *Jeroboam*, and if they (*innuendo*, the People,

&c.) would stand to their Principles, I make no Doubt but to conquer our Enemies, (*innuendo* the King and all his loyal Subjects) with Rams Horns, broken Pitchers, and a Stone in a Sling, as in the Time of old.

Upon this Indictment he was arraigned, and pleaded Not Guilty, and was tried at Bar, and found guilty of High Treason upon the Evidence of two Women. And the Court having assigned Mr. Wallop, Mr. Pollexfen, and Mr. Bampfield to be his Counsel, they moved in Arrest of Judgment.

First, That the Words discharged of the Innuendo's, if taken separate, or altogether, have no Tendency to Treason. The first Paragraph doth not import any Crime; and to say that we have had two wicked Kings, may be a Misdemeanor, but 'tis not Treason, either by Intendment of the Death of the King, or by levying War against him.

The Crime seems to consist in the next Words, which are, [if they would stand to their Principles, *&c.*] This seems to stir up the People to Rebellion, but as they are placed in the Indictment, they will not admit of such a Construction, neither as they have Reference to the Words precedent, or as they stand by themselves.

The Words which go before are, viz. We have had two wicked Kings together. 'Tis not expressed what Kings, or when they Reigned, which is very uncertain, (Et si ipsi ad Fundamentalia sua starent, which Word ipsi is relative, and must refer ad proximum antecedens, and then it must be ipsi Reges) which is the proper and natural Sense of the Words.

But now if the Innuendo's must be inserted, it must be under some Authority of Law, either to design the Person or the Thing, which was not certain before, that the Intention of the Party speaking may be more easily collected; and this is the most proper Office of an Innuendo. 4 Co. 17.

It will not change the Meaning of the Words, for that is to make them still more incertain. Hob. 45. 2 Cro. 126.

Now most of the Innuendo's in this Indictment are naught, because they do not ascertain the subject Matter.

First, by the Word People, (*innuendo* the People of England) may be as well intended any other People, because there was no previous Discourse of the People of England.

Then follow these Words, We have had two wicked Kings now together, (*innuendo* King Charles the First and Second) which may be as well intended of King Ethelred and Alfred, because the Words denote a Time past, and therefore cannot possibly intend the King, of whom there was no precedent Discourse.

course. And the Rule is, De Dubiis & Generalibus benignior Sententia recipienda est.

Besides those Words are insensible, and indeed impossible, for we cannot have two wicked Kings together, it ought to be successively.

Then to say, we shall conquer our Enemies, cannot be intended the Enemies of the King, because the Word Enemies is of a large Sense; for Man, by reason of his Sins and Infirmities, hath many Enemies, and possibly such might be intended.

If therefore it be doubtful what Enemies were meant, if it shall not be in the Power of a Clerk, by an innuendo to make Words of another Sense than what they will naturally bear, nor to help where they are insensible, as in this Case: If there was no precedent Discourse either of Kings, People, or Enemies, which must be proved by the Evidence, then is this Indictment naught, and therefore Judgment ought to be arrested.

Mr. Attorney and Sollicitor contra.

'Tis laid in this Indictment, that the Words were spoken to stir up Rebellion, and to depose the King, and 'tis so found by the Verdict of twelve Men.

That which aggravates the Offence is, That it was spoken in a publick Assembly to the People, which must be intended the People of England, for to such the Defendant preached, and to them he declared the Power given unto him by God, to heal them by Prayer: Then he tells them that their King is wicked, and having insinuated this Doctrine into their Minds, he then bids them to stand to their Principles in opposing and subduing wicked Kings.

'Tis objected that there ought to have been a precedent Discourse of the King, but the Precedents are otherwise.

In 33 H. 8. Rot. 17. There was an Indictment against the Lord Grey, for Words spoken against the King, without setting forth any precedent Discourse of him.

So was my Lord Cobham's Case in 12 Jac. for that he proditorie dixit & propalavit hæc Verba, viz. It will never be well for *England*, until the King and his Cubs are killed, without an Averment that the Words were spoken de Rege.

2 Roll. Rep. 88. And in William's Case, reported by my Lord Rolls, who was indicted for High Treason, for writing two Books, in which were many Traiterous Assertions, but no Averment of any previous Discourse concerning the King, all these Indictments were thus, viz. Dixit such Words de Domino Rege.

Therefore the Indictment is good in Form, if the Words therein contained amount to Treason. Now they do import Treason, or not: If they do import it, then 'tis unnecessary to aver that they were spoken de Rege, because it cannot be intended to be Treason against any other King.

If a Man should say, that he would go to Whitehal and kill the King; 'tis not necessary to aver any precedent Discourse de Rege.

In Actions on the Case for Words, there must be an Averment of the Person, because many Men are of the same Name; but in Indictments the Form will govern the Case.

Several Traitors have suffered Death in such Cases as this at Bar, and many learned Men in all Ages have attended this Court, and this Objection was never made 'till now; and therefore the Precedents being without this Averment de Rege, where the overt Act is by Words, Judgment was prayed against the Prisoner.

Curia. Words may be an overt Act; but then they must be so certain and positive, as plainly to denote the Intention of the Speaker.

If a Man should tell another, That he would drive the King out of England, there needs no Averment that such Words were spoken de Rege, because they tend immediately to depose the King; but if he had said that he would go to Whitehall and destroy his Enemies, that is not Treason without an Averment, &c. Judgment was arrested.

DE
Term. Sancti Hill.

Anno 36 Car. II. in Banco Regis, 1684.

Pool *versus* Trumbal.

25 Car. 2. cap. 5.

THE Defendant was sued in the Spiritual Court for Dilapidations, and pleaded the general Pardon, by which all Offences, Contempts, Penalties, *&c.* were pardoned; and for this Reason he prayed a Prohibition, but it was denied, because the Statute never intended to pardon any Satisfaction for Damages, but only to take away Temporal Punishments.

Dorrington *versus* Edwin. Mich. 36 Car. II. *Rot.* 277.

Sci' Fa' will lie against Pledges in Replevin by Pleint. Thes. Brev. 274.

SCire Facias against Pledges in a Replevin brought by Pleint, setting forth, that John Temple did levy a Pleint in the Sheriffs Court of London, for the taking of three Baggs of Money, in which Suit he found Pledges de prosequendo & de retorno habendo, if it should be awarded.

That this Pleint was transmitted out of that Court into the Hustings, and by * Certiorari removed into the King's-Bench, where the Plaintiff declared as aforesaid, &c.

* If it had not been a Court of Record, it might have been removed by *Refalo.* Dalt. 425. 9 Hob. 6.58. 13 E.1. c. 2. F. N. B. 74. F. Dalt. 273.

Dorrington avowed the taking, &c. and Temple was nonsuited, and thereupon a Retorn' Habend' was awarded to the Sheriff, who returned elongat', &c.

Then a Sci' Fa' was brought against the Pledges upon the Statute of Westm. 2. which provides, that where Lords upon Replevins cannot obtain Justice in inferior Courts against their Tenants, when such Lords are attached at their Tenants Suits, they

may

may have a *Recordari* to remove the Plea before the Justices, *&c.* and the Sheriff shall not only take Pledges of the Plaintiff to prosecute his Suit, but also to return the Cattle if a Return be awarded, *&c.*

The Defendants appeared, and prayed Oyer of the Certiorari, which was returned by the Mayor and Sheriffs only, without the Aldermen.

And upon a Demurrer the Question was, Whether a Scire Facias will lie against them by Vertue of this Statute, they being only Pledges in Replevin brought by Pleint without Writ.

The Case was argued by Mr. Pollexfen for the Defendants.

And for the Defendants it was said, That they could not be charged by this Scire Facias, because the Pleint was removed by Certiorari, and thereby the Plaintiff Dorrington had lost the Benefit he had against the Pledges in the Sheriff's Court.

This Case was compared to other Actions in inferior Courts, which if removed by Habeas Corpus, the Bail below are discharged of Course.

By the Common Law there were no Pledges of Retorn' Habend', for before this Statute the Sheriff could not make a Replevin without the King's Writ. Now he hath Power to take Pledges; but if he will make Deliverance of the Goods ad querelam alicujus sine brevi, the Fault is still in him, for he may * compel the Party to bring a Writ, and then the Pledges will be liable, because it will appear who they are. Dyer 246. * Dalt. 434.

And therefore it hath been adjudged, That where a Replevin is brought by Writ, the Sheriff cannot make Deliverance without taking Pledges, because if the Plaintiff should recover, he hath a Remedy against them by Scire Facias; but if he recover upon a Replevin brought by Pleint, the Judgment shall not be avoided by assigning the Want of Pledges for Error, because in such Case the Sheriff is not by Law obliged to take Pledges. Cro. Car. 446. Cro. Car. 594.

2. This Scire Facias is brought too soon, for there ought to go an Alias & Pluries Retorn' habend' before the Return of Elongata, and then, and not before, the Scire Facias is properly brought.

The Pledges are answerable, and the Scire Facias is well brought, and this grounded upon the Statute of W. 2. which directs Pledges to be taken before the Delivery of the Goods: It Econtra.

takes Notice, that Replevins were sued in Inferior Courts by the Tenants against their Lords, who had distrained for Rents due for Services or Customs; and that such Lords could not have Justice done in those Courts, and therefore to remedy this Mischief the Statute gives the Writ Recordare, &c. to remove the Pleint before the Justices; and because such Tenants, after they had replevied their Cattle, did usually sell them, so that a Retorn could not be made to the Party distraining, therefore it directs that the Sheriff shall take Pledges for returning the Beasts, if a Return should be awarded, which would be to little Purpose if such Pledges were not liable upon the Retorn of Elongat.

Now as to the removing of the Pleint by Certiorari, that makes the Case more strong in the Plaintiff's Behalf, because the Record it self, una cum omnibus ea tangen. is removed; but by an Habeas Corpus the Person is only removed, and the Court hath thereby a Jurisdiction over his Cause, which the Inferior Court hath lost, because it hath lost his Person.

2. This Scire Facias is not brought too soon, as hath been objected, for 'tis in vain to bring an Alias & Pluries after the Sheriff had returned Elongat': 'Tis like the common Case where a Scire Facias is brought against the Bail, and Non est inventus is returned, after which there never was an Alias or Pluries Capias.

And afterwards in Michaelmas-Term following Judgment was given that the Pledges are liable.

Palmer *versus* Allicock.

22 & 23 Car. 2. cap. 10.

By the Statute of Distribution of Intestates Estates 'tis provided, That in Case there be no Wife, then the Estate of the Husband dying intestate shall be distributed equally amongst the Children, and if no Child, then to the next of Kin of the Intestate in equal Degree, and to those who legally represent them.

A Man died intestate, having no Wife at the Time of his Death, and but one Child, who was an Infant, afterwards Administration was granted of the Father's Estate durante minore Ætate of the Child, who died before the Age of seventeen.

Then Administration was granted by a Peculiar to the next of Kin of the Infant, and an Appeal was brought in the Arches by the next of Kin of the Father, to revoke that Administration.

In

In a Prohibition the Question was, Whether Administration de Bonis non, &c. of the first Intestate, shall be granted to the next of Kin of the Father or the Child?

Mr. Pollexfen argued this Term for the Plaintiff in the Prohibition, viz.

That the Statute gives a Power to the Ordinary to take Bonds of such Persons to whom Administration is committed, the Forms of which Bonds are expressed in the Act, and the Conditions are to make a true and perfect Inventory, and to exhibit it into the Registry.

He hath also a Power to distribute what remains after Debts, Funeral Charges and Expences.

Thus the Law stands now.

Then as to the Case at the Bar, three Things are to be considered:

1. If a Man dies intestate, leaving two Sons and no Wife, each hath a Moiety of his personal Estate immediately vested in him, so that if one Brother should afterwards die intestate, the other shall have the whole.

2. If an Interest be vested in two, then by this Statute the like Interest is vested in one, so that if he die Intestate, his Administrator shall have the Estate.

3. If so, then the Consequence will be, that in this Case Administration de Bonis non of the first Intestate shall go to the next of Kin of the Infant.

By Interest is meant a Right to sue for a Share after Debts paid, which Interest every Person hath in a Chose in Action: As if a Man doth covenant with two, that they shall have such an Estate after Debts paid, an Interest vests in them by this Covenant, and if they die, it goes to their Executors, such also is the Interest of every Residuary Legatee.

Now if any of them die before the Residue can be distributed, the Wife or Children of him so dying shall have it.

And to make this more clear, it will be necessary to consider how the Law stood before the making of this Act.

At the Common Law neither the Wife, Child, or next of Kin, had any Right to a Share of the Intestate's Estate, but the Ordinary was to distribute it according to his Conscience to pious Uses, and sometimes the Wife and Children might be amongst the Number of those whom he appointed to receive it, but the Law intrusted him with the sole Disposition of it. § 2 Inst. 399.

After-

13 E. 1. c. 19. Afterward by the Statute of Westm. 2. he was bound to pay the Intestate's Debts so far as he had Assets, which at the Common Law he was not bound to do, and an Action of Debt would then, and not before, lie against him, if he did alien the Goods, and not pay the Debts.

Pl. Com. 277. Greisbrook *versus* Fox.

Then the Statute of * 31 E. 1. was made, by which he was impowered to grant Administration to the next of Kin, and most lawful Friend of the Intestate; and by this Statute the Person to whom Administration was committed might have an Action to recover the Intestate's Estate, for at the Common Law he had no Remedy.

* 31 E. 1. c. 11.

1 Inst. 133 b. 2 Inst. 397. 9 Co. Hensloe's *Case*.

But then afterwards the Statute of 21 H. 8. cap. 5. enacts, That the Ordinary shall grant Administration to the Widow or next of Kin of the Person deceased, or to both; and this was the first Law which gave any Interest to the Wife, to whom Administration being once granted, the Power of the Ordinary was determined, and he could not repeal it at his Pleasure as he might at the Common Law.

Hob. 83. 1 Cro. 62, 202.

But after the making of this Statute many Mischiefs did still remain, because the Administration being once committed, the Person to whom it was granted had the whole Estate, and the rest of the Relations of the Deceased were undone; and therefore if his Children were under Age, or beyond the Seas, and a Stranger had got Administration, it would have been a Bar to them.

And thus it continued many Years, the Ordinary still making Distribution as he thought fit, taking only a Bond from the Person to whom he granted Administration for the Purposes aforesaid, and sometimes to dispose the Surplus after Debts and Legacies, as he should direct, and no Prohibition was granted to remedy these Inconveniences till about the 12th Year of King James the First.

Hob. 83.

But now by this Act a good Remedy is provided against these Mischiefs, and 'tis such which takes away the Causes thereof, which is, that the Administrator shall not have the whole Estate, but that a Distribution shall be made.

The Title of the Act shews the Meaning thereof to be for the better Settlement of Intestates Estates; and the Body of it shews how Distribution shall be made; so that such Bonds which were usually given by the Administrator, before this Law to make Distribution, as the Ordinary should direct, are now taken away, and other Forms are prescribed; and there can be no Remedy taken upon such new Bonds till the Ordinary hath appointed the Distribution, so that in effect this Act makes the Will of a Person dying intestate, and tells what Share his Relations shall have and

and 'tis probable that the Custom of London might guide the Parliament in the making of this Law, which Custom distributes the Estate of a Freeman amongst his Wife and Children.

This shews that an Interest is vested in them, which goes to the Administrator, the Consequence thereof is very considerable; for if such Children should marry, they have a Security by this Act that a Portion shall be paid; and if the Wife should take another Husband, he will be entitled to her Share, and this may be a Means of giving Credit in the World, when the Certainty of their Portions are so well known and secured.

'Tis such an Interest which is known in the Law, and may be compared to that in Sir Thomas Palmer's Case, who sold 1600 Cord of Wood to a Man, who assign'd it to another, and afterwards the Vendor sold 2000 Cord to one Maynard, to be taken at his Election: The Assignee of the first Person cut 600 Cord, and Maynard carried it away; thereupon an Action was brought, and the Plaintiff had Judgment, because the first Vendee had an Interest vested in him which he might well assign. 5 Co. 24.

This Case is a plain Proof that a Man may have an Interest in a Chattel without a Property, and such an Interest which gives the Person a Remedy to recover, and where there is a Remedy, there must be a Right, for they are Convertibles.

'Tis not a new Thing in the Law, that a contingent Interest in the Ancestor shall survive to the Heir; as if a Man be seized of the Manor of S. and covenants that when B. shall make a Feoffment to him of the Manor of D. then he will stand seized of the said Manor of S. to the Use of the Covenantee and his Heirs, who died leaving Issue an Heir, who was then an Infant, B. made a Feoffment to the Covenantor accordingly. It was held that no Right descended to the Heir of the Covenantee, but only a Possibility of an Use which might have vested in the Ancestor, and therefore the Heir shall claim it by Descent. Wood's *Case*, *cited in* Shelley's *Case*, 1 Co. 99.

'Tis like a Debt to be paid at a Day to come, which is Debitum in præsenti, tho' solvendum in futuro, and tho' the Obligee cannot have an Action before the Day is come, yet such an Interest is vested in him, that he may release it before that Day, and so bar himself for ever. Lit. Sect. 512.

Now if this Act makes a Will, it ought to be construed as such; and it cannot be denied, that if this Case had happened upon a Will, the Executor of the Son would have a very good Title.

'Tis a weak Objection to affirm, that this Law was made to establish the Practice of the Ecclesiastical Courts, and that 'tis only explanatory of the Statutes of E. 3. and H. 8. because 'tis plainly

plainly introductory of a new Law, for Distribution is now made otherwise than it was before.

2. An Interest is vested where there is but one Child.

For the better understanding of this Point, the Clause in the Act ought to be consider'd; which is, viz. If there be no Wife then to be distributed amongst the Children; if no Child, then to the next of Kin of the Intestate. Upon which Clause these Objections have been made:

Obj. 1. That 'tis insignificant, because the Statute of H. 8. gives the Right of Administration to the Child.

2. That Distribution cannot be made where there is but one.

3. That this Clause ought to be construed according to the Law in the Spiritual Courts.

Answ. Now as to the first Objection, 'tis true, that before this Act the Child had a Right of Administration, but that Right was only personal; so that if he had died before he had administred, his Executor or Administrator could not have it.

Besides, many Inconveniences did attend this personal Right of Administration, which are now prevented by the vesting of an Interest.

For when the Right was personal, and the Administrator gave Bond with Sureties to administer truly, and the Ordinary had appointed Destribution to be made, the Administrator was bound to perform it tho' not in equal Degree; and if he died before the Estate was got in, it was lost for ever.

But now by this Clause, Distribution must be made equally, viz. One third Part of the Surplus to the Wife, the rest by equal Portions to the Children, so that what was very incertain before, and almost at the Will of the Ordinary, is now reduced to a Certainty; and therefore an Interest must vest in such Persons to whom such equal Distributions of filial Portions are given.

2. Object. That Distribution cannot be made where there is but one Child.

Answ. This also is true in Propriety of Speech, and taking the Word Distribute in the strict Sense.

But this was never intended by the Statute, as may plainly appear upon the Construction of the whole; for the Word Children doth comprehend a Child and more, and the Form of the Bond directed by this Statute is that the Administrator shall deliver the Goods to such Person and Persons, &c. which shews that one is

is comprehended, and therefore Distribuere in this Case is no more than Tribuere, and must be so taken.

The Parliament never intended that Distribution should not be made where there is but one Child, as may be easily collected from the Reason of the Thing, and the Inconveniencies which would ensue.

1st. If a Man should die, leaving a Wife and one Child, the Wife would be entitled to one Third, and the Child to the other two Thirds of the personal Estate. Now if the Child shall have two Thirds, being comprehended under the Word Children, What Reason can be given why he should not have the Whole where there is no Wife, which he could not have if the Word Children did not comprehend Child in this Case?

2dly. If a Man hath a personal Estate to the Value of 2000 l. and dieth leaving Issue three Sons, but hath in his Life-Time made Provision for the second Son to the value of 1000 l. the eldest Son dies intestate, shall the youngest be totally excluded from the remaining 1000 l. because there is none left to have Distribution, his second Brother being preferred in the Life-time of his Father, by an equal Portion with what remains?

3dly. If the Father hath a Son married, and two Brothers, and dies intestate; now if his Estate should not be vested in the Son, then if he should also die intestate, his Wife could have nothing, but it would go to the Unkles; and this would be a very hard Construction of this Law to carry the Estate to the Unkles and their Executors from the Son and his Administrator.

But there is a Case which proves that a Child is intended by the Word Children; 'tis between Amner and Lodington, cited in Matthew Manning's Case, which was: A Man being possessed of a Term for Years, devised it to his Wife for Life, and after her Death, to her Children unpreferred, and made her Executrix, and died; she married again, and had but one Daughter unpreferred, and after the Death of the Mother this executory Devise was held good to the Daughter, though it was by the Name of Children, and she enjoyed the Term. 8 Co. 96. his

3. Object. That this Act should be construed according to the Spiritual Law.

Answ. That cannot be, for all Statutes ought to be expounded according to the Rules of the Common Law, and not according to their Law; for they have no Law which gives Power to sue, nor to distribute to the Wife or next of Kin, but the usual Course was for the Ordinary to dispose of Intestates Goods to pious uses.

Then

Then admitting this to be an Interest vested, the Consequence will be, that it shall go to the Administrator, and then Administration must be granted where the Estate legally ought to go.

4 Co. 51. Ognel's Case. 1 Cro. 106.

The Administration of the Husband to the Goods of the Wife is grounded upon this Reason, because the Marriage is quasi a Gift to him in Law.

It was not the only Mischief before this Law, that the Administrator run away with the whole Estate; for if a Man died intestate, leaving but one Son then beyond Sea, and Administration was granted to a Stranger, he who had Right could not appeal after fourteen Days, which the Son could not do at that Distance, and so by this Means a wrongful Administrator was entitled to the whole, and he whose Right it was, had no Remedy to Recover at his Return.

But now this inconvenience is likewise redressed by the Statute of Distributions, for when the Son returns he may put the Bond in Suit; and for these Reasons it was prayed that the Prohibition might stand.

Econtra.

Mr. Williams argued for the Defendant in Easter-Term, 2 Jacobi; the Substance of whose Argument was, That though the Plaintiff had gotten Administration, yet no Interest was thereby vested in him, but that the Appeal was proper; and for this he cited the Case of Beamond and Long, which was Baron and Feme Administratrix of her former Husband recover in Debt; the Feme died, the surviving Husband brought a Scire Facias to have Execution; and upon a Demurrer, all the Court, but Hide, agreed that the Scire Facias would not lie for the Husband alone, because it was a Debt demanded by the Administratrix in auter Droit.

Cro. Car. 208.

This Statute hath not wholly altered the Common Law in this Matter; it only limits the Practice of Ecclesiastical Courts, and makes Provision for particular Purposes, viz. That Distribution shall be made to the Wife and Children, and their Children; which is so far introductory of a new Law, but no farther: So that the Right of Administration is as it was before, and therefore must be granted to the next of Kin of the Father.

This Court hath no Power to grant a Prohibition in such a Case; and if it should, 'tis the first which ever was granted of this Kind, for it ought not to be determined here, but in an Ecclesiastical Court, which hath an original Jurisdiction of this Cause, and the Appeal is in proprio loco.

To which Mr. Pollexfen answered, That the contrary was very plain, for here have been many Prohibitions granted even

even upon this very Act; and the Question now before the Court is not concerning the Manner of Distribution, but the Right of Administration, whether any Interest is vested in the Son or not? 'Tis true, the Estate in Law goes to the Administrator, but the Interest and Right to sue for and recover the Estate goes to the Son; so that if he should die before he is in actual Possession, his Administrator shall have it to pay Debts, and to distribute, &c.

In the Case of a Will, if a Man should devise his Estate to his Wife and Children after Debts and Legacies paid, an Interest vests in those Children, which doth not differ from the Case at the Bar, but that in the one Case the Testator makes the Will, and in the other 'tis made by an Act of Parliament.

Some Inconveniencies have been already mentioned if the Law should be otherwise taken, but there be many more; for if no Interest should vest in the Child 'till after Distribution, he could neither be trusted for his Education or Necessaries whilst living, and no Body would bury him if he should happen to die before the Year and a Day, for the Funeral Charges would be lost.

It will likewise occasion Delays in Administrators to make Distribution, in hopes of Gain; neither will any honest Man take an Administration upon himself, because he can neither pay Money safely, or take a Release, for if the Infant die before Distribution, it is void.

But notwithstanding these Reasons, the Court gave Judgment in Michaelmas-Term following, That a Consultation should go, the Chief Justice being absent. Skinner 218 218 —

DE
Termino Paſchæ,

Anno 1 Jac. II. in Banco Regis, 1685.

Coram Georgio Jefferies *Mil' Capital' Juſtic'.*
Franciſco Wythyns *Mil',*
Richardo Holloway *Mil',* } *Juſticiariis.*
Thoma Walcot *Mil',*

Rex *verſus* Marſh, *and others.*

Information for a Forgery.

JAmes Marſh, John W. and John L. were indicted upon the Coroner's Inquest for the Murder of R. D. at H. in Kent; and upon this Indictment they were arraigned and tried at the Bar this Term.

The Fact upon the Evidence appeared to be, That the Priſoners were Cuſtom-Houſe Officers, who ſuſpecting that ſome Wool would be tranſported, went to the Sea-ſide in the Night-time, where there happened an Affray, and the Priſoner Marſh was twice knocked down, and recovering himſelf ſhot the Deceaſed. They were all acquitted of the Murder; and then upon Complaint made, that Marſh was only found guilty upon the Coroner's Inquest, two of the ſaid Jury were now ſworn in Court, who depoſed, that they upon the Coroner's Inquest found the Indictment againſt Marſh alone, which Indictment was in Engliſh; but that one J. D. who was then Mayor of H. and who by Vertue of that Office was alſo Coroner, took the Indictment, and told the Jury it muſt be turned into Latin, which was done, and he then inſerted the Names of the two other Priſoners now at the Bar, whereupon the ſaid Mr. D. was now called, and he appearing, was bound in a Recognizance to anſwer this Matter; and the two Priſoners, who were acquitted, were likewiſe bound to proſecute him, and the Jury-Men were ordered to put their Affidavit in Writing, and ſwear it in Court.

An

An Information was afterwards exhibited against Mr. D. which was tried at the Bar in Trinity-Term following, and he was found guilty; but having spoke with the Prosecutor in the long Vacation, he was only fined 20 Nobles in Michaelmas-Term.

Roberts *versus* Pain.

IN a Prohibition to the Court of Arches the Case was: The Plaintiff was presented by the Mayor and Aldermen of Bristol to the Parish-Church of Christ-Church in the said City, and the Defendant libelled against him because he was not 23 Years of Age when made Deacon, nor 24 when he entered into the Orders of a Priest; and the Statute requires, that none shall be made a Minister, or admitted to preach, being under that Age.

Prohibition not granted where a temporal Loss may ensue.

13 Eliz. c. 12.

The Reason now alledged for a Prohibition was, because this Matter was triable at Law, and not in the Spiritual Court, because if true, a Temporal Loss, viz. Deprivation, might follow.

But the Court denied the Prohibition, and compared this Case to that of a Drunkard or ill Liver, who are usually punished in the Ecclesiastical Courts, tho' a temporal Loss may ensue; and if Prohibitions should be granted in all Cases where Deprivation is the Consequence of the Crime, it would very much lessen the Practice of those Courts.

David Burgh's *Case*.

THE Parishoners of St. Leonard Foster-Lane gave this Man (who had a Wife and five Children) 5 l. in Money to remove into another Parish, upon Condition that if he returned in 40 Days, that he should repay the Money; he removed accordingly, and staid away by the Space of 40 Days. The Parish to which he removed obtained an Order upon an Appeal for his Settlement in the last Parish, where he was lawfully an Inhabitant; which Order being removed into this Court, and the Matter appearing thus upon Affidavits, they declared their Opinion only upon the Order to remove, viz. That the Man had gained a Settlement in the Parish to which he removed; for he being an Inhabitant there for so long Time, as was required by Law to make a Settlement, and not disturbed by the Officers, they were remiss in their Duty, and the Court would not help their Negligence.

DE
Term. Sanctæ Trin.

Anno 1 Jac. II. in Banco Regis, 1685.

Dominus Rex *versus* Dangerfield.

THE Defendant was convicted of publishing a Libel, wherein he had accused the King (when Duke of York) that he had hired him to kill the late King Charles, &c. And on Friday June 20. he was brought to the Bar, where he received this Sentence, viz.

That he should pay the Fine of 500 l. That he should stand twice in the Pillory, and go about the Hall with a Paper in his Hat signifying his Crime: That on Thursday next he should be whipp'd from Algate to Newgate, and on Saturday following from Newgate to Tyburn; which Sentence was executed accordingly; and as he was returning in a Coach on Saturday from Tyburn, one Mr. Robert Frances, a Barrister of Grey's Inn, ask'd him in a jeering Manner, Whether he had run his Heat that Day; who replied again to him in scurrilous Words; whereupon Mr. Frances run him into the Eye with a small Cane which he had then in his Hand, of which Wound the said Mr. Dangerfield died on the Monday following.

Mr. Frances was indicted for this Murder, and upon Not guilty pleaded, was tried at the Old-Baily, and found guilty, and executed at Tyburn on Friday July the 24th, in the same Year.

Mr. Baxter's *Case.*

HE was a Nonconformist Minister, against whom an Information was exhibited for writing of a Book, which he entitled, A Paraphrase upon the New Testament, and the Crime alledged against him in the said Information was, That he intending

tending to bring the Protestant Religion into Contempt, and likewise the Bishops, (innuendo the Bishops of England) did publish the Libel, in which was contained such Words, &c. setting forth the Words. He was convicted: And Mr. Williams moved in Arrest of Judgment, That the Words in the Information, and the Bishops therein mentioned, were misapplied to the Protestant Religion and the Bishops of England by such Innuendo's, which could not support this Charge against the Defendant.

That the Distringas and Habeas Corpora were inter nos & Richardum Baxter, which could not be, because the Information was exhibited in the Name of the Attorney-General.

But the Court over-ruled these Exceptions, and said, That by the Word Bishops in this Information, no other could be reasonably intended but the English Bishops; thereupon the Court fined him 500 l. and ordered him to give Security for his good Behaviour for seven Years.

Procter *versus* Burdet.

AN Action of Covenant was brought by an Apprentice, setting forth the Indenture, by which the Defendant his Master had covenanted to find and allow the Plaintiff Meat, Drink, Lodging, and all other Things necessary, during such a Time; and the Breach was as general as the Covenant, viz. That he did not find him Meat, Drink, Lodging, & alia necessaria.

3 Lev. 170. In Covenant the Breach was generally assigned, and held good.

The Plaintiff had Judgment by Nil dicit; and upon a Writ of Enquiry brought, entire Damages were given against the Defendant: And in a Writ of Error upon this Judgment, the Error assigned was, That the Breach was too general, and that entire Damages were given amongst other Things for alia necessaria, and doth not say for what; and a Case was cited in the Point in Trinity-Term, 16 Jacobi, where the Judgment was reversed for this very Reason.

2 Cro. 436. Astel *versus* Mills.

The Counsel contra argued, That that which is required in an Action of Covenant is, That there may be such a Certainty, as the Defendant may plead a former Recovery in Bar, if he be sued again; and therefore one need not be so particular in assigning of the Breach upon a Covenant as upon a Bond; for in a Bond for Performance of Covenants where there is a Covenant to repair, if it be put in Suit, 'tis not sufficient to say, That the House is out of Repair, but you must shew how: But in a Covenant 'tis enough to say, That it was out of Repair.

If

Kelway 85. If in this Case the Plaintiff had shewed what Necessaries were not provided for him, it would have made the Record too long, and therefore 'tis sufficient for him to say, that the Defendant did not find alia necessaria.

2 Cro. 304, 367, 1 Rol. Rep. 173. 3 Bulf. 31. 2 Saund. 373. That Case in 2 Cro. has since been adjudged not to be Law, for many contrary Judgments have weakened the Authority of it, viz. That the Breach may be assigned as general as the Covenant; as where a Man covenanted that he had a lawful Estate and Right to let, &c. the Breach assigned was, That he had no lawful Estate and Right to let, &c. and doth not shew that the Lessor had not such Right, or that he was evicted, yet it was held good.

Curia. In a Quantum meruit they formerly set out the Matter at Length, but now of late in that Action in general Words, and also in Trover and Conversion pro diversis aliis bonis, hath been held good, which is as general as this Case.

There are many Instances where Breaches have been generally assigned and held ill: That in Croke is so; but the latter Opinions are otherwise: Affirmetur Judicium.

Pye *versus* Brereton.

A Lease was made of Tythes for Three Years, rendring Rent at Michaelmas and Lady-day; and an Action of Debt was brought for Rent Arrear for two Years: Upon Nil debet pleaded the Plaintiff had a Verdict, and it was now moved in Arrest of Judgment, that the Declaration was too general, for the Rent being reserved at two Feasts, the Plaintiff ought to have shewed at which of those Feasts it was due. 2 Cro. 668.

But the Counsel for the Plaintiff said, That it appears by the Declaration that two Years of the three were expired; so there is but one to come, which makes it certain enough.

Curia. This is helped by the Verdict; but it had not been good upon a Demurrer.

2

D E

DE
Term. Sancti Mich.

Anno 1 Jac. II. in Banco Regis, 1685.

MEmorandum, That in *Trinity*-Vacation last died Sir *Francis North*, Baron of *Guilford*, and Lord Keeper of the Great Seal of *England*, at his House in *Oxfordshire*, being a Man of great Learning and Temperance. And Sir *George Jefferies*, Baron of *Wem*, and Chief Justice of the *King's-Bench*, had the Seal delivered to him at *Windsor*, and was thereupon made Lord High Chancellor of *England*. And Sir *Edward Herbert*, one of the King's Council, succeeded him in the Place of Chief Justice. There died also this Vacation, Sir *Thomas Walcott*, one of the Justices of the *King's-Bench*, and he was succeeded by Sir *Robert Wright*, one of the Barons of the *Exchequer*.

Sir John Newton *& al' versus* Stubbs.

IN an Action on the Case for Words the Plaintiffs declared, That they were Justices of the Peace for the County of Gloucester, *&c.* and that the Defendants spoke these scandalous Words of them; Viz. Sir *John Newton* and Mr. *Meredith* make Use of the King's Commission to worry Men out of their Estates, *& postea eodem die, &c.* they spoke these Words; Viz. Sir *John Newton* and Mr. *Meredith* make Use of the King's Commission to worry me and Mr. *Creswick* out of our Estates. And afterwards these Words were laid in Latin, (without an Anglice) ad tenorem & effectum sequen', &c.

Words laid to be spoke *ad tenorem & effectum sequen'* not good.

There was a Verdict for the Plaintiffs, and entire Damages, and now Mr. Trindar moved in Arrest of Judgment.

1. That the Words in the Declaration are laid in Latin, without an Anglice, and without an Averment that the Hearers did understand Latin.

Roll. Abr. 74. Pl. 2.

2

2. Tis

2. 'Tis not expressly alledged, That the Defendant spoke those very Words, for being laid ad tenorem & effectum sequen', something may be omitted which may alter the Sense and Meaning of them; and for this very Reason Judgment was stayed, tho' the Court held the Words to be actionable.

Cro. Eliz. 857.

Rex *versus* Ayloff, & *al'*.

Treason.

They were outlawed for High-Treason, and on Tuesday the 27th Day of October they were brought to the Bar, and a Rule of Court was made for their Execution on Friday following.

The Chief Justice said, That there was no Hardship in this Proceeding to a Sentence upon an Outlawry, because those Malefactors who wilfully flie from Justice, add a new Crime to their former Offence, and therefore ought to have no Benefit of the Law; for tho' a Man is guilty, yet if he put himself upon his Trial, he may, by his submissive Behaviour, and Shew of Repentance, incline the King to Mercy.

In Felonies which are of a lower Nature than the Crimes for which these Persons are attainted, Flight even for an Hour is a Forfeiture of the Goods of the Criminal: So likewise a Challenge to three Juries is a Defiance to Justice; and if that be so, then certainly flying from it is both despising the Mercy of the King, and contemning the Justice of the Nation.

They were both executed on Friday the 30th of October following.

Dominus Rex *versus* Colson, & *al'*.

Information for a Riot not good.

An Information was exhibited against the Defendants, setting forth, That they, with others, did riotously assemble themselves together, to divert a Watercourse, and that they set up a Bank in a certain Place, by which the Water was hindred from running to an ancient Mill in so plentiful a Manner as formerly, &c.

Upon Not guilty pleaded it came to a Trial, and the Jury found, that quoad factionem Ripæ the Defendants were guilty, and quoad Riotum not guilty.

And now Mr. Williams moved in Arrest of Judgment, because that by this Verdict the defendants were acquitted of the Charge in the Information, which was the Riot; and as for the erecting of the Bank, an Action on the Case would lie, and the Judgment was accordingly arrested.

Mason *versus* Beldham. Trin. 1 Jac. *Rot.* 408.

THE Plaintiff brings his Action against the Defendant, and sets forth, That in Consideration that he would suffer the Defendant to enjoy a House and three Water-Mills, &c. he promised to pay so much yearly as they were reasonably worth; and avers that they were worth so much: And upon a Demurrer the Question was, Whether this Action would lie for Rent?

Quantum meruit will lie for Rent.

It was argued for the Defendant that it would not lie, because it was a real Contract.

Cro. Eliz. 242, 786, 859.

'Tis true, there is a Case which seems to be otherwise; 'tis between Acton and Symonds, which was in Consideration that the Plaintiff would demise to the Defendant certain Lands for three Years, at the Rent of 25 l. by the Year, he promised to pay it; this was held to be a personal Promise, grounded upon a real Contract, and by the Opinion of three Judges, the Action did lie, because there was an express Promise alledged, which must also be proved. But Justice Croke was of a contrary Opinion.

2 Cro. 668. Cro. Car. 414.

Mr. Pollexfen contra. If a Lease be made for three Years, reserving a Sum in gross for Rent, and which is made certain by the Lease, in such Case an Action for Debt will lie for the Rent in Arrear: But if where no Sum certain is reserved, as in this Case, a Quantum meruit will lie; and no Reason can be given why a Man may not have such an Action for the Rent of his Land, as well as for his House or Chamber: And Judgment was given for the Plaintiff.

Anonymus.

Prohibition for Words, where some are actionable and others not.

There was a Libel in the Spiritual Court for scandalous Words, Viz. She is a Bitch, a Whore, an old Bawd. And a Prohibition was now prayed by Mr. Pollexfen, because some of the Words were actionable at Law, and some punishable in the Spiritual Court; and therefore prayed that it might go Quoad those Words which were actionable at Law.

The Chief Justice granted it, because the Words were an entire Sentence, and spoken altogether at the same Time, and therefore if a Prohibition should not go, it would be a double Vexation.

DE

Termino Paſchæ,

Anno 1 Jac. II. in Banco Regis, 1685.

Earl of Yarmouth *verſus* Darrel.

Grant of the King of ſole Printing, not good.

THE Plaintiff brought an Action on the Caſe, ſetting forth Letters Patents of King Charles II. by which the Sole Printing of Blank Writs, Bonds and Indentures, were granted to him, excepting ſuch Forms which belonged to the Cuſtom-Houſe, and which were formerly granted to Sir Roger L'Eſtrange; that this Grant was to continue for the Space of 30 Years, and that the Defendant had Notice thereof, and had printed 500 Blank Bonds, which he laid to his Damage of the Sum of 40 l.

Upon Not guilty pleaded, the Jury found a ſpecial Verdict; the Subſtance of which was, That the Defendant was a Stationer, and that the Company of Stationers for the Space of 40 Years laſt paſt, before the granting of theſe Letters Patents, had conſtantly printed Blank Bonds; and ſo made a general Concluſion.

Mr. Trindar argued for the Plaintiff, and the only Queſtion was, Whether this Patent did veſt a ſole Intereſt in the Plaintiff, excluſive to all others?

In his Argument he inſiſted on theſe Points:

1. That the King hath a Prerogative in Printing, and may grant it excluſive to others.

2. That this Prerogative extends to the Caſe at the Bar.

That he hath ſuch a Prerogative, 'tis confirm'd by conſtant Uſage, for ſuch Grants have been made by the Kings of England ever ſince Printing was invented. But to inſtance in a few, viz.

The Patent for printing of Law-Books was granted to one More, on the 19th Day of January, in the 15th Year of King James I. And when that Patent was expired, another was granted to Atkyns and others, on the 15th Day of November, in the 12th Year of King Charles II.

In 23 Eliz. a Patent was granted to the Company of Stationers, for the sole printing of Psalm-Books and Psalters, for the Space of 30 Years. And on the 8th of August, 13 Eliz. the like Patent was granted to Christopher Barker, for Life. Another Patent to the Company of Stationers for printing of Corderius, *&c.* These and many more of the like Nature, shew what the constant Usage has been.

Now the Statute of Monopolies doth not reach to this Case, because of the Proviso therein to exempt all such Grants of sole Printing: And by the Statute of King Charles II. for regulating of the Press, 'tis enacted, That no Person shall print any Copy which any other hath, or shall be granted to him by Letters Patents, and whereof he hath the sole Right and Privilege to print. And upon the Breaches of these Statutes several Judgments have been given.

14 Car. 2. cap. 33.

Between Streater and Roger in this Court, 'tis true the Judgment was against the Plaintiff; but upon a Writ of Error brought in Parliament that Judgment was reversed.

Mich. 24. Car. 2. Rot. 237.

The same Term there was a Judgment given upon a special Verdict in the Common-Pleas for the Plaintiffs, who were the Company of Stationers, against Seymour, for printing of Almanacks. And they obtained the like Judgment against Wright, for printing of Psalters and Psalm-Books.

Hill 35. Car. 2. B.R.Rot. 99. 1 Mod. 256.

Now to apply this to the principal Case; 'tis to be considered, that these Books for which the sole Printing was so claimed, were of a publick Nature and Importance, relating to the Good and Benefit of the Subjects; and so likewise are Blank Bonds, for there may be false and vitious Impressions, to the Ruin and Destruction of many innocent People.

And as a farther Argument that the King hath this Prerogative, 'tis likewise to be considered, that where no individual Person can claim a Property in a Thing, there the King hath a Right vested in him by Law; and it cannot be pretended that any particular Person hath a Right to print those Bonds, therefore the finding that such were printed by the Company for above 40 Years, is immaterial; because there being an inherent Prerogative in the King, whenever he exerts it, all other Persons are bound up who were at Liberty before.

To prove which, the Judgment in the Case of the East-India Company is express in Point; for before that Patent the Subject had Liberty to trade to those Places prohibited by that Grant; but afterwards they were restrained by that Grant.

Neither is this in the Nature of a Monopoly; 'tis not like that of the sole Grant of making Cards, which hath been adjudged void, and with great Reason, because that Grant reached to prohibit a whole Trade, and therefore differs from this Case; for the Defendant may print other Instruments or Books, and exercise his Trade in some other lawful and profitable Commodities; and so might the Merchants in the Case of the East-India Company, for they were restrained by the Patent as to particular Places, but might trade to any other Part of the World. 11 Co. 84.

Neither will the Subjects in general receive any Prejudice by this or such like Grants; for if the Patentees make ill Use of their Privileges, tho' it cannot be properly called an Office, yet 'tis a Trust, and a Scire Facias will lie to repeal their Grants.

It was argued by the Counsel for the Defendant, That the Verdict having found that the Company of Stationers had used to print those Bonds for above 40 Years before the making of this Grant: The Question will be, Whether they are now divested of a Right so long enjoyed? Econtra.

And as to that, 'tis not a new Thing to object, That notwithstanding such Grants, yet other Persons have insisted on a Right to print, and have printed accordingly.

Thus the sole printing of Law-Books was granted to one Atkyns, yet the Reports of Justice Jones and my Lord Chief Justice Vaughan were printed without the Direction of the Patentees.

Printing, as 'tis a Manual Occupation, makes no Alteration in this Case, for the King hath as great a Prerogative in writing any Thing that is of a publick Nature, as he hath in printing of it.

Now considering Printing as an Art exclusive from the Thing printed, this Patent is not good: For if a Man invent a new Art, and another should learn it before the Inventor can obtain a Patent, if afterwards granted 'tis void.

Then consider it in relation to the Thing printed, which in this Case are Blank Bonds; 'tis not a new Invention, because the Company of Stationers have printed such above 40 Years, and for that Reason this Patent is void; for where the Invention is not new, there Trade shall not be restrained. 1 Roll. 4. 11 Co. 53. ib.

No

No Man can receive any Prejudice by the printing of such Bonds, for they are of no Use till filled up; 'tis only a bare Manufacture of setting of so many Letters together; but filling up the Blanks makes them of another Nature.

2 Rol. Abr. 215. pl. 5. Grants of Things of less Moment have been adjudged Monopolies, as a Patent for the sole making of all Bills, Pleas and Briefs in the Council of York; for by the same Reason a like Patent might be granted to make all Declarations in the Courts of Westminster-Hall.

Curia. The King hath a Prerogative to grant the sole Printing to a particular Person; all the Cases cited for the Plaintiff do not reach the Reason of this Case; for there is a Difference between Things of a publick Use, and those which are publick in their Nature; even Almanacks have been used to ill Purposes, as to foretel future Events; yet they are of publick Use to shew the Feasts and Fasts of the Church.

The Court enclined, That the Patent was not good.

Jackson *versus* Warren.

Amendment.

A Motion was made in Arrest of Judgment, for that the Day when the Assises were to be held, and the Place where, were left out of the Distringas, and so a Mistrial: But the Court were of another Opinion, for if there had been no Distringas the Tryal had been good; because the Jurata is the Warrant to try the Cause, which was right, and therefore the Distringas was ordered to be amended by the Roll.

1 Roll. Abr. 201.

Dominus Rex *versus* Sparks.

Where a Punishment is directed by a Statute, the Judgment must be pursuant.

IS enacted by the Statute of 1 Eliz. That every Minister shall use the Church-Service in such Form as is mentioned in the Book of Common-Prayer, and if he shall be convicted to use any other Form, he shall forfeit one whole Year's Profit of all his Spiritual Promotions, and suffer six Months Imprisonment.

1 Eliz. cap. 2. 13 & 14. Car. 2. cap. 4.

And by the Statute of King Charles the IId. All Ministers are to use the Publick Prayers, in such Order and Form as is mentioned in the Common-Prayer-Book, with such Alterations as have been made therein by the Convocation then sitting.

The Defendant was indicted at the Quarter-Sessions in Devonshire, for using alias Preces in the Church, & alio Modo than mentioned in the said Book, and concludes contra Formam Statuti: He was found guilty, and fined 100 Marks; and upon a Writ of Error brought, Mr. Pollexfen and Mr. Shower argued for the Plaintiff in Error, that this Indictment was not warranted by any Law; and the Verdict shall not help in the Case of an Indictment, for all the Statutes of Jeofails have left them as they were before.

Now the Fact, as 'tis laid in this Indictment, may be no Offence, because to use Prayers alio Modo than enjoined by the Book of Common-Prayer, may be upon an extraordinary Occasion, and so no Crime.

But if this should not be allowed, the Justices of Peace have not Power in their Sessions to enquire into this Matter, or if they had Power, they could not give such a Judgment, because the Punishment is directed by the Statute; and of this Opinion was the whole Court.

The Chief Justice said, That the Statute of the 23 Eliz. could have no Influence upon this Case, because another Form is now enjoined by later Statutes; but admitted that Offences against that Statute were enquirable by the Justices. 23 Eliz. cap. 1.

The Indictment ought to have alledged, that the Defendant used other Forms and Prayers instead of those enjoined, which were neglected by him; for otherwise every Parson may be indicted that useth Prayers before his Sermon, other than such which are required by the Book of Common-Prayer.

Clerk *versus* Hoskins.

Debt upon a Bond for the Performance of Covenants in certain Articles of Agreement, in which it was recited, That whereas the now Defendant had found out a Mystery in colouring Stuffs, and had entered into a Partnership with the Plaintiff for the Term of seven Years; he did thereupon covenant with him, that he would not procure any Person to obtain Letters Patents within that Term to exercise that Mystery alone.

The Defendant pleaded, that he did not procure any Person to obtain Letters Patents, &c.

The

The Plaintiff replied and assigned for Breach, that the Defendant did within that Term procure Letters Patents for another Person to use this Mystery alone for a certain Time. Et hoc petit quod inquiratur per Patriam.

And upon a Demurrer to the Replication, these Exceptions were taken:

1. That the Plaintiff hath not set forth what Term is contained in the Letters Patents.

2. That he had pleaded both Record and Fact together; for the Procuring is the Fact, and the Letters Patents are the Record, and then he ought not to have concluded to the Country; Prout patet per Recordum.

To which it was answered, that the Plaintiff was a Stranger to the Term contained in the Letters Patents, and therefore could not possibly shew it; but if he hath assigned a full Breach, 'tis well enough.

Then as to the other Exception, viz. the Pleading of the Letters Patents here, is not Matter of Record; here is a plain Negative and Affirmative upon which the Issue is joined, and therefore ought to conclude, & hoc petit, &c.

Curia. There is a Covenant that the Defendant shall not procure Letters Patents to hinder the Plaintiff within the Seven Years of the Partnership; Now this must be the Matter upon which the Breach ariseth, and not the Letters Patents; so that it had been very improper to conclude prout patet per Recordum. Judgment for the Plaintiff.

Rex *versus* Hetherfal.

Melius inquirendum not granted but for Misdemeanor of the Jury. Postea 238.

THE Defendant was Felo de se, and the Coroner's Inquest found him a Lunatick, and now Mr. Jones moved for a Melius inquirendum, but it was denied, because there was no Defect in the Inquisition; but the Court told him, that if he could produce an Affidavit that the Jury did not go according to their Evidence, or of any indirect Proceedings of the Coroner, then they would grant it: But it was afterwards quashed, because they had omitted the Year of the King.

Friend *versus* Bouchier. Trin. 34 Car. II. *Rot.* 920.

EJectment upon the Demise of Henry Jones, of certain Lands in Hampshire.

What Words in a Will make a general Tail.

The Jury found this Special Verdict following, Viz. That William Holmes was seised in Fee of the Lands in Question, who by his last Will, dated in the Year 1633. devised it to Dorothy Hopkins for Life, Remainder to her first Son, and to the Heirs of the Body of such first Son, &c. and for Default of such Issue, to his Cousin W. with several Remainders over: And in Default of such Issue, to Ann Jones, and to her Heirs, (who was the Lessor of the Plaintiff:) That before the Sealing and Publishing of this Will, he made this Memorandum,

Viz. *Memorandum*, That my Will and Meaning is, That *Dorothy Hopkins* shall not alien or sell the Lands given to her from *the Heirs Male of her Body* lawfully to be begotten, but to remain upon Default of such Issue to *W.* and the Heirs Male of his Body to be begotten, according to the true Intent and Meaning of this my Will.

Dorothy Hopkins had Issue Richard, who had Issue Henry, who had Issue a Daughter, now the Defendant.

The Question was, Whether the Son of Dorothy did take an Estate Tail by this Will, to him and to the Heirs of his Body in general, or an Estate in Tail Male.

This Case was argued in Michaelmas-Term, 36 Car. II. and in the same Term a Year afterwards, by Counsel on both Sides.

Those who argued for the Plaintiff held, That the Son had an Estate in Tail Male; and this seems plain by the Intention of the Testator, that if Dorothy had Issue Daughters, they should have no Benefit, for no Provision is made for any such by the Will; and therefore the Daughter of her Son can have no Estate, who is more remote to the Testator.

This is like the Case of Conveyances, wherein the Habendum explains the Generality of the precedent Words; as if Lands be given to Husband and Wife, and to their Heirs, habendum to them and the Heirs of their Bodies, Remainder to them and the Survivor, to hold of the Chief Lord, with Warranty to them and their Heirs: This is an Estate Tail, with a Fee expectant.

Turnham *vers.* Cooper. 2 Cro. 476. Poph. 138. *Id.* 25 Ass. Pl. 14.

So it is here, tho' the first Words in the Will extend to Heirs, which is general; yet in the Memorandum 'tis particular to Heirs Males; and the Words Heirs and Issues are of the same Signification in a Will.

Ex Parte Def.

The Memorandum is a Confirmation of the Will, and the Construction which hath been made of it is not only inconsistent with the Rules of Law, but contrary to the Intent of the Testator, and against the express Words of the Will.

Cases upon Wills are different from those which arise upon Deeds, because in Conveyances subsequent Words may be explanatory of the former; but in Wills, the first Words of the Testator do usually guide those which follow.

Dyer 171. a. 1 And. 8. *Id.* Goldf. 16. Moor 593.

As if Land be devised for Life, Remainder to F. and the Heirs Males of his Body; and if it happen that he die without Heirs (not saying Males) the Remainder over in Tail; this was held not to be a general Tail, but an Estate in Tail Male, therefore the Daughter of F. could not inherit.

Now to construe this to be an Estate Tail Male doth not only alter the Estate of the Sons of Dorothy, but of the Issue of W. and nothing is mentioned in this Memorandum of the Limitation over to Jones; so that the whole Will is altered by it.

But this Memorandum cannot enlarge the Estate of Dorothy, because it is inconsistent with the Intention of the Testator, who gave her only an Estate for Life by the Will; but if she should have an Estate Tail, she might by Fine and Recovery bar it, and so alien it contrary to his express Words.

Besides, there is no Estate limited to Dorothy by this Memorandum; and she having an express Estate for Life, devised to her by the Will, it shall never be enlarged by such doubtful Words which follow.

2 Leon. 226. Moor 593.

As where a Man had 100 Acres of Land, called by a particular Name, and usually occupied with a House, which House he let to S. with 40 Acres, Parcel of that Land, and then devised the House and all the Lands called by that particular Name, &c. to his Wife: Adjudged she should only have the House and the 40 Acres, and that the Devise shall not be extended by Implication to the other sixty Acres.

So that to make the Design of this Will and Memorandum to be consistent, the latter Words must be construed only to illustrate the Meaning of the Testator in the former Paragraph of the Will, and must be taken as a farther Declaration of his Intention, Viz. that the Heirs Males mentioned in the Memorandum is only a Description of the Persons named in the Will.

The Law doth usually regard the Intention of the Testator, and will not imply any Contradictions in his Bequests.

The Court was of Opinion that it was a plain Case; for in the Limitation 'tis clear that 'tis a general Tail; and it doth not follow that the Testator did not design any Thing for his Grandaughters, because no Provision was made for Daughters: For where an Estate is entailed upon the Heirs of a Man's Body, if he hath a Son and Daughter, and the Son hath Issue a Daughter, the Estate will go to her, and not to the Aunt. Judicium.

Now this Memorandum doth not come to make any Alteration in the Limitation, because it directs that the Estate shall go according to the true Intent and Meaning of the Will, and is rather like a Proviso than an Habendum in a Deed. And therefore Judgment was given accordingly for the Defendant.

DE
Term. Sancti Mich.

Anno 1 Jac. II. in Banco Regis, 1685.

Hicks *versus* Gore.

ON Tuesday the 17th Day of November there was a Trial at the Bar by a Somerset-Shire Jury in Ejectment. The Case was thus:

The Plaintiff claimed the Lands by Virtue of the Statute of 4 & 5 Ph. & Mar. cap. 8. by which 'tis enacted:

That it shall not be lawful for any Person to take away any Maid or Woman-Child unmarried, and within the Age of sixteen Years, from the Parents or Guardian in Soccage; and that if any Woman-Child or Maiden, being above the Age of twelve Years and under the Age of sixteen, do at any Time assent or agree to such Person that shall make any Contract of Matrimony (contrary to the Form of the Act), that then the next of Kin of such Woman-Child or Maid to whom the Inheritance should descend, return, or come after the Decease of the same Woman-Child or Maid, shall from the Time of such Assent and Agreement, have, hold and enjoy all such Lands, Tenements and Hereditaments, as the said Woman-Child or Maid had in Possession, Reversion and Remainder, at the Time of such Assent and Agreement during the Life of such Person that shall so contract Matrimony, and after the Decease of such Person so contracting Matrimony, that then the said Land, *&c.* shall descend, revert, remain and come to such Person or Persons as they should have done in case this Act had never been made, other than him only that so shall contract Matrimony.

Benjamin Tibboth being seised in Fee of the Lands in question to the Value of 700 l. per Annum, had Issue a Son and four Daughters; the Son had Issue Ruth his only Daughter, who was married to the Defendant Gore; her Father died in the

Time of her Grandfather, and her Mother fearing that this Daughter might be stolen from her, applies her self to my Lady Gore, and entreats her to take this Daughter into her House, which she did accordingly.

My Lady had a Son then in France, she sent for him, and married him to this Ruth, she being then under the Age of sixteen Years, without the Consent of her Mother, who was her Guardian.

The Question was, Whether this was a Forfeiture of her Estate during Life?

It was proved at the Trial, that the Mother had made a Bargain with the Lessor of the Plaintiff, that in case he recovered she should have 1000 l. and the Thirds of the Estate, and therefore she was not admitted to be a Witness.

The Plaintiff could not prove any Thing to make a Forfeiture, and therefore was nonsuited.

The Chief Justice said, That the Statute was made to prevent Children from being seduced from their Parents or Guardians by flattering or enticing Words, Promises or Gifts, and married in a secret Way to their Disparagement; but that no such Thing appeared in this Case, for Dr. Hascard proved the Marriage to be at St. Clement's Church in a Canonical Hour, and that many People were present, and that the Church Doors were open whilst he married them.

Anonymus.

By the Statute of 21 Jacobi 'tis enacted, That no Writ to remove a Suit out of an Inferior Court shall be obeyed, unless it be delivered to the Steward of the same Court before Issue or Demurrer joined, so as the Issue or Demurrer be not joined within six Weeks next after the Arrest or Appearance of the Defendant. 21 Jac. c. 23.

In this Case, Issue was joined, and the Steward refused to allow the Habeas Corpus, and the Cause was tried, but not before an Utter Barrister, as is directed by the Statute.

Curia. The Steward ought to return the Habeas Corpus, and they having proceeded to try the Cause, no Utter Barrister being Steward, let an Attachment go.

Claxton

Claxton *versus* Swift. Hill. 1 Jac. 2. *Rot.* 1163.

If the Plaintiff recover against the Drawer of a Bill, he shall not afterwards recover against any of the Endorsers. Lutw. 878.

THE Plaintiff being a Merchant brought an Action upon a Bill of Exchange, setting forth the Custom of Merchants, &c. and that London and Worcester were ancient Cities, and that there was a Custom amongst Merchants, That if any Person living in Worcester draw a Bill upon another in London, and if this Bill be accepted and endorsed, the first Endorser is liable to the Payment.

That one Hughes drew a Bill of 100 l. upon Mr. Pardoe, payable to the Defendant or Order.

Mr. Swift endorsed this Bill to Allen or Order, and Allen endorsed it to Claxton.

The Money not being paid Claxton brings his Action against Hughes, and recovers, but did not take out Execution.

Afterwards he sued Mr. Swift, who was the first Endorser, and he pleads the first Recovery against Hughes in Bar to this Action, and avers that it was for the same Bill, and that they were the same Parties.

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

Mr. Pollexfen argued, That it was a good Bar, because the Plaintiff had his Election to bring his Action against either of the Endorsers or against the Drawer, but not against all; and that he had now determined his Election by suing the Drawer, and shall not go back again though he never have Execution; for this is not in the Nature of a joint Action which may be brought against all. 'Tis true that it may be made joint or several by the Plaintiff; but when he has made his Choice by suing of one, he shall never sue the rest, because the Action sounds in Damages, which are uncertain before the Judgment, but afterwards are made certain, & transeunt in Rem judicatam, and is as effectual in Law as a Release.

2 Cro. 73. Velv. 65. Brown *versus* Wootton.

As in Trover the Defendant pleaded, that at another Time the Plaintiff had recovered against another Person for the same Goods so much Damages, and had the Defendant in Execution; and upon a Demurrer this was held a good Plea; for tho' in that Case it was objected, that a Judgment and Execution was no Satisfaction unless the Money was paid, yet it was adjudged that the Cause of Action being against several, for which Damages

were to be recovered; and because a Sum certain was recovered against one, that is a good Discharge against all the other; but 'tis otherwise in Debt, because each is liable to the entire Sum.

Chief Justice. If the Plaintiff had accepted of a Bond from the first Drawer, in Satisfaction of this Money, it had been a good Bar to any Action which might have been brought against the other Indorsers for the same; and as this Case is, the Drawer is still liable, and if he fail in Payment, the first Endorser is chargeable, because if he make Indorsement upon a bad Bill, 'tis Equity and good Conscience that the Endorsee may resort to him to make it good: But the other Justices being against the Opinion of the Chief Justice, Judgment was given for the Defendant: But it was afterwards reversed in the Exchequer Chamber. Lut. 882. b.

Pawley *versus* Ludlow.

DEbt upon a Bond. The Condition was, That if John Fletcher shall appear such a Day coram Justitiariis apud Westm', &c. that then, &c.

The Defendant pleaded, That after the 25th Day of November, and before the Day of the Appearance, he did render himself to the Officer in Discharge of this Bond; and to this the Plaintiff demurred.

Darnel for the Defendant admitted, That if a Scire Facias be brought against the Bail upon a Writ of Error, who plead, that after the Recognizance, and before the Judgment against the Principal affirmed, he rendred himself to the Marshal in Discharge of his Bail, that this is not a good Plea, but that the Sureties are still liable, because by the Statute they are not only liable to render his Body, but to pay the Debt recovered. 3 Bulstr. 191. 2 Cro. 402. 3 Jac. cap. 8.

But if a Judgment be had in this Court, and a Writ of Error brought in the Exchequer Chamber, and pending that Writ of Error the Principal is rendred, the Bail in the Action are thereby discharged. 1 Rol. Abr. 334. Pl. 11.

It was argued on the other Side, That this is not the like Case of Bail upon a Writ of Error, for the Condition of a Recognizance, and that of a Bond for Appearance, are different in their Nature, the one is barely that the Party shall appear on such a Day, the other is that he shall not only appear and render Econtra.

his

his Body to Prison, but the Bail likewise do undertake to pay the Debt, if Judgment should be against the Principal.

Now where the Condition is only for an Appearance at a Day, if the Party render himself either before or after the Day, 'tis not good.

Chief Justice. If the Party render himself to the Officer before the Day of Appearance, he is to see that he appear at the Day, either by keeping of him in Custody, or letting of him to Bail, the End of the Arrest is to have his Body here.

If he had not been bailed, then he had still remained in Custody, and the Plaintiff would have his proper Remedy; but being once let to Bail, and not appearing in Court according to the Condition of the Bond, that seems to be the Fault of the Plaintiff, who had his Body before the Day of Appearance.

Judgment for the Defendant.

DE
Term. Sancti Hill.

Anno 1 Jac. II. in Banco Regis, 1685.

Serjeant Hampson's *Case.*

By the Statute of Queen Elizabeth, 'tis Enacted, That if the Person excommunicated have not a sufficient Addition, or if 'tis not contained in the *Significavit*, that the Excommunication proceeds for some Cause or Contempt, or of some original Matter of Heresy, refusing to have his Child baptized, to receive the Sacrament, to come to Divine Service, or Errors in Matters of Religion or Doctrine, Incontinency, Usury, Simony, Perjury in the Ecclesiastical Court, or Idolatry, he shall not incur the Penalties in the Act. 3 Eliz c. 23.

Serjeant Hampson was excommunicated for Alimony, and now Mr. Girdler moved that he might be discharged, because none of the aforesaid Causes were contained in the Significavit.

Curia. He may be discharged of the Forfeiture for that Reason, but not of the Excommunication.

Anonymous.

One who was outlawed for the Murder of Sir Edmund-Bury Godfrey, now brought a Writ of Error in his Hand to the Bar, praying that it might be read and allowed.

It was read by Mr. Astry, Clerk of the Crown.

The Errors assigned were; viz.

That it did not appear upon the Return of the Exigent in the first Exact', that the Court was held pro Comitatu.

That the Outlawry being against him and two other Persons, 'tis said in the last Exact', that Non comperuit, but doth not say, nec eorum aliquis comperuit.

For these Reasons the Outlawry was reversed, and he held up his Hand at the Bar, and pleaded Not-guilty to his Indictment, and was admitted to Bail, and afterwards he was brought to his Trial, and no Witness in Behalf of the King appearing against him, he was acquitted.

The Mayor and Commonalty of Norwich *versus* Johnson.

Waste lies against an *Executor de son tort* of a Term. 3 Levinz 35.

A Writ of Error was brought to reverse a Judgment given for the Plaintiff in the Common-Pleas in an Action of Waste. The Declaration was, that the Plaintiff demised a Barn to one Took for a certain Term, by Virtue whereof he was possessed, and being so possessed, died: That the Defendant was his Executor, who entered and made Waste, by pulling down of the said Barn.

The Defendant pleaded, That Took died intestate, and that he did not administer.

The Plaintiff replied, That he entered as Executor of his own Wrong: And to this Plea the Defendant demurred, and the Plaintiff joined in the Demurrer.

This Case was argued by Mr. Appleton of Lincoln's-Inn for the Plaintiff, who said, That an Action of Waste would not lie against the Defendant, because the Mayor and Commonalty, &c. had a Remedy by an Assise to recover the Land upon which the Barn stood, and a Trover to recover the Goods or Materials, and that such an Action would not lie against him at the Common Law, because he neither was Tenant by the Curtesy, nor in Dower, against whom Waste only lay.

6 Ed. 1. c. 5. So that if the Plaintiff is entitled to this Action, it must be by Vertue of the Statute of Gloucester; but it will not lie against the Defendant even by that Statute, because the Action is thereby given against the Tenant by the Curtesy, in Dower, for Life or Years, and treble Damages, &c.

But the Defendant is neither of those; and this being a penal Law, which not only gives treble Damages, but likewise the Recovery of the Place wasted, ought therefore not to be taken strictly, but according to Equity.

Tenants

Tenants at Sufferance, or at Will, by Elegit, or Tenants by Statute Staple, and also Pernors of Profits were never construed to be within this Statute, and therefore a particular Act was made to give him in Reversion an Action of Waste, where Tenant for Life or Years had granted over their Estates, and yet took the Profits and committed Waste. 11 H. 6. c. 5.

Then the Question will be, What Estate this Executor de son tort hath gained by his Entry. Co. Lit. 371.

And as to that he argued, that he had got a Fee-simple by Disseisin, and that for this Reason the Plaintiff was barred from this Action; for if the Son purchase Lands in Fee, and is disseised by his Father, who makes a Feoffment in Fee to another with Warranty and dieth, the Son is for ever barred; for tho' the Disseisin was not done with any Intention to make such a Feoffment, yet he is bound by this Alienation. 1 Roll. Abr. 662.

So where a Man made a Lease for Life and died, and then his Heir suffered a Recovery of the same Land without making an actual Entry, this is an absolute Disseisin, because the Lessee had an Estate for Life; but if he had been Tenant at Will, it might be otherwise.

But admitting that the Defendant is not a Disseisor, then the Plaintiffs must bring their Case to be within the Statute of Gloucestor, as that he is either Tenant for Life or Years.

If he is Tenant for Life, he must be so either by Right or by Wrong.

He cannot be so by Right, because he had no lawful Conveyance made to him of this Estate; besides, 'tis quite contrary to the Pleading, which is that he entred wrongfully.

Neither can he be so by Wrong, for such particular Estates, as for Life or Years, cannot be gained by Disseisin, and so is Heliar's Case in 6 Co. 6 Co. 29.

Then if this should be construed an Estate for Years, it must be gained either by the Act of the Party, or by the Act of the Law; but such an Estate cannot be gained by either of those Means.

First, it cannot be gained by the Act of the Party, because an Executor de son tort cannot have any Interest in a Term, and for this there is an express Authority in this Court, which was thus, viz. A Lease in Reversion for Years was granted to a Man who died intestate, his Wife, before she had administred, sold this Term to the Defendant, and afterwards she obtained Letters of Administration, and made a Conveyance of the same Term to the Moor 126. Kendrick *versus* Burges.

Plaintiff, and Judgment was given for the last Vendee, because it was in the Case of a Reversion of a Term for Years, upon which no Entry could be made, and of which there could be no Executor de son tort, tho' it was admitted by the Court, that such an Executor might make a good Sale of the Goods before Administration granted.

Neither can any Entry or Claim make the Defendant an Executor de son tort of a Term for Years, because a wrongful Entry can never gain any Estate but a Fee-simple; for 'tis not to be satisfied with any particular or certain Estate, as for Life or Years.

It cannot be gained by Act of Law, because that abhors all manner of Wrong.

If it should be objected, That though this Executor doth not gain any Estate for his own Benefit; yet he in the Reversion may take him for a Disseisor, and it shall be in his Election, either to make him so, or a Tenant for Years.

To this it may be answered, That the Defendant doth not claim by Colour of any Grant; if he did, then he might be a Disseisor at the Election of him in the Reversion; and this was the very Difference taken in the Case of Blunden and Baugh.

Cro. Car. 302. 2 Roll. Abr. 661. Jones 115. Latch 53.

So likewise if it be objected, That the Defendant is an Occupant, and therefore punishable for Waste; but the Reason is not the same, because the Entry of an Occupant is lawful, and he gains an Estate for Life, which is not this Case.

An Executor de son tort is not a Person taken Notice of in the Law in respect to him in the Reversion, but in respect of the Creditors of the Intestate, and therefore if what he doth may be advantageous to them, the Law will make a Construction upon it for their Benefit; but if such a Person should be within the Intention or Meaning of this Statute, then the natural Consequences will be:

1. That the Place wasted would be recovered.

2. That the Plaintiff would also have treble Damages.

Both which would be a manifest Means to defeat the Creditors of their Debts, for which Reasons he prayed Judgment for the Plaintiff in the Errors.

It was argued by the Counsel on the other Side, That it is plain that the Defendant was Executor de son tort, for such must that Person be who intermeddles with the Intestate's Estate, where there is no rightful Executor or Administrator. Econtra.

Now a Man may be Executor of his own Wrong of a Term for Years, as appears even in that Case cited out of Moor on the other Side, and if so, the Defendant must be liable to this Action.

The Statute may be expounded as well against a wrongful as a rightful Executor; 'tis plain here is a Disseisin, and the Law is now settled, that it shall be in the Election of him in the Reversion to make it so.

This Defendant would justify one Wrong by another, for he confesseth that he hath committed a Disseisin, and therefore will not be answerable for committing of Waste.

As to the Objection, That an Executor de son tort is liable only in respect of Creditors, and that if he should be punished for Waste, it would be an Injury to them, because of the treble Damages recovered against him.

Resp. Such Damages must be answered out of his own Estate; for even in the Case of a rightful Executor, if he commit Waste, he will be chargeable in a Devastavit de Bonis propriis. 5 Co. Poulter's *Case*.

This is not properly a Penal, but a remedial Law, and as such may be construed according to Equity.

'Tis true, Tenants by Elegit or by Statute are not within this Statute, because Waste by them committed is no Wrong; for if they should fell the Timber, it sinks the Debt, and the Cognizor may have a Scire Facias ad computandum.

Curia: It would be an infinite Trouble for him in the Reversion to seek his Remedy for Waste done, if the Law did oblige him to stay till there was a rightful Administrator, and 'tis not to be doubted, but that there may be an Executor de son tort of a Term for Years.

This is a remedial and yet a penal Law, and therefore shall have a favourable Construction: The Judgment was affirmed.

Bridgham

Bridgham *versus* Frontee.

DEBT upon a Bond for Performance of Covenants in a Lease of a House for a certain Term of Years, rendring Rent, &c. And the Breach assigned was, That there was 66 l. Rent in Arrear.

32 H. 8. c. 16. The Defendant pleaded the Statute of H. 8. That all Leases or Dwelling-Houses or Shops made to any Stranger or Alien Artificer shall be void, and sets forth that the Defendant was a Vintner and an Alien Artificer.

And upon a Demurrer, Mr. Thompson for the Defendant said, that a Vintner was an Artificer within the Meaning of the Act; which was made to prevent a Mischief by Foreigners encroaching upon the Trades of the King's Subjects, by which they gained their Livelihood, and therefore shall be expounded largely and beneficially for them.

A Mercer, a Draper or Grocer, are not properly Artificers, yet they are within the Meaning of this Act.

1 R. 3. c. 9. Chief Justice. This Statute refers to another of R. 2. which prohibits Alien Artificers to exercise any Handycraft in *England*, unless as a Servant to a Subject skilful in the same Art, upon Pain to forfeit his Goods; so that 'tis plain, that such who used any Art or Manual Occupation was restrained from using it here to the Prejudice of the King's Subjects.

Now the Mystery of a Vintner chiefly consists in mingling of Wines, and that is not properly an Art, but a Cheat; so the Plantiff had his Judgment.

Rex *versus* Plowright *and others.*

A Distress was taken for Chimney-Money, and the Parties distrained apply themselves to the two next Justices of the Peace, before whom it did appear that Plowright let a Cottage to Hunt, which was not of the yearly Value of 10 s. The Collectors of this Duty distrained upon the Landlord, which the said Justices thought to be illegal, and therefore they ordered a Restitution: And a Certiorari being brought to remove the Order into this Court, Mr. Attorney prayed that it might be filed.

But it was opposed by Mr. Pollexfen, for that the Statute of King Charles II. enacts, That no Person inhabiting an House which hath more than two Chymnies, shall be exempted from the Payment of the Duty, &c. and then these Words do follow, viz. That if any Question shall arise about the taking of any Distress, the same shall be heard and finally determined by one or more Justices of the Peace near adjoining, &c. 16 Car. 2. c. 3.

Now here was Money levied by Virtue of this Act, and a Controversy did arise by reason of the Distress, and an Order was made by the Justices, which, according to the Letter and Meaning of the Act, ought to be final; the Intention whereof was to prevent the Charge and Trouble of poor Men in Suits at Law about small Matters, and therefore it gave the Justices Power to determine particular Offences and Oppressions.

Mr. Attorney contra. If the Justices of Peace have Power to determine, &c. that is to make them Judges whether this Duty is payable or not; and so the Courts of Westminster, who are the proper Judges of the Revenue of the King, who by this Means will be without an Appeal, will be excluded.

Curia. This Court may take Cognizance of this Matter as well as in Cases of Bastardy: 'Tis frequent to remove those Orders into this Court; tho' the Act says, That the two next Justices may take Order as well for the Punishment of the Mother, as also for the Relief of the Parish where it was born, except he give Security to appear the next Quarter Sessions.

The Statute doth not mention any Certiorari, which shews that the Intention of the Law-makers was that a Certiorari might be brought, otherwise they would have enacted, as they have done by several other Statutes, that no Certiorari shall lie.

Therefore the Meaning of the Act must be, that the Determination of the Justices of the Peace shall be final in Matters of Fact only; as if a Collector should affirm that a Person hath four Chymnies, when he hath but two, or when the Goods distrained are sold under the Value, and the Overplus not returned; but the Right of the Duty arising by Vertue of this Act was never intended to be determined by them.

Then the Order was filed, and Mr. Pollexfen moved that it might be quash'd; for that by the Statute of 14 Car. 2. the Occupier was only chargeable, and the Landlord exempted. Now by the Proviso in that Act, such a Cottage as is expressed in this Order is likewise exempted, because 'tis not of greater Value than 14 Car. 2. c. 10.

than 20s. by the Year, and 'tis not expressed that the Person inhabiting the same hath any Lands of his own of the Value of 20s. per Annum, nor any Lands or Goods to the Value of 10l.

Now there having been several Abuses made of this Law to deceive the King of this Duty, occasioned the Making of this subsequent Act.

The Abuses were these, viz.

The taking a great House, and dividing it into several Tenements, and then letting them to Tenants, who by reason of their Poverty might pretend to be exempted from this Duty.

The Dividing Lands from Houses, so that the King was by these Practices deceived, and therefore in such Cases the Charge was laid upon the Landlord; but nothing of this appearing upon the Order, it was therefore quashed.

Brett *versus* Whitchot.

Lands not exempted from repairing of the Highways by Grant of the King

IN Replevin. The Defendant avowed the taking of a Cup as a Fine, for a Distress towards the Repairing of the Highway.

The Plaintiff replied, and set forth a Grant from the King, by which the Lands which were chargeable to send Men for the Repairing, &c. were exempted from that Duty. And upon a Demurrer the Question was, Whether the King's Letters Patents are sufficient to exempt Lands from the Charge of the Repairing of the High-ways, which by the Statute of Philip and Mary, and other subsequent Statutes, are chargeable to send Men for that Purpose.

2 & 3 *Ph.* & *Mar.* c. 8.

And it was argued, That such Letters Patents were not sufficient, because they were granted in this Case before the Making of the Statute, and so by Consequence before any Cause of Action; and to prove this, a Case was cited to this Purpose.

2 Inf. 569.

In 2 E. 3. an Action was brought against an Hundred for a Robbery upon the Statute of 13 E. 1. The Bishop of Litchfield pleaded a Charter of R. 1. by which that Hundred, which was held in Right of his Church, was exempted, &c. But it was held, that this Charter could not discharge the Action, because no such Action was given when the Letters Patents were made, but long afterwards.

Judgment was given for the Avowant.

Upton

Upton *versus* Dawkin.

TRespass quare vi & armis liberam piscariam he did break and enter, and one hundred Trouts ipsius Quer' in the Fishery aforesaid did take and carry away.

Trespass for taking Fish *ipsius querentis in libera piscaria* not good.

Upon Not-guilty pleaded, there was a Verdict for the Plaintiff, and this Exception was taken in Arrest of Judgment, viz.

For that the Plaintiff declared in Trespass for taking so many Fish ipsius Quer' in libera piscaria, which cannot be, because he hath not such a Property in libera piscaria to call the Fish his own.

Mod. Case. 183.

Pollexfen contra. If there had not been a Verdict, such a Construction might have been made of this Declaration upon a Demurrer; but now 'tis helped, and the rather because a Man may call them pisces ipsius in a free Fishery; for they may be in a Trunk; so a Man may have a Property tho' not in himself, as in the Case of Jointenants, where 'tis not in one, but in both; yet if one declare against the other, unless he plead the Jointenancy in Abatement, the Plaintiff shall recover.

But notwithstanding the Judgment was reversed.

Dominus Rex *versus* . . . . .

THE Defendant was indicted for Barretry: The Evidence against him was, that one G. was arrested at the Suit of C. in an Action of 4000 l. and was brought before a Judge to give Bail to the Action; and that the Defendant, who was a Barrister at Law, was then present, and did sollicite this Suit; when in Truth at the same Time C. was indebted to G. in 200 l. and that he did not owe the said C. one Farthing.

Barretry.

The Chief Justice was first of Opinion, That this might be Maintenance, but that it was not Barretry unless it appeared that the Defendant did know that C. had no Cause of Action after it was brought.

If a Man should be arrested for a trifling Cause, or for no Cause, this is no Barretry, though 'tis a Sign of a very ill Christian, it being against the express Word of God.

But a Man may arrest another, thinking he hath a just Cause so to do, when as in Truth he hath none, for he may be mistaken, especially where there hath been great Dealings between the Parties.

But if the Design was not to recover his own Right, but only to ruin and oppress his Neighbour, that is Barretry.

A Man may lay out Money in Behalf of another in Suits at Law to recover a just Right, and this may be done in respect of the Poverty of the Party; but if he lend Money to promote and stir up Suits, then he is a Barretor.

Now it appearing upon the Evidence, that the Defendant did entertain C. in his House, and brought several Actions in his Name where nothing was due, that he was therefore guilty of that Crime.

But if an Action be first brought, and then prosecuted by another, he is no Barretor, though there is no Cause of Action. The Defendant was found guilty.

DE
Termino Paſchæ,
Anno 2 Jac. II. in Banco Regis, 1686.

Coram Edwardo Herbert *Mil' Capital' Juſtic'.*
Franciſco Wythens *Mil'*,
Richardo Holloway *Mil'*, } *Juſticiariis.*
Thoma Walcot *Mil'*,

MEmorandum, That the firſt Day of this Term, Sir *Thomas Jones*, Chief Juſtice of the *Common Pleas*, had his *Quietus*, and Sir *Henry Beddingfield*, one of the Juſtices of the ſame Court, ſucceeded him in that Office. Likewiſe the Honourable *William Mountague*, Eſq; Lord Chief Baron of the *Exchequer*, had his *Quietus*; and Sir *Edward Atkyns*, one of the Barons of the ſame Court, ſucceeded him. Sir *Job Charleton*, one of the Juſtices of the *Common-Pleas*, had his *Quietus*, but was made Chief Juſtice of *Cheſter*; and Sir *Edward Lutwich*, the King's Serjeant, was made one of the Juſtices of the *Common Pleas*; and Serjeant *Heath* was made one of the Barons of the *Exchequer*.

Okel *verſus* Hodgkinſon.

THE Father and Son join in a Fine, in order to make a Settlement upon the ſecond Wife of the Father, who was only Tenant by the Curteſie, the Remainder in Tail to his ſaid Son. One of the Cognizors died after the Caption, and before the Return of the Writ of Covenant; and now a Writ of Error was brought to reverſe it, and this was aſſigned for Error.

Curia. If it had been in the Case of a Purchaser for a valuable Consideration, the Court would have shewed him some Favour; but it being to do a Wrong to a young Man, they would leave it open to the Law.

THE first Day of this Term, being the 22d Day of *April*, there was a Call of Serjeants, *viz.* Sir *John Holt*, of *Grey's*-Inn, *Recorder* of *London*, who was made King's Serjeant; Sir *Ambrose Philips*, made also King's Serjeant; *Christopher Milton*, *John Powel*, *John Tate*, *William Rawlinson*, *George Hutchins*, *William Killinworth*, *Hugh Hodges*, and *Thomas Geers*. They all appeared that Day at the *Chancery*-Bar, where having taken the Oaths, the Lord Chancellor *Jefferies* made a short Speech to them; after which they delivered a Ring to him, praying him to deliver it to the King. They went from the *Inner-Temple* Hall to *Westminster*, and counted at the *Common Pleas*, and gave Rings, the *Motto* whereof was, DEUS, REX, LEX.

Dominus Rex *versus* Saloway.

SAloway drowned himself in a Pond, and the Coroner's Enquest found him Non Compos Mentis, because 'tis now generally supposed that a Man in his Senses will not be Felo de se.

The King's Counsel moved for a Melius Inquirendum, and that the Inquisition might be quash'd, for that it sets forth, Quod pred' Defend' circa horam octavam ante meridiem in quoddam stagnum se projecit, & per abundantiam aquæ ibidem statim suffocat' & emergit' erat, which is insensible.

Pemberton Serjeant contra. Here is no Exception taken to the Substance of the Inquisition; and the Word suffocat' had been sufficient, if the Word emergit' had been left out.

The Court were of Opinion, That there being another Word in this Inquisition which carries the Sense, 'tis therefore sufficient; but if it had stood singly upon this Word emergit', it had not been good.

And this Fact happening about the Time of the general Pardon, the Court was of Opinion, That where an Interest is vested

in the King, a Pardon of all Forfeitures will not divest it; but that nothing was vested here before Inquisition found.

2. It was objected, That this Inquisition ought to set forth, That Saloway came by his Death by this Means, & nullo alio modo quocunq;

To which it was answered by Pemberton, That in Matters of Form only, the Judges have sent for the Coroner into Court, and ordered him to amend it.

Rodney *versus* Strode.

AN Action on the Case was brought against three Defendants, one of them suffered Judgment to go by Default, and the other two pleaded Not guilty. The Cause was tried the last Assizes at Exeter, and it was for imposing the Crime of Treason upon the Plaintiff, and for assaulting and imprisoning of him: There was a Verdict for the Plaintiff, and 1000 l. Damages against Mr. Strode, and 50 l. against the other Defendant, who pleaded.

In a Joint Action the Jury may sever the Damages.

The Plaintiff entred a Nolle prosequi against him, who let the Judgment go by Default; and against the other Defendant for the 50 l. Damages, and took Judgment only against Mr. Strode.

Serjeant Pemberton moved for a new Trial, by reason of the excessive Damages, which were not proportioned to the Quality of the Plaintiff, he being a Man of mean Fortune.

But it was opposed by the Plaintiff, for that the Defendant pursued him as a Traitor; and when he was apprehended for that Crime, he caused him to be arrested for 1000 l. at the Suit of another Person, to whom he was not indebted; so that upon Consideration of the Circumstances of the Case, the Court refused to grant a new Trial.

Then Serjeant Pemberton for the Defendants moved in Arrest of Judgment, and for Cause shewed, That the Jury have found both guilty, and assessed several Damages, which they cannot do, because this is a joint Action, to which the Defendants have pleaded jointly; and being found guilty modo & forma, the Jury cannot assess the Damages severally, for the Damage is the same by the one as the other; and therefore it hath been adjudged, That where an Action of Battery was brought against three, and one pleaded Not guilty, and the other two Son Assault De-

Cro. Eliz. 860. Austen *vers.* Millard *et al.*

Demesne, and several Damages found against them, it was held ill for that very Reason, because it was a joint Offence.

'Tis true, where there are divers Defendants, and Damages assessed severally, the Plaintiff hath Election to take Execution de melioribus damnis, but this is when the Trials are at several Times.

Cro. Car. 239. Walsh *versus* Bishop.

So 'tis where they plead several Pleas; as in an Action of Battery, one pleads Not guilty, and the other Justifies, and both Issues are found for the Plaintiff; in such Case he may enter a Non pros' against one, and take Judgment against the other, because their Pleas are several; but where they plead jointly, the Jury cannot sever the Damages.

1 Bulf. 157. Sampson *vers.* Cramfield, *& al'.* Rast. Entr. 677. b.

But Mr. Pollexfen for the Plaintiff insisted, that even in this Case Damages may be assessed severally; for where two Defendants are sued for the same Battery, and they plead the same Plea, yet Damages may be assessed severally.

So was Trebarefoot and Greenway's Case in this Court which was an Action for an Assault and Battery, and false Imprisonment: One of the Defendants pleaded Not guilty, and the other justified; Issue was joined, and there was a Verdict for the Plaintiff, and Damages assessed severally. The Plaintiff entred a Nolle prosequi as to one, and took Judgment against the other; and upon this a Writ of Error was brought in this Court, and the Judgment was affirmed.

So if an Action of Trespass be brought against two for taking of 100 l. the one took 70 l. and the other 30 l. Damages shall be assessed severally.

It was admitted, that regularly the Damages ought to be entire, especially where the Action is joint; but where the Facts are several, Damages may likewise be so assessed; but in this Case the Jury hath done what the Court would do, had it been in a criminal Cause.

Curia. This is all but one Fact which the Jury is to try: 'Tis true, when several Persons are found guilty criminally, then the Damages may be severed in Proportion to their Guilt; but here all are equally guilty of the same Offence; and it seems to be a Contradiction to say that the Plaintiff is injured by one to the Value of 50 l. and by the other to the Value of 1000 l. when both are equally guilty.

Every Defendant ought to answer full as much as the Plaintiff is damnified: Now how is it possible he should be damnified so much by one, and so little by the other?

But notwithstanding this Opinion, Judgment was afterwards given for the Plaintiff.

Peak *versus* Meker.

IN an Action on the Case for Words, the Plaintiff declared, That he was a Merchant, and bred up in the Church of England, and that when the present King came to the Crown, the said Plaintiff made a Bonfire at his Door in the City of London, and that the Defendant then spoke of him these Words, for which he now brought this Action; Viz. He (innuendo the Plaintiff) is a Rogue, a Papist Dog, and a pitiful Fellow; and never a Rogue in Town has a Bonfire before his Door but he. The Plaintiff had a Verdict, and 500 l. Damages were given: A Writ of Error was brought; but it was adjudged without Argument, that the Words were actionable.

Joyner *versus* Pritchard.

AN Action was brought upon the Statute of R. II. for prosecuting of a Cause in the Admiralty-Court, which did arise upon the Land: It was tried before the Chief Justice in London, and a Verdict for the Plaintiff. Admiralty.

Mr. Thompson moved in Arrest of Judgment, for that the Action was brought by Original, in which it was set forth, that the Defendant prosecut' fuit, & adhuc prosequitur, &c. in Curia Admiralitat': Now the prosequitur, is subsequent to the Original, and so they have recovered Damages for that which was done after the Action brought.

Curia. These Words, adhuc prosequitur, must refer to the Time of suing forth this Original; like the Case of a Covenant for quiet Enjoyment, and a Breach assigned, that the Defendant built a Shed, whereby he hindred the Plaintiff that he could not enjoy it hucusq; which Words must refer to the Time of the Action brought, and not afterwards. Judgment was given for the Plaintiff.

Dominus Rex *versus* . . . . .

Forgery.

AN Information was brought against the Defendant for Forgery, setting forth, That the Defendant being a Man of ill Fame, &c. and contriving to cheat one A. did forge quoddam scriptum, dated the 16th Day of October, in the Year 1681. continens in se scriptum obligatorium, per quod quidem scriptum obligatorium præd' A. obligatus fuit præd' Defend' in quadraginta libris, &c.

He was found guilty; and afterwards this Exception was taken in Arrest of Judgment.

Viz. That the Fact alledged in the Information was a Contradiction of it self, for how could A. be bound when the Bond was forged?

2. It is not set forth what that scriptum obligatorium was, whether it was scriptum sigillatum, or not.

Curia. The Defendant is found guilty of the Forging of a Writing, in which was contained quoddam scriptum obligatorium, and that may be a true Bond. Judgment was affirmed.

MEMORANDUM. On *Tuesday*, *April* the 27th, Sir *Thomas Powes* of *Lincoln's Inn* was made Sollicitor-General, in the Place of Mr. *Finch*, and was call'd within the Bar.

Hanchet *versus* Thelwal.

Devise. What Words in a Will make an Estate for Life, and what in Tail.

IN Ejectment a special Verdict was found, in which the Case did arise upon the Construction of the Words in a Will; Viz. The Testator being seised in Fee, had Issue two Sons and four Daughters: He made his Will, and devised his Estate (being in Houses) by these Words: Viz. Item, I give and bequeath to my Son *Nicholas Price* my Houses in *Westminster*; and if it please God to take away my Son, then I give my Estate to my four Daughters (naming them) Share and Share alike; and if it please God to take away any of my said Daughters before Marriage, then I give her or their Part to the rest surviving. And if all my *Sons* and *Daughters* die *without Issue*, then I give my said House to my Sisters *Anne Warner*, and her Heirs.

Nicholas Price entered and died without Issue, then the four Sisters entered, and Margaret the eldest married Thellwel, and died, leaving Issue a Son, who was the Lessor of the Plaintiff, who insisted upon his Title to a fourth Part of the Houses.

The Question was, What Estate the Daughters took by this Will, whether joint Estates for Life, or several Remainders in Tail?

If only joint Estates for Life, then the Plaintiff, as Heir to his Mother, will not be intitled to a fourth Part; if several Remainders in Tail, then the Father will have it during his Life, as Tenant by the Curtesy.

This Case was argued this Term by Mr. Pollexfen for the Plaintiff: And in Hillary-Term following by Counsel for the Defendant.

The Plaintiff's Counsel insisted, that they took joint Estates for Life, and this seemed to be the Intent of the Testator, by the Words in his Will; the first Clause whereof was,

Viz. I give and bequeath my Houses in W. to *Nicholas Price*. Now by these Words an Estate for Life only passed to him, and not an Inheritance, for there was nothing to be done, or any Thing to be paid out of it.

2. The next Clause is, Viz. If it please God to take away my Son, then I give my Estate to my four Daughters, Share and Share alike.

Now these Words cannot give the Daughters a Fee-simple, by any Intendment whatsoever; but if any Word in this Clause seems to admit of such a Construction, it must be the Word Estate, which sometimes signifies the Land it self, and sometimes the Estate in the Land.

But here the Word Estate cannot create a Fee-simple, because the Testator gave his Daughters that Estate which he had given to his Son before, and that was only for Life.

Then follow the Words, Share and Share alike; and that only makes them Tenants in Common.

3. The next Clause is, Viz. If it please God to take away any of my said Daughters before Marriage, then I give her or their Part to the rest surviving.

These Words, as they are penned, can have no Influence upon the Case.

4. Then followeth the last Clause, Viz. And if all my Sons and Daughters die without Issue, then I give, *&c.*

These Words create no Estate Tail in the Daughters; for the Testator having two Sons and four Daughters, it cannot be

collected by these Words, how they shall take, and by Consequence it cannot be an Estate Tail by Implication.

Now suppose one of the Daughters should die without Issue, 'tis uncertain who shall have her Part; and therefore there being no Appointment in what Order this Estate shall go, it cannot be an Estate Tail, and to maintain this Opinion, this Case was cited.

2 Cro. 655. Gilbert *versus* Witty.

One Collier was seised in Fee of three Houses, and had Issue three Sons, John. Robert, and Richard; he devised to each of them a House in Fee, Proviso, if all my Children die without Issue of their Bodies, then the Houses to be to his Wife.

The two eldest Sons died without Issue, the younger had Issue a Daughter, who married the Lessor of the Plaintiff.

The Question was, Whether by the Death of the eldest Son without Issue, there was a cross Remainder to Richard, and the Heirs of his Body; or whether the Wife shall take immediately, or expect 'till after the Death of all the Sons without Issue? And it was adjudged, that the Wife shall take immediately, and that there were no cross Remainders, nor any Estate by Implication, because it was a Devise to them severally by express Limitation.

Cro. Eliz. Taylor *versus* Sawyer.

So that if no Estate Tail ariseth to the Daughters in this Case by Implication, then 'tis no more than a Devise to his Issue, which extends to them all, and gives only an Estate for Life.

Ex Parte Def.

For the Defendant it was argued, that the Sons and Daughters have an Estate Tail by Implication.

It was agreed that Nicholas had only an Estate for Life, and that the Word Estate in this Case means the Houses, and not the Interest in them.

'Tis true, there is no express Limitation of any Estate to them, but there is an express Determination of it.

Now if this be not an Estate Tail by Implication, then the Words, dying without Issue, are void.

More 127.

A Devise to his Son, and if he die not having a Son, then 'tis devised over: This is an Estate Tail in Remainder.

It cannot be a Doubt who shall take first; for the Daughters shall take it, and after them, as 'tis most natural, the eldest Son; for where there is the same Proximity of Blood, the Estate shall go to the eldest.

Dyer 323.

Hob. 33.

As for Instance: One Chapman being seised in Fee of two Houses, and having three Brothers, devised the House which A. dwelt in to his said three Brothers, and the House in which his Brother Thomas Chapman did dwell, he devised to the said Thomas,

mas, paying so much, &c. or else to remain to the Family of the Testator, provided that the Houses be not sold, but go to the next of the Males, and the Blood of the Males. Thomas died without Issue, the eldest of the two surviving Brothers had Issue a Daughter, and died: The Question was, Whether that Daughter or the youngest Brother of the Testator should have the House? It was adjudged that the Daughter should have it in Tail. For the Proviso, that the Houses be not sold, &c. made it a Tail; and the Words, viz. to remain to the Family, must be intended to the eldest.

If this be not an Estate Tail, then the Devise over to Anne Warner is void.

As to the Case of Gilbert and Witty, that moves upon another Reason; for there every one took by a distinct and separate Limitation.

Curia. In that Case all the Estate was limited distinctly to the three Sons; but in this 'tis otherwise, for the Testator had two Sons, and no Estate was limited to one of them before; then he saith, If all my Sons and Daughters die without Issue, then, &c. And thus the Cases differ, which creates the Difficulty.

But no Reason can be given why this Court should not construe Wills according to the Rules of Common Law, where an Estate by Implication is so incertain; for when Men are sick, and yet have a disposing Power left, they usually write Nonsense, and the Judges must rack their Brains to find out what is intended.

This cannot be an Estate Tail in the Daughters, and therefore the Heir must come in for his fourth Part.

Judgment for the Plaintiff.

Dixon *versus* Robinson.

THIS was a special Issue, directed out of Chancery, and tried this Day at the Bar by a Middlesex Jury. Wayehil Fair.

The Question was, Whether Ballivus, probi Homines & Burgenses Burgi de Andover in Hampshire, had Power to keep a Fair at Wayehil in any one Place where they please; the Bill being exhibited to confine the Fair to a particular Place; which Fair was granted to them by Charter from Queen Elizabeth.

They who would have it confin'd to a certain Place, gave in Evidence, That the Hospitaller of Ewelme in Oxfordshire, was seised in Fee of the Manor of Rambridge, within which Manor

the Place was where the Fair was always kept, and that the Parson of Andover had Glebe there.

That this Place was called Wayehil, and that the Profits did arise by Piccage and Stallage, to the yearly Value of 200 l.

That it was an ancient Fair, held there by Prescription before the Town of Andover had a Charter.

That upon the late Surrender of Charters, the Town of Andover did likewise surrender and took a new Charter, in which Liberty was given to them to keep this Fair in what Place they would.

That both the Hospitaller and Parson petitioned the King in Council, and obtained an Order to try where the Fair ought to be kept, which was tried accordingly at the Exchequer Bar, and a Verdict for the Parson.

Chief Justice. If the Fair belongs to Andover, they may chuse whether they will keep it at any Place; and that may create another Question, Whether they may not forfeit this Franchise by Disuser?

But certainly if the Place be not limited by the King's Grant, they may keep it where they please, or rather where they can most conveniently; and if it be so limited, they may keep it in what Part of such Place they will.

Dawling *versus* Venman.

Action for a scandalous Affidavit in *Chancery*.

AN Action on the Case was brought against the Defendant, for making a Scandalous Affidavit in *Chancery*, in which were these Words:

Viz. Mr. *Dawling* is a Rogue and a Knave, and I will make it out before my Lord Chancellor, and I will have him in the Pillory.

Upon Not guilty pleaded, there was a Verdict for the Plaintiff, and Damages entire.

It was moved in Arrest of Judgment, for that the Truth of an Oath shall not be liable to a Trial in an Action on the Case; for the Law intendeth every Oath to be true.

Cro. Eliz. 521. 2 Cro. 607. Sid. 50. Hutt. 11.

Before the Statute of 3 & 11 H. 7. which gives Power to examine Perjury, there was not any Punishment at the Common Law for a false Oath made by any Witness, and therefore an Action will not lie for a scandalous Affidavit. Adjornatur.

2

Anonymus.

Anonymus.

NOta: An Action of Assault and Battery, and false Imprisonment, was brought against four Defendants: The Plaintiff had Judgment, and they brought a Writ of Error.

Release of one Def. shall not discharge the rest of a personal Thing.

The Plaintiff in the Action pleaded the Release of one of them, and to this Plea all four jointly demur.

The Opinion of the Court was, That Judgment might be given severally; for they being compelled by Law to join in a Writ of Error, the Release of one shall not discharge the rest of a personal Thing.

But where divers are to recover in the Personalty, the Release of one is a Bar to all; but it is not so in Point of Discharge.

6 Co. Ruddock's Case.

If two Copartners make a Lease of an House, and the Rent is in Arrear, and one of them brings the Action and recovers, the Judgment shall be arrested, because one alone hath recovered in Debt for a Moiety, when both ought to join.

But 'tis agreed, That if one Tenant in Common make a Lease rendring Rent, which afterwards is in Arrear, they must join in an Action of Debt, because it savours of the Personalty: But 'tis otherwise in case of the Realty.

Lit. Sect. 316.

DE

DE
Term. Sanctæ Trin.

Anno 2 Jac. II. in Banco Regis, 1686.

Herbert, *Chief Justice.*
Wythens, }
Holloway, } *Justices.*
Wright, }

Sawyer, *Attorney General.*
Powis, *Solicitor General.*

Aldridge *versus* Duke.

Trespass continued many Years, and the Statute of Limitations pleaded, the Jury gives Damages only for the last six Years.

A Assault, Battery, Wounding and Imprisoning of him, from the 10th of August, 24 Car. 2. usque Exhibitionem Billæ.

The Defendant pleaded Not guilty, infra sex Annos.

The Plaintiff replied, That the Writ was sued out 2 Octobris, 1 Jacobi 2. And that the Defendant was guilty within six Years next before the Writ brought.

Upon this Issue was joined, and a Verdict was given for the Plaintiff, and entire Damages given.

Mr. Pollexfen moved two Exceptions in Arrest of Judgment.

1. That a Verdict cannot help what appears to be otherwise upon the Face of the Record.

2

Now

Now here the Plaintiff declared, that he was imprisoned the 10th of August 24 Car. 2. which is 13 Years since, and being one entire Trespass, the Issue is found as laid in the Declaration, which cannot be for so many Years between the Cause of Action and bringing of the Writ; for if a Trespass be continued several Years, the Plaintiff must sue only for the last six Years, for which he hath a compleat Cause of Action; but when those are expired, he is barred by the the Statute.

When the Plaintiff hath any Cause of Action, then the Statute of Limitations begins; as in an Action on the Case for Words, if they are actionable in themselves without alledging special Damages, the Plaintiff will recover Damages from the Time of the Speaking, and not according to what Loss may follow. Sid. 25.

So in Trover and Conversion, when there is a Cause of Action vested, and the Goods continue in the same possession for seven Years afterwards; in such Case 'tis the first Conversion which entitles the Plaintiff to an Action.

So in the Case at Bar, tho' this be a continued Imprisonment, yet so much as was before the Writ brought is barred by the Statute.

Thompson contra. The Verdict is good, for the Jury reject the Beginning of the Trespass, and give Damages only for that which falls within the six Years; and this may be done because 'tis laid usque Exhibitionem Billæ.

If the Defendant had pleaded Not Guilty generally, then Damages must be for the 13 Years, tho' the Plaintiff of his own shewing had brought his Action for a Thing done beyond the Time limited by the Statute; but having pleaded Not guilty at any Time within six Years, if the Verdict find him guilty within that Time, 'tis against him. Cro. Car. 163, 381, 404.

As to the Objection, That the Cause of Action ariseth beyond six Years, tho' it doth appear so in the Declaration, yet that doth not exclude the Plaintiff, for there might have been Process out before, or he might be disabled by an Outlawry, which may be now reversed; or he might be in Prison, and newly discharged, from which Time he hath six Years to begin his Action, for being under either of these Circumstances the Statute doth not hurt him.

Curia. If an Action of false Imprisonment be brought for seven Years, and the Jury find the Defendant guilty but for two Days, 'tis a Trespass within the Declaration.

This Statute relates to a distinct and not to a continued Act, for after six Years it will be difficult to prove a Trespass, many Accidents may happen within that Time, as the Death or Removal of Witnesses, &c.

Judgment was given for the Plaintiff.

Dobson *versus* Thornistone.

Words spoken of a Farmer actionable.

THE Plaintiff was a Husbandman, who brought an Action against the Defendant for these Words, He owes more Money than he is worth, he is run away, and is broke. He had a Verdict, and it was moved now in Arrest of Judgment, that the Words being spoken of a Farmer, are not actionable.

Hill. 28. Eliz. B. R. Godb. 40.

To say, that a Gentleman is a Cozener, a Bankrupt, and hath got an Occupation to deceive Men; tho' he used to Buy and Sell, yet being no Merchant, 'twas the better Opinion of the Court, that the Words were not actionable.

Stile 420.

So to say of a Farmer, that he is a Whoreson Bankrupt Rogue, and it not appearing that he got his Living by Buying and Selling, or that the Words were spoken of him relating to his Occupation, 'tis not actionable.

Sid 299. Hutt. 50.

For it must not only appear that the Plaintiff hath a Trade, but that he gets his Living by it, otherwise the Words spoken of him will not bear an Action.

T. Jones 156. con.

But the Court held the Words to be actionable: The like Judgment was given in the Case of a Carpenter, Mich. 3. Jac. for Words, Viz. He is broke, and run away. Post. 155.

Anonymous.

Mis-entry of a Writ of Enquiry amendable without paying Costs.

NOta: Judgment was given upon a Demurrer, and a Writ of Enquiry was awarded; and in the Entry thereof upon the Roll, the Words (per Sacramentum duodecim proborum & legalium Hominum) were left out, and now the Question was, Whether it shall be amended?

It was said, that a Capiatur for a Misericordia shall be amended upon the new Statute of Jeofails, after a Verdict; but whether upon a Demurrer, it was doubted.

Cro Car. 184.

In a Quo Warranto, Judgment was entred by Disclaimer, by the Consent of all Parties, and the Words, Virtute & Prætextu Literarum Patentium geren. Dat. 17 Jacobi, were wrote in the

Margin of the Paper-Book by the then Attorney General; but by reason of a Stroke cross them, the Clerk omitted them in engrossing the Judgment: But upon a Motion, the Court held this amendable in the Common Law.

Curia. The Error is only a Misentry of the Writ of Enquiry, and amendable without paying of Costs.

Mr. Aston the Secondary said, That Costs were never paid in this Court upon such Amendments, nor in the Common Pleas until my Lord Chief Justice Vaughan's Time; but he altered the Practice, and made that Rule, That if you amend after a Writ of Error brought, you must pay Costs.

Holcomb *versus* Petit.

A Devastavit was brought against an Administrator of a rightful Executor, who pleaded an insufficient Plea; and upon a Demurrer the Question was upon the Statute of 30 Car. 2. The Title whereof is, An Act to enable Creditors to recover Debts of Executors and Administrators of Executors in their own Wrong, which is introductory of a new Land, and charges those who were not chargeable before at the Common Law; but it enacts, That when Executors of Persons who are *Executors de son tort*, or Administrators, shall convert the Goods of any Person deceased, that they shall be liable as their Testator or Intestate would have been.

Administrator of a rightful Executor is liable to a *Devastavit*. 30 Car. 2. c. 7.

Gold held, That he shall not be charged, for where an Act of Parliament charges an Executor, in such Case an Administrator shall be likewise charged; but if an Administrator be charged, that shall never extend to an Executor. The Rule is, A majori ad minus valet Argumentum, sed non econtra; therefore the rightful Executor shall not be charged by this Act, which only makes Executors of Executors de son tort liable.

Pollexfen contra. There can be no Reason given why the Act should make an Administrator of an Administrator liable to a Devastavit, and not an Administrator of an Executor de son tort, for the Mischief will be the same, and therefore a rightful Executor who wastes the Testator's Goods ought to be charged.

The Recital of this Act is large enough; the Preamble is general, and the enacting Clause expresseth Executors and Administrators of Executors *de son tort*; but then it also mentions Administrators, but not such who are their Administrators de son tort.

Now the Word Administrator is in it self a general Word, and extends to any one who meddles with the personal Estate, so that the Preamble being general, and the Act remedial, 'tis within the same Mischief.

Curia. The Word Administrator is very comprehensive, for when an Executor pleadeth, he saith, Plene administravit.

If a rightful Executor waste the Goods, he is a kind of an Administrator de son tort for abusing of the Trust.

There is no Superiority between an Executor or an Administrator, for by this Act they are both equal in Power as to the Goods of the Deceased.

Judgment was given, That the Administrator of the rightful Executor shall be liable.

Jenings *versus* Hankeys.

Where an Informer shall be a Witness, though he hath Part of the Penalty. 13 Car. 2. c. 10.

IS enacted by the Statute of 13 Car. 2. That they who kill, course, hunt or take away Red or Fallow Deer in any Ground where Deer are kept, *&c.* or are aiding therein, if such are convicted by Confession or Oath of one Witness before one Justice of the Peace within six Months after the Offence done, shall forfeit 20 *l.* one Moiety to the Informer, the other to the Owner of the Deer, to be levied by Distress by Warrant under the Justice's Hand.

The Defendant was convicted by the Oath of the Informer; and Mr. Shower moved that it might be quashed, because the Informer is not to be admitted as a Witness, he being to have a Moiety of the Forfeiture.

12 Co. 68. 2 Rol. Abr. 685.

The Party to an usurious Contract shall not be admitted as an Evidence to prove the Usury, because he is Testis in propria Causa, and by their Oath may avoid their own Bonds.

Mr. Pollexfen contra. The Statute gives Power to convict by the Oath of a credible Witness, and such is the Informer.

'Tis not a material Objection to say, That the Informer shall not be a Witness because he hath a Moiety of the Forfeiture, for in Cases of the like Nature the Informer is always a good Witness.

As upon the Statute for suppressing of Conventicles the Informer is a good Witness, and yet he hath Part of the Penalty; for otherwise that Act would be of little Force, for if he who sees the People met together be not a good Witness, no Body else can.

Curia. In the Statute of Robberies a Man swears for himself; because there can be no other Witness, he is a good Witness.

2 Skinner 82

Harman *versus* Harman.

DEBT upon a Bond against an Administrator, who pleaded fully administred, and that he had not Notice of this Bond before such a Day.

Notice of a Debt must be given to an Administrator.

In this Case a special Verdict was found; upon which the Question was, Whether Notice was necessary to be given of Debts of an inferior Nature?

The Court gave no Opinion; but they agreed that a Judgment upon a simple Contract may be pleaded in Bar to an Action of Debt upon a Bond; and that 'tis no Devastavit in an Executor to pay a Debt upon such a Contract before a Bond Debt, of which he had no Notice.

Vaughan 94.

So where an Obligor did afterwards enter into a Recognizance in the Nature of a Statute, and Judgment was against him upon the Bond, and then he died; his Executrix paid the Creditor upon the Statute, and the Obligee brought a Scire Facias upon the Judgment on the Bond Debt, and she pleaded Payment of the Recognizance; this was held a good Plea, for she is not bound to take Notice of the Judgments against the Testator without being acquainted therewith by his Creditors, for she is in no wise privy to his Acts.

2 Anders. 159.
1 Mol. 172

DE
Term. Sancti Mich:
Anno 2 Jac. II. in Banco Regis, 1686.

Anonymus.

Perjury in a Deposition taken before Commissioners in *Chancery.*

AN Information was exhibited against the Defendant for Perjury, setting forth that a Bill in Chancery was exhibited by one A. B. and the Proceedings thereon.

The Perjury was assigned in a Deposition made by the Defendant 30 Julii, 1683. and taken in that Cause before Commissioners in the Country.

It was tri.d this Day at the Bar; and the Question was, Whether the Return of the Commissioners, that the Defendant made Oath before them, shall be a sufficient Evidence to convict him of Perjury without their being present in Court to prove him the very same Person?

Serjeant Pemberton, for the Defendant, admitted an Information will lie in this Case against him, but the Commissioners must be here, or some other Person, to prove that he was the Person who made Oath before them.

The Commissioners sign the Depositions, and they ought to produce them so signed to the Court and prove it, for Depositions are often suppressed by Order of the Court.

If a true Copy of an Assidavit made before the Chief Justice of this Court be produced at a Trial, 'tis not sufficient to convict a Man of Perjury.

This is not like the Case of Perjury assigned in an Answer in Chancery taken in the Country, for that is under the Party's Hand, but here is nothing under the Defendant's Hand, and therefore the Commissioners ought to be in the Court to prove him to be a Man.

The

The Court were equally divided: The Chief Justice and Wythens Justice were of Opinion, that it was not Evidence to convict the Defendant of Perjury; it might have been otherwise upon the Return of a Master of Chancery, for he is upon his Oath, and is therefore presumed to make a good Return; but Commissioners are not upon Oath, they pen the Depositions according to the best of their Skill, and a Man may call himself by another Name before them without any Offence.

The Commissioners cannot be mistaken in the Oath, tho' they may not know the Person; for this Court may be so mistaken in those who make Affidavits here, but not in the Oath; if the Commissioners or the Clerk to the Commissioner had been here, they would have been good Evidence.

If an Affidavit be made before a Justice of the Peace of a Robbery as enjoined by the Statute, if you will convict the Person of Perjury, you must prove the Swearing of the Affidavit.

The Attorney General perceiving the Opinion of the Court, rather than the Plaintiff should be nonsuit, because no Evidence could be given, offered to enter a Nolle prosequi, which the Court said could not be done, because the Jury were sworn; but he insisted upon it, and said he would cause it to be entered.

Sir John Knight's *Case.*

AN Information was exhibited against him by the Attorney General upon the Statute of 2 E. 3. Which prohibits all Persons from coming with Force and Arms before the King's Justices, *&c.* and from going or riding armed in Affray of Peace, on Pain to forfeit his Armour, and suffer Imprisonment at the King's Pleasure. Information upon the Statute for going arm'd. 2 E. 3. c. 3.

This Statute is confirmed by that of R. 2. with an Addition of a farther Punishment, which is to make a Fine to the King. 20 R. 2. 1.

The Information sets forth, That the Defendant did walk about the Streets armed with Guns, and that he went into the Church of St. Michael in Bristol, in the Time of Divine Service, with a Gun, to terrify the King's Subjects contra Forman Statuti.

This Case was tried at the Bar, and the Defendant was acquitted.

The

The Chief Justice said, That the Meaning of the Statute of Ed. 3. was to punish People who go armed to terrify the King's Subjects.

'Tis likewise a great Offence at the Common Law, as if the King was not able or willing to protect his Subjects; and therefore this Act is but an Affirmance of that Law, and it having appointed a Penalty, this Court can inflict no other Punishment than what is therein directed.

DE

DE
Term. Sancti Hill.

Anno 2 & 3 Jac. II. in Banco Regis, 168$^{6}_{7}$.

Kingston *versus* Herbert.

A Common Recovery was suffered Anno 22 Jacobi primi, and a Writ of Error was brought about five Years since to reverse it, and Judgment was given for the Reversal; and it was now moved to set aside that Reversal, because there was no Scire Facias against the Tertenants.

Where a *Scire Facias* must go to the Tertenants before Judgment be reversed.

Mr. Williams, who argued against the Reversal, said that the Want of a Scire Facias must be Error either in Law or in Fact; it cannot be Error in Law, for that must appear upon the Record it self, which doth not here.

It cannot be Error in Fact, because there is no Necessity of such a Writ, 'tis only Discretionary in the Court, and not Ex Necessitate Juris.

But on the other Side it was insisted, That the Court cannot proceed to examine Errors before a Scire Facias is awarded to the Tertenants, for they may have a Matter to plead in Bar to the Writ, as a Release, &c. and the Party cannot be restored to all which he hath lost by the suffering of the Recovery, unless the Defendant be brought in upon the Scire Facias.

Dyer 320, 331.

Curia. The only Question is, Whether this Judgment be well given without a Scire Facias?

The Secondary hath reported that the Practice is so.

Then as to the Objection, That such a Scire Facias is not ex Necessitate Juris, but only Discretionary; 'tis quite otherwise, for 'tis not only a cautionary Writ, as all other Scire Facias's, but 'tis a legal Caution which in a manner makes it necessary.

Infra 274.

'Tis

'Tis true, if there had been a Judgment corruptly obtained, this Court might have set it aside; but if Erronice, 'tis a Doubt whether it may be vacated but according to the Forms and Methods of Law. Adjornatur.

Baldwin *versus* Flower.

Words, where actionable without special Damage.

BAron and Feme brought an Action on the Case for Words spoken of the Wife: The Declaration was, That the Defendant having some Discourse with another Person, called the Wife Whore, and that she was his Whore, and concluded ad Dampnum ipsorum, *&c.*

The Plaintiff had a Verdict, and it was now moved in Arrest of Judgment, for that the Words were not actionable without alledging special Damage.

But it was answered, that the Action was well brought. To say, A Man is rotted with the Pox, is actionable without alledging special Damage, because the Person by such Means will lose the Communication and Society of his Neighbours.

Rol.Abr.35. placit. 7.

As to the Conclusion ad Dampnum ipsorum, 'tis good, for if she survive the Husband the Damages will go to her, and so are all the Precedents.

Curia. The Words are actionable: And three Justices were of Opinion, that the Conclusion of the Declaration was as it ought to be, which Justice Wythens denied; for if an Inkeeper's Wife be called a Cheat, and the House loses the Trade, the Husband hath an Injury by the Words spoken of his Wife, but the Declaration must not conclude ad Dampnum ipsorum.

Sir Thomas Grantham's *Case.*

HE bought a Monster in the Indies, which was a Man of that Country, who had the perfect Shape of a Child growing out of his Breast as an Excrescency, all but the Head.

This Man he brought hither and exposed to the Sight of the People for Profit.

The Indian turns Christian and was baptized, and was detained from his Master, who brought a Homine Repleg'; the Sheriff returned that he had replevied the Body, but doth not say, the Body in which Sir Thomas claimed a Property; whereupon

upon he was ordered to amend his Return, and then the Court of Common Pleas bailed him.

Banson *versus* Offley.

An Appeal of Murder was tried in Cambridgshire against Three Persons, and the Count was, That Offley did assault the Husband of the Appellant, and wounded him in Huntingtonshire, of which Wound he did languish and die in Cambridgshire, and that Lippon and Martin were assisting.

An Appeal of a Murder was tried, not where the Stroke was given, but where the Party died.

The Jury found a special Verdict, in which the Fact appeared to be, that Lippon gave the Wound, and that Martin and Offley were assisting.

The first Exception to this Verdict was, That the Count and the Matter therein alledged must be certain, and so likewise must the Verdict, otherwise no Judgment can be given; but here the Verdict finding that another Person gave the Stroke, and not that Person against whom the Appellant had declared, 'tis directly against her own shewing.

2. This Fact was tried by a Jury of Cambridgeshire, when it ought to have been tried by a Jury of both Counties.

The Court answered to the first Exception, That it was of no Force, and that the same Objection may be made to an Indictment, where in an Indictment if one gives the Stroke, and another is abetting, they are both principally and equally guilty; and an Indictment ought to be as certain as a Count in an Appeal.

As to the second Exception, 'tis a good Trial by a Jury of Cambridgeshire alone, and this upon the Statute of 2 & 3 Ed. 6. the Words of which Statute are, viz. Where any Person, *&c.* shall hereafter be feloniously striken in one County, and die of the same Stroke in another County, that then an Indictment thereof found by the Jurors of the County where the Death shall happen, whether it be found before the Coroner upon the Sight of the Body, or before the Justices of the Peace, or other Justices or Commissioners, who shall have Authority to enquire of such Offences, shall be as good and effectual in the Law, as if the Stroke had been in the same County where the Party shall die, or where such Indictment shall be found.

2 & 3 Ed. 6. c. 24.

'Tis true, that at the Common Law, if a Man had received a mortal Wound in one County, and died in another, the Wife

4 Inst. 49.

or

or next Heir had their Election to bring an Appeal in either County, but the Trial must be by a Jury of both Counties.

But now that Mischief is remedied by this Statute, which doth not only provide that an Appeal shall be brought in the County where the Party died, but that it shall be prosecuted, which must be to the End of the Suit. Adjornatur.

Dominus Rex *versus* Hinton *and* Brown.

Subornation of Perjury.

AN Indictment was brought against the Defendants, setting forth, That a Conventicle was held at a certain Place, and that they movebant, persuadebant, & subornaverunt a certain Person to swear that several Men were then present, who really were at that Time at another Place.

They were found guilty, and a Writ of Error was brought to reverse the Judgment: The Error assigned was, That the Indictment doth not set forth that any Oath was made, so it could not be Subornation.

There is a Difference between the persuading of a Man to swear falsely and Subornation it self, for an Indictment for Subornation always concludes contra Forman Statuti.

Curia. 'Tis not enough to say a Man suborned another to commit a Perjury, but he must shew what Perjury it is, which cannot be without an Oath; for an Indictment cannot be fram'd for such an Offence, unless it appear that the Thing was false which he was persuaded to swear.

The Question therefore is, If the Person had sworn what the Defendants had persuaded him to do, whether that had been Perjury?

There is a Difference when a Man swears a Thing which is true in Fact, and yet he doth not know it to be so, and to swear a Thing to be true which is really false; the first is Perjury before God, and the other is an Offence of which the Law takes Notice.

But the Indictment was quash'd, because the Words, Per Sacramentum duodecim proborum & legalium hominum, were left out.

They held, that if the Return had been right upon the File, the Record shall be amended by it.

Blaxton

Blaxton *versus* Stone.

THE Case was this, viz. A Man seised in Fee, &c. had Issue two Sons; he devised all his Land to his eldest Son, and if he die without Heirs Males, then to his other Son in like Manner?

What Words make an Estate Tail in a Will.

The Question was, Whether this was an Estate Tail in the eldest Son.

Curia. 'Tis plain, the Word Body, which properly creates an Estate Tail, is left out; but the Intent of the Testator may be collected out of his Will, that he designed an Estate Tail; for without this Devise it would have gone to his second Son, if the first had died without Issue: 'Tis therefore an Estate Tail.

DE
Termino Paſchæ,
Anno 3 Jac. II. in Banco Regis, 1687.

Herbert, *Chief Juſtice.*
Wythens, }
Holloway, } *Juſtices.*
Powel, }

Dominus Rex *verſus* William Beal.

A Soldier executed not in the County where he was condemned.

MEmorandum, That on Saturday, April 15. Mr. Attorney moved, that this Court would award Execution upon the Defendant, who was a Soldier, for deſerting his Colours, and was condemned for the ſame at the Aſſizes at Reading in Berks, and reprieved, and that he might be executed at Plimouth, where the Garriſon then was.

The Chief Juſtice in ſome Heat ſaid, That the Motion was irregular, for the Priſoner was never before the Court.

Mr. Attorney then moved for a Habeas Corpus, and on Tueſday April the 18th the Soldier was brought to the Bar, and Mr. Attorney moved it again.

But it was affirmed by the Chief Juſtice and Juſtice Wythens, that it could not be done by Law, for the Priſoner being condemned in Berks, and reprieved by the Judge to know the King's Pleaſure, and now brought hither, cannot be ſent into another County to be executed: It may be done in Middleſex by the Prerogative of this Court which ſits in that County, but no where elſe but in the proper County where the Trial and Conviction was; ſo the Priſoner was committed to the King's-Bench, and the Record of his Conviction was not filed.

But it was the King's Will that this Man should be executed at Plimouth, where the Garrison was, that by this Example other Soldiers might be deterred from running from their Colours.

SIR *Robert Wright*, who was made Chief Justice of the *Common-Pleas*, in the Room of Sir *Henry Beddingfield*, who died the last Term, (as he was receiving the Sacrament) was on *Friday* following, being the 21st of *April*, made Chief Justice of this Court, in the Place of Sir *Edward Herbert*, who was removed into the *Common-Pleas*, and made Chief Justice there; and Sir *Francis Wythens* had his *Quietus* the Night before.

The same 21st Day of April, after this Removal, the Soldier was brought again to the Bar, and upon the Motion of Mr. Attorney, was ordered by the new Chief Justice to be executed at Plimouth, which was done accordingly.

Wright, *Chief Justice.*
Holloway, }
Powel, } *Justices.*
Allibon, }

Monday, May 2d.

NOTA. A Writ of Error was brought upon a Judgment given in this Court, returnable in Parliament, which was prorogued from the 28th Day of April to the 22d Day of November following.

Sir George Treby moved, that it might be discharged; for it could not be a Supersedas to this Execution, because there was a whole Term which intervened between the Teste and Return of the Writ of Error, viz. Trinity-Term.

On the other Side it was said, That the Proclamation was no Record: It only shews the present Intention of the King, which he may recal at any Time.

But the Court made no Rule.

DE

DE
Term. Sanct. Trin.

Anno 2 Jac. II. in Banco Regis, 1686.

Wright, *Chief Justice.*
Holloway, Powel, Allibon, } *Justices.*

Sawyer, *Attorney General.*
Powis, *Solicitor General.*

The Company of Merchant-Adventures *versus* Rebow.

Whetherthe King hath a Prerogative to restrain Trade to a particular Number of Men.

IN a special Action on the Case, the Plaintiffs declared, That in the Reign of H. 4. there was a Society of Merchants-Adventurers in England, and that afterwards Queen Elizabeth did by her Letters Patents incorporate them by the Name of The Governor and Company of the Merchants-Adventurers, &c. and gave them Privilege to trade into Holland, Zealand, Flanders, Brabant, the Country belonging to the Duke of Lunenburgh, and Hamburgh, prohibiting all others not free of that Company; by Vertue whereof they did trade into those Parts, and had thereby great Privileges and Advantages: That the Defendant not being free of the said Company, did trade into those Parts without their Authority, and imported Goods from thence into this Kingdom, ad damnum, &c.

15 E 3. c. 3. The Defendant pleaded as to Hamburgh Not guilty, and as to the other Places he pleaded the Statute of Ed. 3. That the Seas shall be open to all Merchants to pass with their Merchandize whither they please.

The

The Plaintiff demurred, and the Defendant joined in Demurrer.

This Case was now argued by Counsel on both Sides.

The Counsel for the Plaintiff in their Arguments made these Points:

1. What Power the King had by his Prerogative to restrain his Subjects from trading to particular Places.
2. Admitting he had such a Prerogative, whether an Action on the Case will lie?

As to the first Point it was said, that all Trades must be under some Regulation, and that the Subject hath not an absolute Power to trade without the Leave of the King; for it is said in our Books, Omnes Mercatores, nisi publice prohibiti fuerint, habeant salvum & securum Conductum, which is meant of Merchant Strangers in Amity with us, and nisi publice prohibiti must be by the King. Magna Charta, cap. 30. 2 Inst. 57.

Now if Merchants Strangers may be prohibited from coming into England, by the same Reason the King's Subjects may be restrained to go out of the Kingdom; and for that Purpose the Writ of Ne exeat Regnum was framed, which is grounded upon the Common Law, and not given by any particular Statute. F. N. B. 85. 3 Inst. 179.

The King's Prerogative in this and such like Cases is so much favoured by Law, that he may by his Privy Seal command any of his Subjects to return out of a Foreign Nation, or seize their Lands. 1 Leon. 9. More 172.

The first Statute which regulates Trade is, that which confined the Staple to certain Places, that Persons might not go about in Companies to trade without the King's Licence; and from thence came Markets; and if such were kept without the King's Grant, a Quo Warranto would lie against them who continued it, and the People who frequented those Markets were punishable by Fine. 27 E. 3. cap. 1.

The Law is plain, that the King is sole Judge of the Place where Markets shall be kept; for if he grant one to be kept in such a Place, which may not be convenient for the Country, yet the Subjects can go to no other, and if they do, the Owner of the Soil where they meet is liable to an Action at the Suit of the Grantee of the Market. F.N.B. 125. 2 Roll Abr. 140.

Sir *G. Farmer's* Case, cited in 8 Co. 127.

A Custom to restrain a Man from the exercising his Trade in a particular Place, hath been adjudged good; as to have a Bake-House in such a Manor, and that no other should use that Trade there.

2 Cro. *Brown* versus *Joliffe*.

And as a Man may be restrained by Custom, so he may restrain himself from using of a Trade in a certain Place; as if he promise upon a valuable Consideration not to use the Trade of a Mercer in such a Place.

And 'tis very necessary that Trade should in some measure be restrained so as to be managed only by Freemen, because 'tis of more Advantage to the King that it should be carried on by a Company, (especially in London) who may manage it with Order and Government, that is, by some Power to restrain particular Persons from that Liberty which otherwise they would use; and therefore such Companies have always Power to make By-Laws to regulate Trade, which is the chief End of their Incorporation.

And if such Corporations have Power to judge and determine who are fit Persons to exercise Trades within their Jurisdiction, the King hath certainly a greater Prerogative to determine which of his Subjects are fit to trade to particular Places exclusive from the rest.

Sid. 107.

That the Governors of Corporations have taken upon them such Authority, appears in Townsend's Case, who served an Apprenticeship to a Taylor in Oxford, and was refused by the Mayor to be made a Freeman of that City; which shews, that if a Person be not qualified, he may be excluded.

This is a very ancient Company, for Cloth was first brought into this Realm in the Reign of Ed. 3. and was always under some Government.

1 H. 5. no. 41. 2 Abr. Roll. 147. Placit. 39.

My Lord Rolls quoting the Parliament-Roll of H. 5. wherein the Commons pray, that all Merchants might import or export their Goods to any Place, (except such as were of the Staple) paying the Customs, takes Notice that this Prayer was made against the Companies which prohibited such Trading.

This shews, that even in those Days Trade was under a Regulation.

34 E. 3. c. 18. 38 E. 3. c. 11.

King Ed. 3. gave Licence to all Merchants Denizens, who were not Artificers, to go into Gascoigne for Wines, and that Aliens might bring Wines into this Realm, and that all Merchandizes might be carried into Ireland, and exported from thence; which shews, that without such Leave Persons could not trade thither, and Denizens could not import Wines from those Parts.

The Case of sole Printing is a Manufacture, and so not in the Power of the King to restrain, for 'tis a Piece of Art and Skill; but when once it becomes of publick Concernment, then the Prerogative interposeth.

'Tis a vain Objection to say, That every Subject hath a Right to trade, which Right is grounded upon the Common Law; for that Law can give no such Authority against any King's Prohibition: For suppose a foreign Prince should forbid the Subjects of England to trade within his Dominions, what Right can the Common Law give them so to do?

Or suppose any Foreign Prince should restrain Trade to a peculiar Number of Men exclusive of the rest, how would the Common Law help them? So that if this Trade depend upon the Will of a Foreign Prince, why may not the King of England prohibit his Subjects from using of it?

He who hath the sole Power of making Leagues and Treaties is the Foundation of Trade, and can that Right which the Subject hath at the Common Law be independent on this?

The Question now is about the Regulation of a Trade by Letters Patents, which the King hath Power to do.

1. By his Prerogative, for the Appointment of the Staple is not by Vertue of any Act of Parliament, but 'tis the Effect of Leagues and Treaties. 27 E. 3. c. 1. 43 E. 3. c. 1. 47 E. 3. 1 H. 5. Num. 40.

2. By Acts of Parliament which have allowed such Grants, and from other Acts which take Notice of the King's Prerogative.

In 12 H. 7. A Fellowship of Merchant Adventurers in London made an Order to restrain all Persons to sell at such a Mart without their Consent. 12 H. 7. c. 6.

The Statute of 3 Jacobi recites Letters Patents of the Incorporation to certain Merchants to trade into Spain; and 4 Jac. recites the like Letters Patents granted to the Merchants of Exeter by the Queen. 3 Jac. c. 6. Cap. 9.

The next Thing to be considered is, what Acts of Parliament have either taken away or abridged the King's Prerogative.

The first is Magna Charta, viz. That all Merchants shall stay here, nisi publice antea prohibiti, the Meaning of which hath been already explained.

The second Statute is, that which the Defendant hath pleaded. In Answer to which 'tis to be observed, that a Preamble of any Statute Law is the best Expositor of it, because it usually mentions the Occasion of its making; and this Act amongst other

Things and Petitions recites, that the King had granted to the Men of Flanders, that the Staple of Wool should be at Bruges, which Town had ordered that no Wool should be sold to Strangers, which was much to the Damage of trading Merchants.

Now what is the Remedy in this Case? Why the King grants that they may buy Wool at such Prizes as they can agree, and carry it where they please, let the Seas be open, &c. So that this Act had only a Prospect to remedy the Abuse of the Staple, which hath in no Sort abridged the King's Prerogative.

If there should be no Regulation of Trade by the Power and Prerogative of the King, what would become of the Turkey Company, when it might be in the Power of one Man to ruin all the Effects of our English Merchants there, by a Misdemeanor? Therefore it ought to be looked after very strictly.

All Arguments which may be deduced from Monopolies will have no Influence upon this Case, because this Grant doth not bar the Subject of any precedent Right.

2. As to the second Point, 'tis not to be doubted, but that since they are abridged in Interest, an Action on the Case will lie.

Econtra. Mr. Pollexfen contra. These Letters Patents extend to a great Part of Europe, and the Consequence of this Judgment (if for the Plaintiffs) must be, that all Merchants trading thither must be of this Company, or excluded from Trade in those Parts.

Now supposing that several Men may be of this Company, 'tis impossible that all Merchants who trade into those Parts of Europe, should be Members thereof; for where should they meet to make By-Laws? Neither is it probable that other Merchants who live remote from London will adventure their Stock and Estates with the Citizens. What will become of the Clothiers, must they sell their Cloth at the Rate imposed by this Company?

The Question is not whether the King may restrain his Subjects from trading to particular Places, or that the Trade of the People is not under the Government of the King, nor whether he may make Leagues and Treaties, for 'tis certainly his Prerogative; nor how the Staple was formerly, which hath been long since discontinued, and not easy to find out; nothing will follow from either of these Considerations which may be of any Use in this Case.

But

But the Question is, whether the King can make such a Grant excluding all others from trading; for 'tis expressly provided by the Statute of H. 7. that no Englishman shall take of another any Fine or Imposition, for his Liberty to buy and sell. 12 H. 7. c. 6.

The Case of the East-India Company is not like this, for they who argued then did admit, That if the Grant to that Company had restrained the Subjects from trading to Christian Countries it had been void; but it only prohibiting a Trade with Infidels, with whom we should have no Communication without the King's Licence, lest we should forsake the Catholick Faith, and turn Infidels, for that Reason it was held good.

And such a Licence was seen by my Lord Coke, as he tells us in Michelburn's Case, which was granted in the Reign of Ed. 3. 2 Brownl. 296.

But a Patent to exclude all others is void, both by the Common Law and the Statute Law.

As to the Argument, that the Common Law gives no Privilege to trade against the King's Prohibition, because Foreign Princes may restrain the Trade to a particular Number of Men; Can any Inference be made from thence, that the Kings of England may therefore restrain Trade to a like Number of Men?

All Patents prohibiting Trade are void. If a Man would give Lands in Mortmain, or would have a new Way by taking in the Common High-way, this may be done with the King's Licence, and the Escheator or Sheriff is to examine the Fact, and if it be ad Dampnum alterius, such a Licence is void, as being prejudicial to the Subject, and if 'tis void a fortiori, a Grant to restrain Trade must be so. 1 Roll. Rep. 4. 13 H. 4. 14. F. N. B. 222.

All Engrossing and Monopolizing are void by the Common Law, the one is a Species of the other; 'tis defined by my Lord Coke to be an Allowance by the King's Grant to any Person for the sole Buying or Selling of any Thing, restraining all others of that Liberty which they had before the making of such a Grant; and this he tells us is against the ancient and fundamental Rights of this Kingdom. 3 Inst. 181.

This Patent agreeth exactly with that Definition, and therefore it must be against Law; 'tis against an Act of Parliament, which gives Liberty to Merchants to buy and to sell in this Realm without Disturbance; and 'tis expressly against the Statute of 21 Jac. cap. 3. which declares all such Letters Patents to be void. 9 E. c. cap. 1. 18 E. 3. c. 3. 25 E. 3. c. 2. Roll. Abr. 180. 2 R. 2. c. 12. 11 R. 2. c. 7.

2 Inst. 540. 11 Rep.

That which may give some Colour to make such Grants good, is a Pretence of Order and Government in Trade; but my Lord Coke was of Opinion, that it was a Hinderance to both, and in the End it produced Monopolies.

There is a great Difference between the King's Grant and his Prohibition; for the one vests an Interest, which is not done by the other, and all Prohibitions determine by the King's Death; but Grants still remain in Force. Adjornatur.

Langford *versus* Webber.

Justification upon a bare Possession good against a wrong Doer.

IN Trespass for the taking of a Horse; the Defendant justified, for that Joseph Ash was possessed of a Close, &c. and that the Defendant as his Servant took the Horse in that Close Damage fesant.

And upon a Demurrer to this Plea, for that the Defendant did not shew what Title Ash had to this Close. The Counsel for the Defendant insisted, that it being in Trespass, 'tis sufficient to say that Ash was possessed, because in this Case Possession is a good Title against all others. But it might have otherwise in Replevin.

Con' Lutw. 1402. 2 Mod. 70.

Cro. Car. 138. Yelv. 74. Cro. Car. 571. pl. 10.

The Title of the Close is not in Question, the Possession is only an Inducement to the Plea, and not the Substance thereof, which is the taking of the Horse; and the Law is plain, that where the Interest of the Land is not in Question, a Man may justify upon his own Possession against a wrong Doer.

Mr. Pollexfen on the other Side alleged, That Damage fesant would bring the Title of the Land in Question: But the Court gave Judgment for the Defendant.

Perkins *versus* Titus.

Fine upon an Admittance, where it must be certain.

A Writ of Error was brought to reverse a Judgment given in the Common-Pleas, in Replevin for taking of the Plaintiff's Sheep.

The Defendant avowed the taking Damage fesant.

3 Levinz. 255.

The Plaintiff replied, That the Lands where, &c. were Copyhold, held of the Manor of Bushy in Com. Hartf. the Custom whereof was, That every Tenant of the said Manor, qui admissus foret to any Copyhold Estate, should pay a Year's Value of the Land for Fine, as the said Land is worth tempore Admissionis;

And upon a Demurrer, the Question was, 1. Whether this be a good Plea or not, as 'tis pleaded?

2. If it be good as pleaded, then whether such a Custom may be supported by Law?

1. It was for the Plaintiff in the Writ of Error now, and in Michaelmas Term following argued that it was not a good Custom.

The Substance of whose Arguments were, that Fines are either certain or incertain; those which are incertain are arbitrary, and therefore cannot be due of Common Right; nor by Custom, for there can be no Custom for an incertain Fine, and such is this Fine; for the Value of the Land cannot be known, because as this Custom is pleaded, it doth not appear whether it shall be a Year's Value past, or to come, at the Time of the Admittance of the Tenant.

A Custom to assess rationabilem Denariorum summam for a Fine upon an Admittance, that is to say, being two Years Rent of a Tenant of the yearly Value of 53 s. 4 d. is no good Custom. 13 Rep. 1.

A Lease is made for so many Years as a third Person shall name; this is altogether incertain; but when the Term is named, then 'tis a good Lease, but this can be done but once. 13 Ed. 3. Fitz. Abr. 273.

How can this Fine be assessed? It cannot be by Jury, for then it stands in Need of the Common Law, and will be therefore void; for a Custom must have nothing to support it but Usage.

1. Neither can this be a good Custom as 'tis pleaded, because all Customs are made up of repeated Acts and Usages, and therefore in pleading them, it must be laid Time out of Mind, which is not done here; for admissus foret hath a Respect to future Admissions, and are not to those which are past.

2. There is no Time laid when this Fine shall be paid; for 'tis said, Quilibet tenens qui admissus foret, &c. solvet tantam Denariorum summam quantam Terra valebat per Annum tempore Admissionis, &c. which last Words must be taken to relate to the Value of the Land, and not to the Time when the Fine shall be paid; so that if there be such a Custom, which is Lex Loci, and not fully set forth and expressed, the Common Law will not help it by any Construction.

2d. Point. Whether such a Custom can be good by Law?

And they argued that it cannot.

Where the Fine is certain, the Lord may refuse to admit without a Tender of it, upon the Prayer of the Person to be admitted; but where 'tis incertain, the Lord is first to admit the Tenant, and then to set the Fine, the Reasonableness whereof is to be determined 4 Rep. 27. b.

termined by Judges before whom the Case shall depend, or upon Demurrer, or by a Jury upon Proofs of the yearly Value of the Land; but for Non-payment of an unreasonable Fine the Lord cannot enter.

Cro. Eliz. 779. Cro. Car. 196.

The Law admits of no Custom to be good, but such as is very certain; for Incertainty in a Custom, as well as in a Grant, makes both void; and therefore 'tis held a void Custom for an Infant to make a Feoffment when he can measure an Ell of Cloth.

Rol. Abr. 565. 6 Rep. 60. Davies Rep. 37.

It may be objected, that certum est quod certum reddi potest; the Meaning of which Saying must be, quod certum reddi potest, by something which is certain; for if this Rule should be taken to be an Answer to Incertainties, it would destroy all the Books, which say a Custom must be certain.

The Law is very clear, that a Custom is void for the Incertainty; therefore this Custom must be void, for the Value of Land is the most incertain Thing in Nature, and therefore Perjury will not lie for swearing to the Value.

Fitz. Bar. 177. 2 Rol. Abr. 264.

Serjeant Fuller and Mr. Finch contra.

The chief Objection is the Incertainty of this Custom; now if a Custom as incertain as this, hath been held good in this Court, 'tis a good Authority to support this Custom.

And as to that it was said, that a Custom for a Person (whom a Copyholder should name) to have his Land after his Death, and that he should pay a Fine for his Admittance; And if the Lord and Tenant cannot agree about the Fine, that then the rest of the Tenants should assess it. This was adjudged a good Custom by the Court of Common-Pleas, and affirmed upon a Writ of Error in this Court: It was the Case of Crab and Bevis, cited in Warne and Sawyer's Case. Adjornatur.

1 Rol. Rep. 48. 2 Cro. 368. 4 Leon. 238. Noy. 3. 2 Brownl. 85.

Afterwards the first Judgment was affirmed, and all the Court held the Custom to be a good Custom.

Hacket *versus* Herne.

Where the Defendants in the Action must join in a Writ of Error.

Judgment was had in Debt upon a Bond against Father and Son, and afterwards the Father alone brought a Writ of Error, and the Error assigned was, that his Son was under Age; but because the Son did not join in the Error, the Court ordered the Writ to be abated.

If a Quare impedit be brought against a Bishop and others, and Judgment be against them all, they must likewise all join

in a Writ of Error, unless it be where the Bishop claims only as Ordinary.

'Tis true, this is against the Opinion of my Lord Rolls in his Abridgment, who puts the Case, that where a Scire Facias was brought against four Executors, who pleaded plene administraverunt, The Jury find Assets in the Hands of two of them, and that the other eant inde sine Die; two bring a Writ of Error, and altho' at the Opening of the Case it was held that the Writ should abate for that Reason, because brought only by two, yet he says the Judgment was afterwards affirmed, and the Writ held good. Rol. Abr. 929. pl. 30.

But there is a Difference where a Writ of Error is brought by the Plaintiffs in the original Action, and when by the Defendants; for if two Plaintiffs are barred by an erroneous Judgment, and afterwards bring a Writ of Error, the Release of one shall bar the other, because they are both Actors in a personal Thing to Charge another, and it shall be presumed a Folly in him to join with another, who might release all. 5 Co. 25. a. Ruddock's Case.

But where the Defendants bring a Writ of Error 'tis otherwise; for it being brought to discharge themselves of a Judgment, the Release of one cannot bar the other, because they have not a joint Interest, but a joint Burthen, and by Law are compelled to join in Errors.

Mosse *versus* Archer.

COvenant by an Assignee of an Assignee of Lands which were exchanged; the Breach assigned was, that a Stranger, habens Jus & Titulum, did enter, &c. Breach not well assigned.

There was a Verdict for the Plaintiff, and it was now moved in Arrest of Judgment, That the Plaintiff had not shewed a sufficient Breach, for he sets forth the Entry of a Stranger, habens Jus & Titulum, but doth not shew what Title, and it may be he had a Title under the Plaintiff himself, after the Exchange made; and to prove this, the Case of Kirby and Hansaker was cited in Point, and of that Opinion was all the Court. 2 Cro. 315. Hob. 35. 1 Vent. 184.

Nota. It was said in this Case, that an Exchange ought to be executed by either Party in their Life-time, or else it is void. 2 Lev. 37. & 3 Lev 325. contra.

Taylor

Taylor *versus* Brindley.

Variance between the Original and Declaration, where 'tis no Error.

THE Original in Trespass was quare Clausum fregit, and the Plaintiff declared, quare Clausum & Domum fregit, and had Judgment in the Common Pleas, and a Writ of Error was brought in this Court, and the Variance between the Original and Declaration was assigned for Error, and that one was not warranted by the other.

2 Cro. 674. 1 Rol. Abr. 790. n. 7. Cro. Car. 272. 18 Eliz. cap.

But Serjeant Levinz argued, That because the Original was certified three Terms since, and no Continuances between it and the Declaration, therefore that could not be the Original to this Action, and that the Court might for that Reason intend a Verdict without an Original, which is helped by the Statute of Jeofails. But he argued, that where the Original varies from the Declaration, and is not warranted by it, 'tis not aided by this Statute: Judgment was affirmed.

DE
Term. Sancti Mich.

Anno 3 Jac. II. in Banco Regis, 1687.

Wright, *Chief Justice.*
Holloway, Powel, Allibon, } *Justices.*

Sawyer, *Attorney General.*
Powis, *Solicitor General.*

Mathews *versus* Cary. Pasch. 3 Jac. *Rot.* 320.

TRespass for entring of his House, and taking of a Silver Tankard.

The Defendant made Conusance as Bayliff of the Dean and Chapter of Westminster, for that the Place where, &c. was within the Jurisdiction of the Leet of the said Dean, who was seised of a Court Leet, which was held there such a Day, &c. and that the Jury did present the Plaintiff (being a Tallow-Chandler) for melting of stinking Tallow, to the Annoyance of the Neighbours, for which he was amerced, and that the Amerciament was offered to 5 l. which not being paid, the Defendant by a Mandate of the said Dean and Chapter, distreined the Tankard, &c.

1 Salk. 108. Where the Defendant justifies by way of Excuse he must set forth the Warrant, and that he took the Goods *Virtute Warranti.* Shower 61.

The Plaintiff replied de injuria sua propria, absq; hoc, that he did melt Tallow, to the Annoyance of the Neighbours, &c. And upon a Demurrer to this Replication, it was argued this Term by Mr. Pollexfen for the Defendant, and Tremaine for the Plaintiff: And afterwards in Michaelmas Term, 1 Will. & Mariæ, by Mr. Bonithan and Serjeant Thompson for the Defendant.

It was said for the Defendant, that a Presentment in a Court Leet which concerns the Person, (as in this Case) and not the

5 H. 7. 3. Fitz. Bar. 271. Bro. Abr. tit. Travers sansceo. Pl. 183. Presentment in Court, Pl. 15. Dyer 13. b. 11 Co. 42. 1 Rol. Rep. 79.

Freehold was not traversable, and that the Amerciament was a Duty vested in the Lord, for which he may distrain, or bring an Action of Debt. Co. Entr. 572.

But on the other Side it was said, That if such a Presentment is not traversable, the Party hath no Remedy: 'Tis contrary to the Opinion of Fitzherbert in Dyer, who affirmed the Law to be, that it was traversable, and that if upon such a Presentment a Fine should be imposed erroneously, it may be avoided by Plea; and this agrees with the second Resolution in Godfrey's Case.

2. It was objected to the Plea, that it was not good, for it sets forth that the Plaintiff was amerced, and that it was affered at the Court, and so he hath confounded the Office of the Jurors and Affeerers together, which he ought not to do, for he should be amerced to a certain Sum, and not in general, which Sum may be mitigated or affered by others.

Hob. 129. Rol. Abr. 542. 8 Co. 38. 1 Leon. 142.

If it had been a Fine, it need not be affered, because that is imposed by the Court; but this is an Amerciament, which is the Act of the Jury, and therefore it must be affered.

3. The chief Exception was to the Matter of the Warrant, viz. the Defendant sets forth, that he seised by Vertue of a Precept from the Dean and Chapter; whereas he ought to shew it was directed to him from the Steward of the Court, and then to set forth the Warrant, without which he cannot justify to distrain for an Amerciament.

And of this Opinion was the whole Court, and therefore Judgment was given for the Plaintiff in Michaelmas Term, primo Will. & Mariæ.

If it had been in Replevin, where the Defendant made Cognizance in the Right of the Lord, it might be well enough as here pleaded; but where 'tis to justify by way of Excuse, there you must aver the Fact, and alledge it to be done, and set forth the Warrant it self, and the taking Virtute Warranti; for a Bayliff of a Liberty cannot distrain for an Amerciament by Vertue of his Office, but he must have a Warrant from the Steward or Lord of the Leet for so doing.

3 Cro. 698, 748. 1 Leon. 242.

Rast. Ent. 606. Co. Ent. 665.

The other Exception, that the Amerciament ought to be to a Sum, the Precedents are otherwise; for an Amerciament per duodecim probos & legales homines adtunc & ibidem jurat' ad 40 s. afferat' is well enough, but the Warrant is always set forth.

5

Do-

Dominus Rex *versus* Darby.

THE Defendant was indicted for speaking of scandalous Words of Sir J. K. a Justice of the Peace: Viz. Sir *J. K.* is a buffle-headed Fellow, and doth not understand Law: He is not fit to talk Law with me: I have baffled him; and he hath not done my Client Justice. Indictment for scandalous Words.

Mr. Pollexfen for the Defendant said, That an Indictment would not lie for these Words, because not spoken to the Party in the Execution of his Office, but behind his Back: It will not lie for irreverent Words, but for Libels and Writings, because such are publick, but Words are private Offences.

But the Court being of Opinion, That an Indictment would lie where an Action would not, because it respects the publick Peace; and that an Action would not lie in this Case, unless the Party had a particular Loss; and therefore it hath been held not to be actionable to call a Justice of Peace Fool, Ass, Coxcomb. Syd. 65. 2 Cro. 58.

He then took Exceptions to the Form of the Indictment.

1. There is no Place of Abode laid where the Defendant did inhabit, which is expressly required by the Statute of H. 5. Viz: That in Indictments there shall be Addition of the Estate, Degree, *&c.* and of the Towns, Hamlets, Places and Counties, where the Defendants dwell. And by the Statute of H. 6. which gives the Judges Power to amend Records in Affirmations of Judgments, such Defects which are named in the Statute of H. 5. are excepted; and therefore where a Writ of Error was brought to reverse an Outlawry upon the Statute of 5 Eliz. for Perjury, the Defendant was indicted by the Name of *Nicholas Leech* de Parochia de *Aldgate*, and did not shew in what County Aldgate was; and for this Cause it was reversed. 1 H. 5. c. 5. 8 Hen. 6. cap. 12. 2 Cro. 167.

2. The Caption is coram Justiciariis ad Pacem dicti Domini Regis conservand', and the Word [nunc] left out. It was the Opinion of Justice Twisden, that it ought to be nunc conservand', for otherwise it may be the Peace of King Stephen. Sid. 422.

The Counsel on the other Side said, That it was a new Doctrine that the King shall not have the same Remedy by an Indictment which the Subject may have by an Action: What is the Meaning of the Words of all Commissions, de Propalationibus Verborum?

As to the first Exception, they said, That the Indictment was certain enough, for the Defendant is said to be de Almondbury, in the West-Riding of Yorkshire.

To the second Exception they said, That ad Pacem conservand', without nunc, is well enough, for it cannot be intended upon this Indictment, that they were Justices to preserve the Peace in any other King's Reign; and what was quoted out of Siderfin is but the Opinion of one single Judge.

This is a Scandal upon the Government, and 'tis as much as to say, that the King hath appointed an ignorant Man to be a Justice of Peace, for which an Indictment will lie.

And of that Opinion was the whole Court, and gave Judgment accordingly.

Ball *versus* Cock.

Error to reverse a Fine, where the Cognizor died after the Caption, and before it passed the King's Silver. 2 *Vent.* 47.

A Writ of Covenant did bear Teste the first Day of Trinity Term, returnable Tres Trinitatis, and it was taken by Dedimus 30 Julii.

A Writ of Error was brought to reverse this Fine, and the Error assigned was, That the Cognizor died after the Caption, and before the Enrolment at the King's Silver-Office.

It was argued by the Counsel for the Plaintiff in the Writ of Error, that a Fine Sur Cognizance de Droit, &c. is said to be levied when the Writ of Covenant is returned, and the Concord and King's Silver (which is an ancient Revenue of the Crown pro Licentia concordandi) duly entred; for though the Cognizor dieth afterwards, the Fine is good, and the Land passeth; but if the King's Silver be not entred, the Fine may be reversed by Writ of Error, for it is an Action and Judgment, and the Death of either Party abates it.

Dier 220. b. 5 Co. 37. Cro. El. 469.

If it should be objected, That this cannot be assigned for Error, because 'tis against the Record, which is, Placita Terræ irrotulat' de Termino Sanctæ Trinitatis, Anno primo Jacobi, &c.

'Tis true, an Error cannot be assigned against the very Essence of a Record, but in the Matter of Time it may, and so 'tis in this Case.

3 Inst. 230. 4 Co. *Hind's* Case. 10 H. 7. 24.

'Tis like Syer's Case, 32 Eliz. who was indicted for a Burglary, supposed to be done primo Augusti, and upon the Evidence it appeared to be done primo Septembris; and tho' he was acquitted of the Indictment for that Reason, viz. because the Judgment

relates to the Day of the Indiament, yet it was resolved by all the Judges of England, that the very Day needs not be set down in the Indiament; for be it before or after the Offence, the Jury ought to find according to the Truth of the Case upon the Evidence, for they are sworn ad Veritatem dicendam, &c.

This must be assigned for Error, for if the contrary be said, 'tis against the Record, the Custos Brevium having returned, that the Fine was taken 30 July, which could not be in Trinity Term, for that ended 8 July, otherwise 'tis repugnant to it self.

Econtra. It was argued, That this is not assignable for Error: 'Tis true, if the Party had died before the Entry of the King's Silver, it had been Error, but if afterwards 'tis not so. Thus was the Case of Warnecomb and Carril, which was, Husband and Wife levied a Fine of the Lands of the Wife, and this was by Dedimus in the Lent Vacation, she being then but 19 Years of Age: The King's Silver was entred in Hillary-Term before, and she died in the Easter Week; and upon a Motion made the first Day of Easter Term to stay the Engrossing of the Fine, it was denied by the Court, for they held it to be a good Fine.

Dyer 220. b. 12. Co. 124.

Hob. 330.

Another Reason why this is not assignable for Error, is because 'tis directly against the Record, which is of Trinity Term, and can be of no other Term; and to prove this, he cited Arundel's Case, where a Writ of Error was brought to reverse a Fine taken before Roger Manwood, *Esq*; in his Circuit, he being then one of the Justices of the Common Pleas, and the Dedimus was returned per Rogerum Manwood Militem, for he was knighted, and made Chief Baron the Term following. The Fine passed; and this was afterwards assigned for Error, that he who took the Caption was not a Knight; but it being directly against the Record, they would not intend him to be the same Person to whom the Writ was directed. Adjornatur. Afterwards the Fine was affirmed.

2 Cro. 11. Yelv. 33.

Lock *versus* Norborne.

Upon a Trial at Bar in Ejectment for Lands in Wiltshire, the Case was thus, viz. Mary Philpot in the Year of 1678. made a Settlement by Lease and Release to her self for Life, then to Trustees to support contingent Remainders, then to her first, second, and third Son in Tail Male, &c. then to Thomas Arundel in Tail Male, with divers Remainders over.

Verdict shall only be given in Evidence amongst Privies.

It was objected at the Trial, that she had no Power to make such Settlement, because in the Year 1676. her Husband had settled

led the Lands in Question upon her for Life, and upon the Issue of his Body, &c. and for want of such Issue, then upon George Philpot in Tail Male, with several Remainders over, the Remainder to Mary Philpot in Fee; Proviso, that upon the Tender of a Guinea to George Philpot by the said Mary, the Limitations as to him should be void.

George Philpot having afterwards made a Lease of this Land, to try the Title, the Trustees brought an Ejectment; but because the Tender of the Guinea could not be proved, there was a Verdict for the Defendant.

And now Mr. Philpot would have given that Verdict in Evidence at this Trial, but was not suffered by the Court, for if one Man hath a Title to several Lands, and if he should bring Ejectments against several Defendants, and recover against one, he shall not give that Verdict in Evidence against the rest, because the Party against whom that Verdict was had may be relieved against it, if 'tis not good, but the rest cannot, tho' they claim under the same Title, and all make the same Defence.

So if two Tenants will defend a Title in Ejectment, and a Verdict should be had against one of them, it shall not be read against the other, unless by Rule of Court.

But if an Ancestor hath a Verdict, the Heir may give it in Evidence, because he is privy to it; for he who produceth a Verdict, must be either Party or Privy to it, and it shall never be received against different Persons, if it doth not appear that they are united in Interest.

Therefore a Verdict against A. shall never be read against B. for it may happen that one did not make a good Defence, which the other may do.

The Tender of the Guinea was now proved.

DE
Term. Sancti Hill.

Anno 3 Jac. II. in Banco Regis, 1687.

Wright, *Chief Justice.*
Holloway, Powel, Allibon, } *Justices.*

Powis, *Attorney General.*
Wm. Williams, *Solicitor General.*

THIS Vacation Sir *Robert Sawyer* had his *Quietus*, and Sir *Thomas Powis* was made Attorney General, and Sir *William Williams*, of *Grey's-Inn*, was made Solicitor General.

Rex *versus* Lenthal.

AN Inquisition was taken in the second Year of this King under the Great Seal of England, by which it was found, that the Office of Marshal of the King's Bench did concern the Administration of Justice, and that Mr. Lenthal was seised thereof in Fee, and that upon his Marriage he had settled the said Office upon Sir Edward Norris and Mr. Coghill, and their Heirs in Trust, that they should permit him to execute the same during his Life, &c.

That the said Trustees had neglected to give their Attendance, or to execute the said Office themselves; that this Conveyance was made by Mr. Lenthal without the Notice of this Court; that he received the Profits, and afterwards granted the said Office to Cooling for Life.

That

That Cross and his Wife had obtained a Judgment in this Court against Bromley, and had sued forth Execution for the Debt and Damages, for which he was committed to the Custody of the said Cooling, and being so in Execution, did go at large.

They find that Cooling had not sufficient to answer Cross and his Wife for the said Debt, &c. whereupon they impleaded Mr. Lenthal in the Common Pleas for 121 l. 2 s. 4 d. to answer as superior: That at the Trial, Mr. Lenthal gave this secret Deed of Settlement in Evidence; whereupon the Plaintiffs in that Action were nonsuited, ad dampnum, &c.

They find that Cooling went out of the said Office, and the Trustees neglecting the Execution thereof, Mr. Lenthal granted the same to Glover for Life: That during the Time that he executed this Office, one Wordal was convicted of Forgery, and committed to his Custody, and that he permitted him voluntarily to escape, by which the said Office was forfeited to the King.

The King had granted the Office to the Lord Hunsdon.

Sir Edward Norris and Mr. Coghill came in and plead, That Mr. Lenthal was seised in Fee, and that he made a Settlement of the Office upon his Marriage with Mrs. Lucy Dunch, (with whom he had 5000 l. Portion) viz. upon them and their Heirs in Trust, prout in the Inquisition, and that he did execute the Office by their Permission.

Mr. Lenthal pleads, and admits the Grant to Sir Edward Norris and the other Trustee, bearing Date such a Day, &c. but saith, that the next Day afterwards, viz. the 10th Day of August, a Trust of the said Office was declared by another Deed, viz. to himself for Life, with Remainders over, and that by Vertue thereof, and the Consent of the Trustees, he took upon him the Execution of the said Office, and was thereof possessed either by himself or his Deputy, until the Time of the Inquisition taken. Then he traversed that the Escapes were voluntary, (but did not answer the concealing of the Grant) and concludes, viz. per quod petit, that the King's Hands may be amoved, &c.

The Attorney General demurred to the Plea of the Trustees: He likewise demurred to the Plea of Mr. Lenthal, and took Issue that the Escapes were voluntary.

It was argued this Term, and Trinity following, by Counsel on both Sides; And as to the Matter of Law, they made these Points:

1. That this Office cannot be granted in Trust.

2. The Escapes found in the Inquisition, and not answered by the Trustees, are sufficient Causes of Forfeiture of this Office.

3. Another Point was raised, whether the Assignment of this Office to Trustees, (admitting it could be so granted) and their Declaration of the Trust, did create an Estate at Will in Mr. Lenthal?

If it was a Tenancy at Will.

1. Then whether Mr. Lenthal had done any Thing to determine his Will?

2. Whether he can by Law make a Deputy?

3. Whether the Assigning of this Trust without giving Notice thereof to this Court be a Forfeiture:

2. This Office cannot be granted in Trust, because 'tis a personal Inheritance, and will not pass by such Conveyances as are used to convey Lands: So is my Lord of Oxford's Case, in which it was held, that a Covenant to stand seised of an Office is void; neither can Mr. Lenthal take upon him the Execution of this Office by the Consent of the Trustees, for that cannot be without Deed. Jones 128.

If the Law should be otherwise, this Inconvenience would follow, viz. Mr. Lenthal might grant the Office to another, without Leave of the Court, and the Grantee might suffer voluntary Escapes, having no valuable Interest to answer the Parties injured, who must then sue Mr. Lenthal, and he hath no Estate in him, for he hath conveyed the Inheritance to the Trustees, and if they should be likewise sued, no Recovery could be against them, because they are only nominal?

'Tis almost like the Grant of an Office of Chief Prothonotary of the Court of Common Pleas to two Persons for Life, which cannot be good, because the Rolls of the Court cannot be in the keeping of two Persons at one Time. 18 Ed. 4. f. 7.

It hath been adjudged, That this very Office cannot be granted for Years, because 'tis an Office of Trust and daily Attendance: And such a Termor for Years may die intestate, and then it would be in Suspence 'till Administration is committed, which is the Act of another Court. Cro Car. 587. Jones 437.

2. Point; That the Escapes found in the Inquisition, and the Non-attendance of the Trustees, are sufficient Cause of Forfeiture.

'Tis true, at the Common Law Debt upon an Escape will not lie against the Gaoler, that Action was afterwards given by the Statute of W. 2. for before that Act, the only Remedy against

the Gaoler was to bring an Action on the Case against him, founded upon a Wrong done: But now Debt will lie; and if the Party is not sufficient at the Time of the Escape, respondeat superior.

Dyer 237. 2 Inst. 382.

The Marshal who executes this Office, be it by Right or Wrong, is answerable to the King and his People for Escapes: If they are voluntary, 'tis a Forfeiture of his Office; nay, if a Deputy suffer such Escapes, 'tis a Forfeiture by the Principal, unless such Deputation be made for Life, and then the Grantee for Life only forfeits the Office.

As to the Non-attendance of the Trustees, if Mr. Lenthal be Tenant at Will, and hath granted this Office to another for Life, this is a Determination of the Tenancy at Will, and a Forfeiture as to him.

39 H. 6. 32.

Now this Grantee for Life cannot be said to be a Deputy, for such a Grantee himself cannot make a Deputy, and therefore a fortiori a Tenant at Will cannot do it.

But admitting he should be Deputy, yet a Forfeiture by him is a Forfeiture by his Superior; and therefore Mr. Lenthal's Tenancy at Will being gone, the Trustees ought to attend, and their Non-attendance ought to be a Forfeiture.

The Non-attendance of an Officer, who was only a Searcher in a Port-Town, was adjudged a Forfeiture; much greater is the Fault of that Officer who hath the Administration of Justice, if he do not give his Attendance.

Cro. Car. 491.

Besides, if they do not attend, by Consequence they cannot act in the Office; and Non-feazance is as sufficient a Cause of Forfeiture as any other Misbehaviour whatsoever.

39 H. 6. 34. a. 9 Co. 46. Dyer 198. Sid. 81.

But if the Trustees had given Attendance, they are Persons inexperient, and therefore incapable to execute this Office, for which they may be lawfully refused by this Court.

Dyer 150, 151.

Mr. Pollexfen chiefly insisted upon the Point of Pleading, that the Matter found by the Inquisition was not answered by the Plea.

First, he excepted, that the Defendant had not by his Plea entitled himself to any Estate in this Office, and therefore he could not traverse the Title of the King, without making a Title to himself; for why should he desire that the King's Hands may be amoved, and he restored to his Office, if he hath not shewn a Title to it?

1 Leon. 202. 2 Inst. 695. Stamf. 62, 64. 2 Leon. 123.

His pleading of this Deed of Trust, by which he is permitted to receive the Profits, &c. during Life, cannot create such an Estate in him, as will be executed by the Statute of Uses; therefore

he can have no Estate for Life; for if a Man is seised in Fee of an Estate, and makes a Declaration thereof in Trust for J. S. this is no Colour to make an Estate for Life in J. S.

The Defendant hath therefore no more than a Trust in this Office which is nothing in the Eye of the Law, and for which there is no Remedy but by Subpœna in Chancery, so that being only a Cestui que Trust, he hath neither jus in re nor ad rem.

He cannot be Tenant at Will, for he is not made so by the Deed of Trust.

There is a great deal of Difference between Evidence and Pleading; for this very Deed may be an Evidence of an Estate at Will, but 'tis not so in Pleading; therefore he ought to have pleaded that quorum prætextu he was possessed of the Office, and took the Profits, &c. but he having otherwise pleaded, and not entitled himself to any Estate therein, he ought to be laid aside as an incompetent Person.

The Plea of Sir Edward Norris is likewise insufficient; for it sets forth the Deed of Settlement, &c. quorum prætextu (the Defendant) juxta fiduciam in eo positam, was possessed of the Office ad eorum voluntatem.

Now an Office is a Thing which lies in Grant, and cannot be transferred from one to another without Deed, and here is no Deed pleaded; and as no Estate at Will can be granted of an Office without Deed, so likewise there cannot be a Deputation of such Office without it. 1 Leon. 219.

If then there can be no Tenant at Will of an Office, but by Deed, and no such Deed is pleaded, then Mr. Lenthal had no Power to make a Deputation to Cooling; but neither Tenant at Will nor Tenant for Life can make a Deputy, if in the very Grant made to them there is not an express Clause for the Execution of the Office per se vel sufficientem Deputatum suum.

The Substance of all which is, viz. First, here is no Tenant at Will: But admitting him to be so, he hath no Authority to make a Deputy, and if he should appoint a Deputy, he executes the Office without Authority, and may suffer Escapes.

Lastly, by pleading of this Deed, he hath alledged that the Estate was in the Trustees, and that they permitted him to enjoy the Office quorum prætextu, he did execute it, and receive the Profits: Now this is too general, and an Issue cannot be taken upon such a Plea. He should have pleaded positively, that it was dismised to him at Will, and that he made a Deputy; and then also the Authority in Rolls is against him, where 'tis held, that the Marshal of the King's Bench may grant the Office for Life, but cannot give Power to such Grantee to make a Deputy. 2 Rol. Ab. 154.

Now if a Tenant for Life cannot make a Deputy, certainly a Tenant at Will hath no Power so to do.

But suppose a Deputy might be made, his Neglect in the Execution of the Office shall make a Forfeiture of the Estate of the Grantee for Life.

Rol. Abr. 155.

It cannot be reasonably objected in this Case, that 'tis any Hardship for Mr. Lenthal to lose this Office for any Defect in Pleading; for admitting the Plea to be good, yet there is a Cause of Forfeiture, because the Marshal of the King's Bench being a ministerial Officer, is required by Law to be a Person of such Ability as to answer all Escapes, that so Men may have the Benefit of their Suits, for otherwise he having nothing to answer, they may lose their Debts. Now here by a secret Grant Mr. Lenthal hath conveyed the Estate out of himself, and yet still continues Officer in Possession, by which Means the People are deprived of the Remedy which the Law provides for them, and this is a sufficient Cause of Forfeiture.

Then as to the Trustees, they have not said any Thing of the Escapes: 'Tis true, Mr. Lenthal hath traversed those which are alledged to be voluntary, but that signifies nothing to them, because they cannot take any Benefit by the Plea of another, for every one must stand and fall by his own Plea.

If therefore their Non-attendance be a Forfeiture, the Intruders shall not help them, because they come in without any Colour of Right.

Econtra.

But the Counsel on the other Side argued this last Point first, which was thus:

Viz. A Man seised of the Inheritance of the Office of Marshall of this Court, conveys it in Trust, the Cestui que Trust enjoys it, and receives the Profits: The Question now is, Whether the Non-attendance of the Trustees, being never required by the Court, be a Forfeiture of this Office?

And as incident to this Question, it was debated, Whether Mr. Lenthal was Tenant at Will?

'Tis no Forfeiture, for they are not bound to attend.

It cannot be denied but that this Office doth concern the Administration of Justice, but 'tis to be considered what Estate Mr. Lenthal hath in it.

He had once an Estate in Fee, but if it had been for Life or in Tail, it may be settled as this is done, but not for Years, because it may then come to an Administrator.

If Mr. Lenthal be the Cestui que use, then he hath an Estate, of which the Law takes Notice, for he may be a Juror at the Common Law. Co. Lit. 404. Godb. 64.

'Tis plain that he hath an Estate created by Operation of the Law, for he is Tenant at Will, and for that Reason the Attendance of the Trustees is not necessary; but if the Estate had been directly granted to them, then the Office had been forfeited for Non-attendance.

It cannot be denied, but that this Office may be granted at Will, for so is Sir George Reynell's Case: Now if it may be granted at Will by the Possessor, it may likewise be so granted by him who hath an Estate created by the Law, for fortior est dispositio Legis quam Hominis; and in this Case no Inconveniency would happen; for if the Will be determined, then the Grantor is the Officer. 9 Co. 98.

When Mr. Lenthal had assigned this Office to the Trustees, and they by a subsequent Deed had declared it to be in Trust for him, and that he should take the Profits during Life, he hath thereby a legal Estate at Will, for a Cestui que Trust by Deed is a Tenant at Will.

It hath been objected, that a Tenancy at Will of an Office is void; and to prove this, a Case in Jones's Rep. was cited; but the Reason of that Case is guided by the particular Nature of that Office, which could not be alienated without the Consent of the King. Jones 128.

If this Office is not alienable in its Nature, then Mr. Lenthal hath still the Fee-Simple, but that will not be admitted.

But this is not only a bare Estate at Will, but a Trust for Life, and such a Trust which hath a legal Construction; for if a Feoffment be made in Trust, that he should convey the Estate to another, which the Feoffee afterwards refused to do, the Cestui que Trust may bring an Action against him; so if he should be returned on a Jury, 'tis no Exception to say, that he hath not liberum Tenementum, and therefore he is not an incompetent Person to have the Charge of Prisons, if he may be impannelled on a Jury to try Men for their Lives. Godbolt. 64.

1. Then as to the first Question upon the last Point, Whether Mr. Lenthal had done any thing to determine his Tenancy at Will?

The Grant of this Office by him to Cooling will not amount to a Determination of his Will, because 'tis a void Grant.

'Tis true, this is denied by my Lord Coke in his Comment upon Littleton, where he saith, If Tenant at Will grant over his Estate, and the Grantee entereth, he is a Disseisor; for tho' the Grant be void, yet it amounts to a Determination of his Will.

Sect. 71.

What Ground he had for such an Opinion is not known: The Year-Books quoted in the Margin will not warrant it, for they are in no sort parallel.

That Case in the 27th of H. 6. is no more than Tenant at Will cannot grant over his Estate, because he hath no certain or fixed Interest in it; and much to the same Purpose is the Book of 22 E. 4. there cited.

27 H. 6. 3.

22 E 4. 5.

But suppose this to be a void Grant, and to amount to a Determination of the Tenancy at Will, yet if the Trustees had no Notice of it, that shall not determine their Estates.

A Devise to an Executor, that he shall have the Oversight of the Testator's Estate till his Daughter should come of Age; the Executor made a Lease at Will, rendring Rent; before the Year expired the Daughter came of Age, to whom the Tenant at Will attorned: The Executor brought an Action of Debt against him for the Rent Arrear; it was held that this Attornment to the Daughter was no Determination of his Will, for it would be of ill Consequence to the Lessor if such a Tenant should determine his Will a Day or two before the End of the Year, who had enjoyed all the Profits of the Land.

Yelv. 73.

2. Whether he may make a Deputy?

'Tis true, a judicial Officer cannot make a Deputy, unless he hath a Clause in his Patent to enable him, because his Judgment is relied on in Matters relating to his Office, which might be the Reason of the making of the Grant to him: Neither can a Ministerial Officer depute one in his Stead, if the Office be to be performed by him in Person; but when nothing is required but a Superintendency in the Office, he may make a Deputy.

This appears more evident in the common Case of a Sheriff, who is an Officer made by the King's Letters Patents, and 'tis not said that he shall execute his Office per se vel sufficientem Deputatum suum, yet he may make a Deputy, which is the Under-Sheriff, against whom Actions may be brought by the Parties grieved.

Roll. Rep. 274. 1 Leon. 146. 3 Leon. 99. Cro. Eliz. 173.

And such a Deputy may be made without a Deed, for he claims no Interest in the Office but as a Servant, and therefore where an Action on the Case was brought against the Deputy of a Sheriff for an Escape, who pleaded that the Sheriff made him

Cro. Eliz. 67. 10 Co. 192. a.

his Deputy to take Bail of Prisoners, and that he took Bond, &c. and shewed no Deed of Deputation, yet the Plea was held good upon a Demurrer.

3. Whether the Assignment of this Trust without giving Notice to this Court be a Forfeiture?

Tenant in Fee-Simple may do it, for he hath a Power so to do by reason of the Dignity of his Estate.

He who grants this Office without acquainting of this Court therewith, must remain an Officer still, and is subject to all Duties and Attendance 'till the Court hath Notice of the Grant.

But there is no Occasion of acquainting the Court in this Case, for upon the Grant made to the Trustees by Mr. Lenthal, he is still the Officer, tho' he hath not the same Estate.

It was objected, That Sir Edward Norris, &c. hath not said any Thing to the Escapes; but that doth neither concern Mr. Lenthal or the Trustees; for if he be Tenant at Will, they are not answerable for his Neglect, for 'tis a personal Tort in him. 2 Cro. 17.

If Tenant for Years makes a Feoffment, 'tis a Forfeiture of his Estate; but if he makes a Lease and Release, tho' 'tis of the same Operation, yet it will not amount to a Forfeiture.

Now if any Escapes should happen, there is a plain Remedy for the Parties aggrieved; for if Tenant at Will remaineth in Possession of an Office, and suffers voluntary Escapes, his Office shall be seised into the Hands of this Court, then he in the Reversion must make his Claim, and when that is done, he is an Officer nolens volens; and this was the Duke of Norfolk's Case.

Now tho' these Escapes are found by the Inquisition to be voluntary, yet they are answered in the Plea, for that Part of the Inquisition is traversed, and that they were vi & armis, and this being not yet tried, the Court cannot give Judgment thereon.

If there be many negligent Escapes, these shall not amount to a Forfeiture; as if a Rebel should break Prison, or the Prison should be on Fire, those are negligent, but the Officer should not be so much as fined.

But if it should be a Forfeiture, the Neglect must be particularly alledged, for the Word Neglect is too general. Adjornatur. 5 Ed. 4. 27. Dyer 66.

Anonymus.

Anonymus.

An Indictment quashed for misreciting of a Statute.

A Man was indicted for using of a Trade, not being an Apprentice, against the Statute of 5 Eliz. cap. 4. And now a Motion was made to quash it, because the Act gives Power to two Justices of the Peace, Quorum unus, to hear and determine Offences committed against any Branch thereof, either by Indictment or Information before them in their Sessions; and 'tis not said, that one of the Justices before whom this Indictment was taken, was of the Quorum.

This Objection was answered by the Court, that the Sessions cannot be kept without one Justice of the Quorum.

The Act saith, That it shall not be lawful to any Person, other than such who did then lawfully use any Art, Mystery, or manual Occupation, to set up any Trade used within this Realm, except he had been an Apprentice for seven Years, *&c.* and 'tis not averred that the Trade mentioned in the Indictment was a Trade used before the making of the Act.

This seemed to be a material Objection, but the Indictment was quashed for misreciting of the Statute.

Price *versus* Davies.

ERror to reverse a Fine taken by Commission, and the Error assigned was, that the Cognizor died before the Return of the Writ of Covenant.

But this Point was not argued, because Justice Allybon was of Opinion, that the Plaintiff in the Errors had not well entitled himself by the Writ; for it was brought by him ut Consanguineus & Hæres, scilicet Filius, &c. but doth not shew how he was of Kindred.

To this Objection, Sir William Williams, the Solicitor General, replied, That if a Descent be from twenty Ancestors, 'tis not necessary to say, that he was Son and Heir of such a one, who was Son and Heir of such a one, and so to the twentieth Ancestor.

Agreeable to this are all the Precedents. In Formedons, 'tis only said, that Jus descendit. Adjornatur.

The Countess of Plymouth *versus* Throgmorton.

ERror to reverse a Judgment in the Common Pleas in an Action of Debt upon a Mutuatus brought by Mr. Throgmorton as Executor to Sir Edward Biggs, against the Countess as Administratrix of the Earl of Plymouth, wherein the Plaintiff sets forth a Writing, by which the Earl had given Power to Sir Edward to be the Collector and Receiver of his Money and Rents, and that he promised to allow him 100 l. per Annum for his Pains, and in Default of Payment thereof, that Sir Edward should detain the same; which Writing was in these Words following, viz.

1 Salk. 65. Contract, where 'tis entire shall not be separated in an Action of Debt.

I do direct and appoint Sir *Edward Biggs* to take and receive to his own Use 100*l.* of lawful Money of *England* out of the first Money which he shall receive of mine.

The Action was brought for 75 l. being his Salary for three Quarters of a Year, and Judgment by Nil dicit.

It was argued this Term, and in Easter Term, by Counsel on both Sides.

It was agreed on all Sides, that the Earl left sufficient Assets to satisfy all his Bond Creditors, but not enough to pay Debts upon simple Contract.

First, It was said for the Plaintiff in the Errors, that no Action of Debt will lie against an Executor upon a Mutuatus, because the Testator might have waged his Law, but this was not much insisted on.

11 Co. Godfrey's *Case*.

2. That admitting an Action would lie, yet this is an erroneous Judgment, because the Suit was for 75 l. for three Quarters Salary, when by the Writing Sir Edward was to serve the Earl a whole Year, and this being an entire Contract shall not be separated.

Therefore he cannot be well entitled to the Action unless his Testator had served a Year, and he had averred it so in his Declaration.

As where a Covenant was to pay 2 s. for copying every Quire of Paper, and the Breach assigned that he copied 4 Quire and 3 Sheets, for which 8 s. and 3 d. was due to the Plaintiff; 'tis true, he had Judgment, but it was reversed, because it was an entire Covenant, of which no Apportionment could be made pro Rata.

Yelv. 133. 7 Co. 10. Allen. 9.

3. That which was chiefly insisted on was, to make these Words amount to an Obligation, that so it might be satisfied amongst the Bond Creditors.

But those who argued for the Plaintiff in the Errors said, that it cannot be an Obligation, for it was only a bare Letter of Attorney, and an Authority, and no more; for there were no Words to oblige the Earl, or which can make a Warranty, and therefore if the Money was not received, the Party to whom the Note was given could not resort back to him who made it, had they been both living, neither shall the Plaintiff now to his Administratrix.

Like the Common Cases of the assigning of Judgment, if the Assignee doth not receive the Money, he cannot have an Action against the Assignor, who only directs and appoints him so to do.

Ex Parte Def.

But on the other Side, the second Objection was thus answered, viz. That this being only an executory Thing, the Plaintiff may now bring an Action for so long Time as his Testator served, and this may be apportioned secundum Ratam; if the Law should be otherwise, the Case of all Servants would be bad, for they are generally hired for a Year, and not usually serve so long.

Sid. 225.

In an Assumpsit to pay for a Year's Board, and the Plaintiff had declared only for three Quarters of a Year, but yet had Judgment, because (as the Book saith) if there be any Variance in the Agreement, 'tis for the Advantage of the Defendant.

Vaughan 92, 93. Pl. Com. 182. Dyer 21.

The 3d. Objection answered, viz.

When a Man is indebted to another by simple Contract, which is acknowledged by Deed, an Action of Debt will lie against his Executor, for any thing which is under Hand and Seal will amount to an Obligation, especially where the Debt is confessed.

Now there are Words in this Deed to shew what Money was due, and that makes it a Bond.

But the Court was of Opinion, that this was an entire Agreement, and therefore the Action not well brought for three Quarters Salary, and for this Reason the Judgment was reversed, Nisi, &c.

Chapman *versus* Lamphire.

AN Action on the Case was brought for scandalous Words spoken of the Plaintiff, who declared that he was a Carpenter, and a Freeman of the City of London, and that he got great Sums of Money by Buying of Timber and Materials, and by Building of Houses, and that the Defendant having Discourse of him and of his Trade, spoke these Words, viz. He is broken and run away, and will never return again.

Words spoken of a Carpenter, where actionable. Ante 112.

There was a Verdict for the Plaintiff, and a Motion was now made in Arrest of Judgment, for that a Carpenter was not a Trade within the Statute of Bankrupts; and a Day being given to speak to it again.

Mr. Pollexfen argued, That before the Statutes made against Bankrupts, Words spoken reflecting upon a Man in his Trade, were actionable even at the Common Law, because it might be the Occasion of the Loss of his Livelihood; and therefore it was actionable to say of a Scrivener, that he is broken and run away, and dares not shew his Face; and yet a Scrivener was not within the Statutes of Bankruptcy before the Act of 21 Jac. therefore the Action must lie at the Common Law, because Words disparage him in his Trade.

1 Rol. Abr. 59. pl. 6. Hutton 60.

But the Counsel for the Defendant said, That these Words were not actionable, for they do not tend to his Disparagement, he may be broke, and yet as good a Carpenter as before.

T. Jones 156.

The Case of one Hill in 2 Car. in this Court was much stronger than this; the Words spoken of him where, viz. *Hill* is a base broken Rascal, and hath broken twice already, and I will make him break the third Time; the Plaintiff had Judgment, but it was arrested.

Latch 114.

A Carpenter builds upon the Credit of other Men, and so long as the Words do not touch him in the Skill and Knowledge of his Profession, they cannot injure him.

Chief Justice. The Credit which the Defendant hath in the World may be a Means to support his Skill, for he may not have an Opportunity to shew his Workmanship without those Materials for which he is entrusted.

The Judges were divided in Opinion, two against two, and so the Plaintiff had his Judgment, there being no Rule made to stay it, so that he had his Judgment upon his general Rule for Judgment; but if it had been upon a Demurrer or Special Verdict, then it would have been adjourned to the Exchequer Chamber.

Goring *versus* Deering.

Auterfoits convict of Manslaughter no good Plea in an Appeal for Murder.

IN an Appeal for the Murder of Henry Goring, Esq; brought by his Widow,

The Defendant pleaded, That he was indicted for the said Murder at the Sessions-House in the Old-Bailey in Middlesex; that he was found guilty of Manslaughter, and not of Murder, prout patet per Recordum; that he was Clericus, & paratus fuit legere ut Clericus, if the Court would have admitted him, and that he is the same Person, &c.

To this Plea the Appellant demurred.

The Truth of this Case was, That after the Conviction, and before the Sentence, an Appeal was brought, so that the Defendant had not an Opportunity to pray his Book.

It was argued by Mr. Pollexfen for the Appellant, and by Sir George Treby for the Appellee.

3 H. 7. c. 1. If the Statute of 3 H. 7. was not in the Way, this Plea might be a good Bar to the Appeal, because before the making of that Law, Auterfoits convict, &c. had been a good Plea, but now that Statute deprives the Defendant of that Benefit; for 'tis enacted, That if any Man be acquitted of Murder at the King's Suit, or the Principal *attainted*, the Wife or next Heir to him so slain, may take and have their Appeal of the Murder within a Year and a Day after the said Murder done, against the said Persons so acquitted, or attainted, if they be alive, and the Benefit of * Clergy before not had.

* *Nota*, At this Time Clergy was allowed for Murder, but now taken away by the Statute of 23 H. 8. c. 1. Hale's Pl. Cor. 232.

Now though the Party be neither acquitted or attainted, but is only condicted of Manslaughter, yet the Word Attaint in this Statute signifies the same with Convict, and this appears by the penning of the Act in that Clause which mentions the Benefit of Clergy, viz.

That if any Man be attainted of Murder, the Heir shall have an Appeal, if the Benefit of Clergy be not had.

Now an Attainder supposeth a Conviction, for one is the Consequence of the other, and if it should not signify the same Thing in this Place, then that Clause would be in vain, because if it should be taken for the Judgment given upon the Conviction, then 'tis too late for the Party to have any Benefit of his Clergy.

Thus it was held in the second Resolution of Wrot and Wigg's Case, That the Word Attaint in this very Act shall not be intended only of a Person who hath Judgment of Life, but also of one Convict by Confession or Verdict. 'Tis true, 'tis said in that Case, and so likewise in Holecroft's Case, that Auterfoits convict of Manslaughter, upon an Indictment of Murder, is a good Bar to an Appeal at the Common Law, as well as if the Clergy had been allowed; the Reason may be, because in both those Cases the Judgments were by Confession, so that the Court ought to have granted the Clergy; but this is a Conviction by Verdict, which alters the Case.

4 Co. 46. a.

2 Anders. 68.

Econtra. Auterfoits convict is a good Plea at the Common Law in all other Cases (Treason only excepted) at this Day.

It appears by the Statute of H. 7. that the Year and Day which was the Time allowed for the Appeal, and in which Time the King's Indictment could not be tried, was an Usage, but not a Law, therefore that Act provides that the King shall proceed upon the Indictment within the Year and a Day, and not stay for the Appeal of the Party.

If the Party be attainted or acquitted, the Wife or next Heir shall have an Appeal, but not if he be convicted.

But now admitting that the Word Attaint hath the same Signification with the Word Convict, yet this is a good Plea both within the Words and the Equity of the Statute.

This appears upon the Construction of that Law, which must be expounded according to the vulgar Sense and Signification of the Words; and therefore where the Statute saith, That an Appeal lies where the Benefit of Clergy is not had, [is, that it is not had de Jure,] but the Clergy in this Case was de Jure, and the Defendant was ready to read, if he had been admitted thereunto by the Court.

Thus is the Statute of Malbridge about the taking away of Wards, viz. Si Parentes conqueruntur, that is, if they had Cause to complain.

2. This Statute hath been expounded according to Equity, for though it gives an Appeal to the Wife or next Heir of him slain, yet if a Woman be killed, her next of Kin shall bring an Appeal.

There-

Therefore by the same Equity these Words, viz. [The Benefit of Clergy not had,] shall be construed had by the Grant of the Court; for if a Man be indicted without the Addition of Clerk, he cannot demand his Clergy unless the Court ask him; but if he be indicted with that Addition, then he may demand it, because 'tis supposed by the Court that he can read.

Co Ent. 355.

6 E. c. 9.

That this Appeal was not well brought, these Exceptions were taken, grounded upon the Statute of Gloucester, by which seven Things are required in an Appeal of Murder:

That the Appellor declare the Fact, the Year, the Day, the Hour, the Year of the King, the Town where the Fact was done, and with what Weapon the Party was slain.

Now in this Case there is a Defect in two of the Things required by that Statute:

1. That of the Hour, which is laid too general, for 'tis circa Horam octavam, which is not certain enough.

2. They have laid no Will, for 'tis that the Defendant did assault the Husband of the Appellant in Parochia Sancti Martini in Campis; now tho' that Word Parochia has crept into Fines and Recoveries, and likewise into Indictments, it must not be allowed in Appeals.

There may be several Mills in one Parish, and tho' this is ruled good in Indictments, it ought not to be so here, because of the Difference between an Indictment and an Appeal; for in Indictments you need not mention the Hour, but it must be done in Appeals.

Stamf. 80. b. Doct. & Stud. 48.

A Parish is an Ecclesiastical Division, and tho' such may be a Will, 'tis not necessary, Ex Vi termini, that it should be so.

But afterwards, in Trinity Term, 4 Jac. the Chief Justice delivered the Opinion of all the Judges (except Justice Street) who were assembled for that Purpose at Serjeants-Inn, that this was no good Plea, and that the Court ought not to ask the Prisoner what he had to say, and so to let him into the Benefit of his Clergy: Tamen quære, for 'tis otherwise * resolved.

In the Case of Armstrong and Lisle 1 Salk. 60.

The Company of Horners *versus* Barlow.

A By-Law restrained to *London*, and not to extend farther.

DEBT upon a By-Law, wherein the Company set forth, That they were incorporated by Letters Patents of King Charles I. and were thereby empowered to make By-Laws for the better Government of their Corporation, and that the Master, Warden and Assistants of the Company made a Law, viz. That two

Men

Men appointed by them should buy rough Horns for the Company, and bring them to the Hall, there to be distributed every Month by the said Master, *&c.* for the Use of the Company; and that no Member of the Company should buy rough Horn within four and twenty Miles of *London* but of those two Men so appointed, under a Penalty to be imposed by the said Master, Warden, *&c.* That the Defendant did buy a Quantity of rough Horn contrary to the said Law, &c.

There was Judgment in this Case by Default.

And for the Defendant it was argued that this was not a good By-Law.

1. Because it doth restrain Trade, for the Company are to use no Horns but such as those two Men shall buy, and if they should have Occasion for more than those Men should buy, then 'tis plain that Trade is thereby restrained. 11 Co. 54. Hob. 210.

2. The Master, &c. hath reserved a Power which they may use to oppress the Poor, because they may make what Agreements they will amongst themselves, and set unreasonable Prices upon those Commodities, and let the younger Sort of Tradesmen have what Quantity, and at what Rates they please.

To which it was answered by Serjeant Thompson;

First, This By-Law is for the Encouragement of Trade, because the Horns are equally to be distributed when brought to the Hall for the Benefit of the whole Company.

But the material Objection was, that this being a Company incorporated within the City of London, they have not Jurisdiction elsewhere, but are restrained to the City, and by Consequence cannot make a By-Law which shall bind at the Distance of four and twenty Miles; for if they could make a Law so extensive, they might by the same Reason enlarge it all over England, and so make it as binding as an Act of Parliament, and for this Reason it was adjudged no good By-Law.

Sir John Wytham *versus Sir* Richard Dutton.

ASsault and false Imprisonment, 14 Octob. 36 Car. 2. &c. The Defendant, as to the Assault before the 6th Day of November, pleads Not guilty, and as to the False Imprisonment on the said 6th Day of November in the same Year he made a special Justification, viz.

That

That 28 Octob. 32 Car. 2. &c. the King by his Letters Patents did appoint the Defendant to be Captain General and Chief Governor of Barbadoes, and so sets forth the Grant at large, by which he appoints twelve Men to be of the King's Counsel during Pleasure, of which the Plaintiff Wytham was one; that the Defendant had also Power by the Advice of that Counsel to appoint and establish Courts, Judges and Justices, and that the Copies of such Establishments must be sent hither for the King's Assent with Power also to establish a Deputy-Governor; that by Vertue of these Letters Patents the Defendant had appointed Sir John Wytham to be Deputy-Governor of the said Island in his Absence, and that he being so constituted did male & arbitrarie execute the said Office.

That when the Defendant returned to Barbadoes, viz. 6 November, 35 Car. 2. he called a Counsel, before whom the Plaintiff was charged with male Administration in the Absence of the Defendant, viz. That he did not take the usual Oath for observing of Trade and Navigation; that he assumed the Title of Lieutenant Governor, and that Decrees made in Court were altered by him in his Chamber: Upon which it was then ordered, that he should be committed to the Provost Marshal, until discharged by Law, which was done accordingly; in whose Custody he remained from the 6th Day of November to the 20th of December following, which is the same Imprisonment, &c.

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

Mr. Pollexfen argued for the Plaintiff, and Serjeant Thompson for the Defendant.

1. It was said for the Plaintiff, that the Causes of his Commitment (if any) yet, were such which they ought not to meddle withal, because they relate to his Misbehaviour in his Government, for which he is answerable to the King alone.

But supposing they might have some Cause for the committing of him, this ought to be set forth in the Plea that the Plaintiff might answer it; for to say he did not take the Oath of Deputy Governour in what concerned Trade and Navigation, is no Cause of Commitment, because there was no Body to administer that Oath to him, for he was Governor himself.

Then to alledge that he did alter in his Chamber some Decrees made in the Court of Chancery, that can be no Cause of Commitment, for the Governor is Chancellor there.

Besides, the Defendant doth not shew that any Body was injured by such Alterations, neither doth he mention any particular Order, but only in general, so 'tis impossible to give an Answer to it.

2. He doth not alledge that the Plaintiff had made or done any of these Things, but that he was charged to have done it and non constat whether upon Oath or not.

The Governor hath a large Power given by these Letters Patents to make Laws, such as he by Consent of a general Counsel shall enact. Ex Parte Def.

The Fact is set forth in the Plea, the Plaintiff was committed by Vertue of an Order of Counsel, until he was brought to a general Court of Oyer and Terminer, by which Court he was again committed.

That the Court had Power to commit him, is not denied, for the King is not restrained by the Laws of England to govern that Island by any particular Law whatsoever, and therefore not by the Common Law, but by what Law he pleaseth. 2 Salk. 666.

For those Islands were gotten by Conquest, or by some of his Subjects going in Search of some Prize, and planting themselves there. Calvin's Case.

The Plaintiff being then committed by an Order of Counsel 'till he should be discharged by due Course of Law, this Court will presume that his Commitment was legal.

The Court were all of Opinion that the Plea was not good, so Judgment was given for the Plaintiff; but afterwards, 5 Willielmi & Mariæ, this Judgment was reversed by the House of Peers.

Sir Robert Jefferies *versus* Watkins.

THIS was an Action brought for a Duty to be paid for Weighing of Goods at the common Beam of *London*; setting forth, that the Lord Mayor, &c. Time out of Mind, kept a common Beam and Weights, and Servants to attend the weighing of Goods. That the Defendant bought Goods, &c. but did not bring them to the Beam to be weighed, per quod Proficuum amisit. Verdict cures a defective Declaration.

Upon Not guilty pleaded, there was a Verdict for the Plaintiff, and it was moved in Arrest of Judgment, that the Plaintiff had not brought himself within the Prescription, for he

 doth

doth not say that the Defenadnt sold the Goods by Weight, and this is a Fault which is not helped by a Verdict.

This had been certainly naught upon a Demurrer, and being Substance is not aided by this Verdict.

This is Substance, for the Duty appears to be wholly in respect of the Weights which are kept; now Weighing being the Principal, and it being no where alledged that the Goods were weighed elsewhere, or that they were such which are usually sold by Weight, then there is no need of bringing of them to the Beam.

If one prescribes to a Common, and doth not say for Cattle Levant and Couchant, the Prescription is not good.

This being the Consideration of the Duty, it ought to be precisely alledged, as in an Assumpsit, where the Plaintiff declared, that in Consideration that the Defendant owed him 40 l. he promised to pay it ante Inceptionem proximi Itineris to London, and alledged that such a Day incepit Iter suum ad London, but for omitting the Word proxime, Judgment was arrested after Verdict, because the Duty did arise upon the Commencement of his next Journey.

Yelv. 175. 2 Cro. 245.

The true Reason why any thing is helped by Verdict is, for that the Thing shall be presumed to be given in Evidence at the Trial.

Econtra.

Mr. Pollexfen contra. Here is enough set forth in the Plea, to shew that the Goods were not weighed, and it must be given in Evidence at the Trial, that they were sold contrary to the Custom, which is the only Offence to be proved.

The Want of Averment, that the Goods sold by the Defendant were not weighed shall not vitiate this Declaration after a Verdict.

Cro. El. 458. 2 Cro. 44. Siderfin 218 Palmer 360.

To prove this, some Authorities were cited; as where in Trespass the Defendant justified for Common by Prescription for Beasts Levant and Couchant, and that he put in his Beasts utendo Communia: Issue was taken upon the Prescription, and found for the Defendant. Now tho' he did not aver that the Cattle were Levant and Couchant, yet it was held that it was cured by a Verdict.

And of this Opinion were three Judges now; but Justice Allybon differed, for says he, If this Declaration should be good after a Verdict, then a Verdict will cure any Fault in Pleading.

Judgment for the Plaintiff.

Prowse *versus* Wilcox.

AN Action on the Case for scandalous Words. The Plaintiff declared, That he was a Justice of the Peace for the County of Somerset; and there was a Rebellion in the West by the Duke of Monmouth and others; that Search was made for the Defendant, being suspected to be concerned in that Rebellion; and that the Defendant thereupon spoke these Words of the Plaintiff, viz.

Words spoken of a Justice of the Peace were actionable.

John Prowse is a Knave, and a busy Knave, for searching after me and other honest Men of my Sort, and I will make him give me Satisfaction for plundering me.

There was a Verdict for the Plaintiff, and the Judgment being stayed till the Return of the Postea;

Mr. Pollexfen moved, that the Plaintiff might have his Judgment, because the Words are actionable, for they touched him in his Office of Justice of Peace.

1 Roll. Abr. 59. Pl 3.

It was objected, (to stay the Judgment) that the Words were improper, and therefore could not be actionable.

But admitting them so to be, yet if they in any wise reflect upon a Man in a publick Office, they will bear an Action.

Shore contra. The Plaintiff doth not lay any Colloquium of him as a Justice of the Peace, or that the Words were spoken of him relating to his Office, or the Execution thereof, and therefore an Action will not lie, though an * Information might have been proper against him.

*Vid. antea, Rex *versus* Darby.

If a Man should call another Lewd Fellow, and that he set upon him in the High way, and took his Purse from him, an Action will not lie, because he doth not directly charge him with Felony or Robbery.

2 Cro. 315.

The Court were divided in Opinion, two against two, so the Plaintiff had his Judgment.

Boyle *versus* Boyle.

Prohibition granted.

A Libel was in the Spiritual Court against a Woman causa jactitationis Maritagii.

Godb. Rep. Can. 507. Hale 121. 1 Jac. cap. 11 Sid. 171.

The Woman suggests, that this Person was indicted at the Sessions in the Old-Bailey, for marrying her, (he then having a Wife living) contra Formam Statuti; that he was thereupon convicted, and had Judgment to be burned in the Hand, so that being tried by a Jury and a Court which had a Jurisdiction of the Cause, and the Marriage found, a Prohibition was prayed.

Serjeant Levintz moved for a Consultation, because no Court but the Ecclesiastical Court can examine a Marriage; for in Dower, the Writ is always directed to the Bishop to certify the Lawfulness of the Marriage; and if this Woman should bury this Husband, and bring a Writ of Dower, and the Heir plead Ne unques accouple, &c. this Verdict and Conviction shall not be given in Evidence to prove the Illegality of the Marriage, but the Writ must go to the Bishop.

This is proved by the Case of Emerton and Hide in this Court. The Man was married in Fact, and his Wife being detained from him, (she being in the Custody of Sir Robert Viner) brought an Habeas Corpus: She came into the Court; but my Lord Hale would not deliver the Body, but directed an Ejectment upon the Demise of John Emerton and Bridget his Wife, that the Marriage might come in question. It was found a Marriage; and afterwards at an Hearing before the Delegates, this Verdict was not allowed to be given in Evidence, because in this Court one Jury may find a Marriage, and another otherwise; so that it cannot be tried whether they are legally married by a Temporal Court. 'Tis true, this Court may controul the Ecclesiastical Courts, but it must be eodem genere.

Econtra.

Econtra. It was said, That if a Prohibition should not go, then the Authority of those two Courts would interfere, which might be a Thing of ill Consequence: If the Lawfulness of this Marriage had been first tried in the Court Christian, the other Court at the Old-Bailey would have given Credit to their Sentence.

2 Cro. 535.

But that Court hath been prohibited in a Case of the like Nature, for a Suit was there commenced for saying, That he had a Bastard.

The Defendant alledged, That the Plaintiff was adjudged the reputed Father of a Bastard by two Justices of the Peace, according to the Statute, and so justified the speaking of the Words; and this being refused there, a Prohibition was granted, and so it was in this Case by the Opinion of Three Judges.

Dr. Hedges, a Civilian, being present in the Court, said, That Marriage or no Marriage never came in question in their Court upon a Libel for Jactitation, unless the Party replies a lawful Marriage, and that the Spiritual Court ought not to be silenced by a Proof of a Marriage de facto in a Temporal Court; for all Marriages ought to be de jure, of which their Courts had the proper Jurisdiction.

Sir John Newton *versus* Francis Creswick.

IN an Action on the Case, wherein the Plaintiff declared, That the Defendant exhibited a Petition against him, and Sir R. H. before the King in Counsel, by Reason whereof he was compelled to appear at his great Expence, and that he was afterwards discharged of the Matter alledged against him, which was the Erecting of Cottages in Kingswood-Chase in the County of Gloucester.

Plea, where it amounts to the general Issue.

This Action was first laid in Gloucestershire, and the Defendant moved, that it might be laid in Middlesex, where the Petition was exhibited.

But it was insisted for the Plaintiff, that where a Cause of Action ariseth in two Places, he hath his Election to lay it in either.

The Court held, That the Exhibiting of the Petition was the Ground of the Action; and tho' it contained Matter done in another Place, yet it shall be tried in the Country where the Petition was delivered; for suppose the Petition had contained Matter done beyond Sea, &c.

Now in this Case the Action being brought in Middlesex, the Defendant pleaded, That the Chase was injured by the Erecting the said Cottages, by the Digging of Pits, and by the Making of a Warren by Sir John Newton, and that the other Person, Sir R. H. being then a Justice of the Peace for the County of Gloucester, upon Complaint to him made, did not impose Penalties upon the Offenders, but did abet the said Plaintiff, by reason whereof the Deer were decreased from 1000 Head to 400.

To this Plea the Plaintiff demurred.

Mr.

Mr. Pollexfen argued against the Plea, first that it charged Sir R. H. with no particular Crime, but enlargeth the Matter upon the Plaintiff, and amounts to no more than the general Issue; for the Question is, Whether the Defendant hath falsely prosecuted the Plaintiff before the King in Counsel, which is only Matter of Fact, and which is charged upon the Defendant, and therefore he ought to have pleaded Not guilty.

'Tis true, where the Defence consists in Matters of Law, there the Defendant may plead specially; but where 'tis purely Fact, the general Issue must be pleaded.

Econtra

Econtra: It was insisted upon, that what is alledged in this Plea might be given in Evidence upon the general Issue, but the Defendant may likewise plead it specially, and not trust the Matter to the Lay-gents.

Cro. Eliz. 871, 900. 21 E. 3. 17. 27 Ass. 12. Kelway 81. Moor 600. Rast. Ent. 123. Sed nota, *This Defence was Matter of Law.*

As in Conspiracy, for procuring of the Plaintiff to be falsely and maliciously indicted of a Robbery; the Defendants plead that they were Robb'd, and suspecting the Plaintiff to be guilty, procured a Warrant, in order to have the Plaintiff examined before a Justice of the Peace, of which he had Notice, and absented himself, but was afterwards committed to the Gaol by a Judge of this Court, who advised them to prefer a Bill of Indictment, &c. quæ est eadem Conspiratio; this was adjudged a good Plea, though it amounted to no more than the general Issue, and all this Matter might have been given in Evidence at the Trial.

The Court, except Justice Allybon, advised the Plaintiff to waive his Demurrer, and the Defendant to plead the general Issue.

But Justice Allybon took an Exception to the Declaration, for that the Plaintiff had not alledged any Damnification, but only that he was compelled to appear, and doth not shew how, either by the Petition of the Defendant, or by Summons, &c.

He ought to set forth, that he was summoned to appear before the King, in order to his Discharge; but to say, coactus fuit comparere, is incertain, for that might be in the Vindication of his Honour or Reputation.

He complains of a Petition exhibited against him, which the Defendant hath answered by shewing to the Court sufficient Matter, which might reasonably induce him so to do; and for that Reason he held the Plea to be good. Sed adjornatur.

Rex *versus* Hockenhul.

AN Information was exhibited against him for a Riot, of which he was found guilty, and this Exception was taken in Arrest of Judgment. Misprision of a Clerk amended.

Memorandum quod ad general' quarterial' Session' Pacis tent' &c. Die Sabbati prox' post quindenam Sancti Martini præsentat' existit quod the Defendant 27 Die Januarii, in such a Year, Vi & Armis, &c. So the Fact is laid after the Indictment, which was exhibited against the Defendant at the Michaelmas Sessions, and the Fact is laid to be in January following in the same Year.

But the Attorney General said, This was only a Misprision of the Clerk in titling the Record, viz. in the Memorandum, and there was no Fault in the Body of the Information, and that it was amendable at the Common Law: He cited some Cases to prove where Amendments have been in the Cases of Subjects of greater Mistakes than here, a fortiori it ought to be amended in the King's Case. 8 Co. 156. 4 H. 6. 16. 10 Ass. 26. Cro Car. 144.

'Tis not only amendable at the Common Law, but by several Statutes which extend to all Misprisions of Clerks, except Treason, Felony and Outlawry; wherefore this Mistake of Quinden' Martini was amended, and made Quinden' Hillarii. 4 H. 6. c. 3. 1 H. 6. c 12. Jones 421.

Rex *versus* Sellars.

THE Defendant was indicted at the Sessions in London for not attending at the Wardmote Inquest, being chosen of the Jury for such a Year. Indictment quashed.

To this Indictment he pleaded the King's Grant to the Company of Cooks, of which he was a Member, by which Grant that Company is exempted from being put or summoned upon a Jury or Inquest before the Mayor or Sheriffs, or Coroner of London, &c.

And upon a Demurrer the Question was, Whether the Cooks are discharged by this Gran from their Attendance at the said Wardmote Inquest?

And for the King it was argued, that they are not discharged.

Before the Judgment upon the Quo Warranto brought against the City of London, these Courts there were like the Hundred Courts

Courts in the County; for as these were derived out of the County, so those were derived from the Lord Mayor's Court, which is a Court of Record, and erected for the better Government of the City, and the Aldermen of every Ward had Right to hold Leets there.

4 Inst. 249.

1. But now the Words of this Grant do not extend to this Case, for the Cooks are thereby discharged only from being of a Jury before the Mayor, Sheriffs and Coroner, *&c.* but the Court of Wardmote is held before neither, for 'tis held before the Alderman of the Ward.

Dyer 269.

2. The Words in this Grant ought to be taken strictly, viz. That Cooks shall be exempted if there be other sufficient Men in the Ward to serve besides, and if this doth not appear the Grant is void; but this is not alledged.

Econtra.

Econtra. As to the first Exception it was said, that the Wardmote Court was held before the Mayor, for the Juries there are not to try any Matter, but only to make Presentments which are carried before the Mayor.

Exceptions were taken against the Indictment, which was for not serving at a Wardmote Inquest for such a Year.

1. Because 'tis a Thing not known at the Common Law, that a Man should be of a Jury for a whole Year.

The Indictment was, That the Defendant was an Inhabitant of such a Place, and elected a Jury-man.

2. But doth not say, that he ought to hold the Office to which he was elected.

It was quashed.

Calthrop *versus* Axtel.

Ejectment upon the Statute of *Ph. & Mar.* for marrying under 16 without the Parents Consent. Antea *Hicks* Versus *Gore.*

THE Husband being seised in Fee, had Issue two Daughters, and died, his Wife survived, who was then by Law Guardian in Socage to her Children; one of which, under the Age of sixteen Years, married one Mr. *B.* without her Mother's Consent, by reason whereof her Estate became forfeited during Life to her Sister, by Vertue of the Statute of 4 & 5 Ph. & Mar. who now brought an Ejectment, which was tried at the Bar.

The Mother was produced as a Witness at this Trial against the married Daughter; but it was objected against her, that she was Tenant in Possession of the Lands in Question under her other Daughter, that some Part of the Estate was in Houses, and that she had made Leases thereof to several Tenants for 99

Years,

Years, &c. and covenanted with the Lessees, that she, together with the Infants, when of Age, shall and will join to do any further Act for the quiet Enjoyment thereof; therefore this is like the Case of a Bailiff or Steward, who if they put themselves under such Covenants, shall never be admitted as Witnesses in any Cause where the Title of such Lands shall come in Question.

The Proofs that the Mother did not consent were, That she made Affidavit of the whole Matter, and got the Lord Chief Justice's Warrant to search Mr. B's House for her Daughter, and upon Application made to my Lord Chancellor, she obtained a Writ of Ne exeat Regnum, and got a Homine replegiando, and gave Notice of the Fact in the Gazette, and exhibited an Information in the Crown Office against Mr. B. and his Father, and his Maid.

Attorney General contra. The Preamble of this Act will be a Guide in this Case, which is, For that Maids of great Substance in Goods, *&c.* or having Lands in Fee, have by Rewards and Gifts been allowed to contract Matrimony with unthrifty Persons, and thereupon have been conveyed from their Parents by Sleight or Force, *&c.* Econtra.

Then it enacts, That no Person shall convey away a Maid under 16 Years without her Parents Consent; which Assent is not necessary within the Meaning of this Act, unless the Child be taken away either by Sleight or Force, which must be proved.

The Mother was no good Guardian to these Children, for she did set up one G. to be a Curator for her Daughter in the Spiritual Court, to call her self to an Accompt for the personal Estate of which her Husband died possessed, she having given Security to exhibit a true Inventory.

This Accompt was stated in the Prerogative Court between her and the Curator to 300l. only, for which she gave Bond, when in Truth the personal Estate was worth more, and afterwards obtained a Decree in Chancery, thinking thereby to bind the Interest of the Infants.

In this Case it was said, that there must be a continued Refusal of the Mother, for if she once agree, tho' afterwards she dis-assent, yet 'tis an Assent within the Statute: There must likewise be Proof of the Stealing away.

Obrian *versus* Ram. Mich. 3 Jac. 2 Rot. 192.

Entry of a Writ of Error out of *Ireland.*

Angl' ſſ. DOminus Rex mandavit prædilecto & fideli Conſiliario ſuo Willielmo Davis Militi, Capitali Juſtic. ſuo ad Placita in Curia ipſius Domini Regis coram ipſo Rege in Regno ſuo Hiberniæ tenend' aſſign' Breve ſuum Clauſum in hæc Verba. ſſ. Jacobus ſecundus, Dei Gratia Angliæ, Scotiæ, Franciæ & Hiberniæ, Rex, Fidei Defenſor, &c. prædilecto & fideli Conſiliario noſtro Willielmo Davis Militi, Capital' Juſtic' noſtro ad Placita in Curia noſtra coram nobis in Regno noſtro Hiberniæ tenend' aſſign' Salutem. Quia in Recordo & Proceſſu acetiam in Redditione Judicii Loquelæ quæ fuit in Curia noſtra coram nobis in præd. Regno noſtro Hiberniæ per Billam inter Abel Ram Mil. nuper dict. Abel Ram de Civitate Dublin Alderman' & Elizabetham Grey de Civitate Dublin Viduam, de quodam Debito quod idem Abel a præfat' Elizabetha exigebat. Quæ quidem Elizabetha poſtea cepit Donnogh Obrian Armigerum in Virum ſuum & obiit. Nec non in Adjudicationes Executionis ejuſdem Judicii ſuper Breve noſtrum de Scire Fac. extra eandem Curiam noſtram coram nobis emanen' verſus ipſum præd. Donnogh in Loquela præd. ut dicitur Error intervenit manifeſtus ad grave Dampnum ipſius Donnogh ſicut ex Querela ſua accepimus. Nos Error' ſi quis fuerit Modo debito corrigi & Partibus præd. plen' & celerem Juſtic' fieri volentes in hac Parte vobis mandamus, qd' ſi Judicium in Loquela præd' reddit' ac Adjudication' Execution' Judicii præd. ſuper Breve noſtrum de Scire fac. præd. adjudicat. tunc Record' & Proceſſ. tam Loquel' quam Adjudicationis Executionis Judicii præd' cum omnib' ea tangen' nobis ſub Sigillo veſtro diſtincte & aperte mittatis & hoc Breve ita qd' ea habeamus in Craſt. Aſcen. Domini ubicunque tunc fuerimus in Angl'. Ut inſpect' Record' & Proceſſ. præd' ulterius inde pro Errore il' corrigendo Fieri fac' qd' de Jure fuerit faciend'. Et Scire fac. præfat' Abel qd' tunc ſit ibi ad procedend' in Loquela præd' & faciend' ult' & recipiend' qd. dicta Cur' conſideraverit in præmiſſis. Teſte meipſo apud Weſtm. xxii. Januarii, Anno Regni noſtri ſecundo. Price.

In Adjudicatione Executionis ſuper Scire Fac.

The Return.

Record' & Proceſſ. Loquelæ unde infra fit Mentio cum omnibus ea tangen' coram Dno. Rege ubicunque, &c. ad Diem & Locum infra content' mitto in quodam Record' huic Brevi annex' & Scire feci Abel Ram qd' tunc ſit ibi ad procedend' in Loquela præd. prout interius mihi præcipitur. Reſpons' W. Davis.

Placita

Placita coram Domino Rege apud *the King's Courts* de Termino Sanctæ Trinitatis Anno Regni Domini nostri Caroli Secundi Dei Gratia Angliæ Scotiæ Franciæ & Hiberniæ Regis, Fidei Defensoris, &c. vicesimo nono. Teste Johanne Povey Mil. Savage and Rives.

Com. Civitat. Dublin, ſſ. Memorandum quod die Veneris prox. post Crastinum Sanctæ Trinitatis isto eodem Termino coram Domino Rege apud *the King's Courts* ven' Abel Ram de Civitate Dublin Alderman' per Faustin' Cuppaidge Attornatum suum. Et protulit hic in Cur' dict' Domini Regis tunc ibidem quadam Billam suam versus Elizabetham Grey de Civitate Dublin Viduam in Custod. Maresc. &c. de Placito Debiti. Et sunt pleg' de prosequend' Johannes Doe & Richardus Roe quæ quidem Billæ sequitur in hæc Verba. ſſ. Com. Civitat. Dublin, ſſ. Abel Ram de Civitate Dublin Aldermannus queritur de Elizabetha Grey de Civitate Dublin Vidua in Custodia Maresc. Marescal. Domini Regis coram ipso Rege existen' de Placito qd' reddat ei octingent. Libras bonæ & legalis Monetæ Angliæ quas ei debet & injuste detinet pro eo videlicet qd' cum præd' Elizabetha vicesimo tertio Die Junii Anno Domini millesimo sexcentesimo septuagesimo sexto, Annoq; Regni Regis Caroli Secundi vicesimo octavo, apud Civitat' Dublin prædict. in Parochia Sancti Michaelis Archangeli in Warda Sancti Michaelis in Comitatu ejusdem Civitatis per quoddam Scriptum suum Obligatorium Sigillo ipsius Elizabethæ sigillat' Curiæq; dicti Domini Regis nunc hic osten' cujus dat' est eisdem Die & Anno cogn' se teneri & firmiter obligari præfat. Abel in præd. octingent. Libris Sterling' solvend' eidem Abel cum inde requisit' fuisset Prædicta tamen Elizabetha licet sæpius requisit' prædict. octingent. Libras Sterling' eidem Abel nondum solvit sed ill. ei hucusque solvere recusavit & adhuc recusat ad Dampnum ipsius Abel centum Libr. Sterling' Et inde producit Sectam, &c.

Declaration in Debt upon a Bond.

Et prædicta Elizabetha per Walterum Chamberlain Attornatum suum venit & Defendit Vim & Injuriam quando, &c. Et dicit qd' ipsa non potest dedicere Actionem præd. Abel prædict. nec quin scriptum præd. sit Factum suum nec quin ipsa debet præfat' Abel prædict. Octingent. Libras Modo & Forma prout præd. Abel superius versus eam queritur. Ideo considerat' est qd' præd. Abel recuperet vers. præfat' Elizabetham Debit' suum præd. nec non tres Libras undecim Solid' & sex Denar' Sterl' pro Dampn' suis quæ sustin' tam Occasion' Detention' Debiti ill' quam pro mis. & custag' suis per ipsum circa Sectam suam in hac Parte apposit' eidem Abel

Judgment by *Cognovit Actionem.*

Tisdale.

per Curiam dicti Domini Regis nunc hic ex Assensu suo adjudicata. Ed præd. Elizabetha in Misericordia, &c.

Placita coram Domino Rege apud *the King's Courts* de Termino Paschæ Anno Regni Domini nostri Jacobi Secundi Dei Gratia Angliæ, Scotiæ, Franciæ & Hiberniæ Regis, Fidei Defensoris, &c. secundo. Test. Willielmo Davis Mil. Savage and Rives.

The *Scire Fac.* against Baron after the Marriage and Death of his Wife.

Dominus Rex mandavit Vic' Com. Civitat. Dublin Breve suum Clausum in hæc Verba. *ff.* Jacobus Secundus, Dei Gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei Defensor, &c. Vic. Com. Civitat. Dublin Salutem. Cum Abel Ram de Civitat. Dublin Aldermanus nuper, scilicet Termino Sanctæ Trinitatis Anno Regni Domini Caroli Secundi, Dei Gratia, nuper Regis Angliæ, &c. Fratris nostro præchariſſimi vicesimo nono, in Cur. ipsius nuper Regis coram ipso nuper Rege apud *the King's Courts*, per Billam sine Brevi dicti nuper Domini Regis ac per Judicium ejusd' Curiæ recuperasset versus Elizabetham Grey de Civitat. Dublin Vidua tam quoddam Debitum octingent' Libr. bonæ & legalis Monetæ Angliæ quam tres Libras undecim Solid. & sex Denar. consimilis Monetæ pro Dampnis suis quæ sustin' tam Occasione Detentionis Debiti illius quam pro Mis. & Custag. suis per ipsum circa Sectam suam in hac Parte apposit' unde convict' est sicut nobis constat de Recordo ac post Recuperat' Judicii præd. præd. Elizabetha cepit in Virum suum quendam Donatum Obrian Armigerum, ac postea, scilicet Termino Sanctæ Trinitatis Anno Regni dci. Domini nuper Regis tricesimo primo, in Curia ipsius Dni. Regis coram ipso nuper Rege per Considerationem ejusdem Curiæ adjudicat' fuisset qd. præd. Abel Ram haberet Executionem suam versus præfat' Donat' Obrian & Elizabetham Uxorem ejus de Debito & Dampnis præd. juxta Vim, Formam & Effectum Recuperat' & Adjudicat' prædict. Executio tamen tam Judicii præd. quam Adjudicationis præd. adhuc restat faciend. ac post Adjudicationem præd. præd. Elizabetha obiit & præd. Donat' Obrian eam supervixit prout ex Insinuatione ipsius Abel qui post Recuperationem & Adjudicationem præd. Ordin' Militis super se suscepit in Curia nostra coram nobis accepimus unde idem Abel nobis supplicavit sibi de Remedio congruo in hac Parte adhiberi, & nos eidem Abel in hac Parte fieri volentes quod est justum vobis præcipimus qd. per probos & legales Homines de Balliva vestra Scire fac. præfat. Donat. Obrian qd' sit coram nobis apud *the King's Courts* Die Mercurii prox. post Quinden' Paschæ ostens' si quid pro se habeat vel dicere sciat quare præd. Abel Ram Executionem suam versus eum de Debito & Dampnis Mis. & Custag. præd. habere not debeat juxta Vim, Formam & Effectum

Ordinem Militis suscepit.

Effectum Recuperation' & Adjudicat' præd. si sibi viderit expedir. & ulterius factur' & receptur' quod Curia nostra coram dobis de eo adtunc & ibidem Cons. in hac Parte & habeatis ibi Nomina eorum per quos ei Scire Fac. & hoc Breve. Teste Willielmo Davis Milite apud le *King's Courts* duodecimo Die Februarii Anno Regni nostri secundo.

Ad quem Diem coram dicto Domino Rege apud *the King's Courts*, ven. præd. Abel Ram in propria Persona sua & Vic' videlt. Richardus French & Edwardus Rose Ar. retorn' qd. præd. Donatus Obrian nil habet in Balliva sua per quod ei Scire fac. potuissent nec fuit invent. in eadem & præd. Donatus Obrian non venit ideo sicut prius præcept. est eisdem Vic. qd. per Probos, &c. Scire fac. præfat' Donato Obrian qd. sit coram Domino Rege apud le *King's Courts* Die Mercurii prox' post quinque septimanas Paschæ ad ostend. in Forma præd. si, &c. Ulterius, &c. Idem Dies dat. est præfat. Abel Ram ibidem, &c.

The Return of the Sheriff.

Alias Sci. fa. awarded.

Ad quem Diem coram dicto Domino Rege apud *the King's Courts*, ven. præd. Abel per Faustinum Cuppaidge Attornatum suum & præfat. Vic. ut prius retorn. qd præfat. Donatus Obrian nihil habet in Balliva sua per quod ei Scire facere potuissent nec est invent. in eadem super quo præd. Donat. Obrian per Johannem Morris Attornatum suum ven. & defend. Vim & Injuriam quando, &c. Et dicit qd. præd. Abel Ram Executionem suam versus eum de Debito & Dampnis præd. habere non debet quia dicit qd. præd. Abel Ram alias super Recuperat' & Adjudicat' præd. tulit Breve Domini Caroli Secundi nuper Regis Angliæ, &c. tunc Vic. dicti nuper Regis Com. Civit. Dublin direct. ad præmuniend' ipsum Donat. Obrian & dictam Elizabetham tunc Uxorem ejus ad essend' coram ipso nuper Rege apud le *King's Courts* Die Sabbati prox. post Quinden. S. Martini tunc dicti nuper Regis tricesimo sexto ad ostend' si quid ipsi idem Donat. & Elizabetha tunc Uxor ejus pro se haberent aut dicere scirent quare præd. Abel Ram Executionem suam versus eos de Debito & Dampnis præd. non haberet juxta Vim & Formam Recuperationis præd. si sibi vidissent expedir. Et ad Diem ill' coram ipso nuper Rege apud *the King's Courts*, præd. ven. præd. Abel Ram. in propria Persona sua & præd. Donat. Obrian & Elizabetha Uxor ejus solempnit. exact' non ven. & Johannes Coyne & Samuel Walton Ar' tunc Vic. Com. Civit. præd. super Breve præd. eis per Nomen Vic. Com. Civit. Dublin direct' retornaver' qd. præd. Donat. Obrian & Elizabetha tunc Uxor ejus nihil habuer' in Balliva sua super quo eis Scire fac. potuissent neq; fuer' invent. in eadem Balliva & ideo sicut alias præcept. fuit eisdem Vic. qd. per probos & legales Homines, &c. Scire Fac. præfat. Donat. Obrian & Elizabetha qd. essent coram

Sheriffs Return.

The Defendant appears and pleads another *Sci. fa.* against himself and Wife.

Retorn' vic.

Alias Sci fa.

ram dicto nuper Rege apud le *King's Courts* præd. Die Mercurii prox' post Octab. Sancti Hillarii tunc prox' futur. ad ostend. si quid pro se haberent vel dicere scirent quare præd. Abel Executionem suam versus eos de Debito & Dampnis præd. non haberet in Forma præd. & idem Dies dat. fuit præfat. Abel Ram ibidem, &c. Et eodem Die ill' coram dicto nuper Rege apud *the King's Courts* præd. ven. præd. Abel per. præd. Fustinum Cuppaidge Attornatum suum & præfat. tunc Vic. retornaver. super Breve de al Scire fac. eis in Forma præd. direct. qd. præd. Donat. & Elizabetha nihil habuer' in Balliva sua per quod eis Scire fac. potuissent neq; fuer' invent. in eadem & præd. Abel Ram obtulit se quarto Die Placiti versus præfat. Donat. & Elizabetham & super hoc iidem Donat. & Elizabetha per Henr. Daniel tunc eorum Attorn. ven. & dixer. qd. præfat. Abel Ram Executionem suam versus eos de Debito & Dampnis præd. habere non debuit quia dixer. qd. prædict. Abel Ram infra unum Annum post Recuperationem & Adjucationem præd. prosecut. fuit Breve Domini tunc Regis tunc Vic. Com. Civit Dublin direct. de Fier. fac. de Bonis & Catallis ipsorum Donat. & Elizabeth. Debitum & Dampna præd. & ill' habere coram dicto nuper Rege Die Mercurii prox. post Quinden. Pasch' prox. post Recuperationem & Adjudic. prædict. ad reddend. præfat. Abel Ram pro Debito & Dampnis præd. & dixer. qd. iidem tunc Vic. Virtute ejusdem Brevis apud Civit. Dublin in Paroch. Sancti Michaelis in Com. ejusdem Civitat. levaver' Debitum & Dampna præd' de Bonis & Catallis ipsorum Donat. & Elizabeth, &c. Et ideo petier' Judicionem si præd. Abel Executionem suam de Debito & Dampnis præd. versus eos iterum habere deberet. Et postea scilicet Die Sabbati prox' post Crastin' Ascensionis Domini tunc prox' futur. coram dicto tunc Rege apud le *King's Courts*, præd vener. Partes præd. per Attorn. suos præd. & super hoc iidem Donatus & Elizabetha per Henr. Daniel Attornatum suum præd. reliquer' Verificationem Placiti sui præd. & ideo adtunc & ibidem Cons. fuit qd. præd. Abel haberet Executionem suam versus præfat. Donat. & Elizabetham de Debito & Dampnis præd. juxta Vim Formam & Effectum Recuperationis & Adjudication' prædict. & super hoc idem Abel obtinuit Executionem ill' versus ipsos Donat. & Elizabetham & præd. Donat. in facto dic. qd' præd. Debit. & Dampna præd. de quibus sic adjudicat. fuit qd. præd. Abel haberet Executionem suam præd. in Forma præd. sunt eadem Debitum & Dampna mentionat. in dict' Brevibus de Scire fac. versus ipsum Donat. nunc latis & non alia neque diversa & qd. dict' Recuperatio eadem quam sic adjudicat' fuit est eadem Recuperatio & Adjudicatio mentionat. in dict' Brevibus de Scire fac.

The Baron and Feme appear and plead that Execution was levied upon the Judgment by a *Fieri Fac.*

Relicta Verificatione Placiti.

Judgment thereupon.

verſus ipſum Donat. in Forma præd. latis & non alia neque diverſa & hoc idem Donatus parat. eſt verificare unde ex quo nulla fit Mentio Conſiderationis & Adjudicationis prædict. in dict' Brevibus de Scire fac. idem Donatus Obrian pet. Judicium ſi Cur' hic al. Executionem ſuper Recuperationem & Adjudicationem præd. in dict' nunc Brevibus de Scire fac. mentionat. adjudicari debeat, &c.

Et præd. Abel Ram dic' qd. præd. placitum præd. Donat. Obrian ſuperius placitat. Materiaque in eodem content. minus ſufficiens in Lege exiſtit ad ipſum Abel Ram ab Executione ſua præd. verſus ipſum Donat. habend' precludend' quodque ipſe ad placitum ill' neceſſe non habet nec per Legem Terræ tenetur reſpondere, & hoc parat. eſt verificare, unde pet. Judicium & Executionem ſuam de Debito & Dampnis præd. verſus ipſum Donat. ſibi adjudicari & pro Cauſa Moration' in Lege ſuper placitum ill. idem Abel oſtend. & Cur. hic monſtrat Cauſam ſubſequen. videlicet eo qd. dict' Donat. in placito præd. allegat qd. præd. Abel per Conſ. Cur. Domini Regis hic obtinuit Executionem verſus præfat. Donat. & Elizabetham de Debito & Dampnis præd. & non dicit ſe illud probatur. per Record' prout dicere debuit. Demurrer. Special Cauſes.

Et præd. Donatus Obrian per Attorn. ſuum præd. dic' qd. placitum præd. Materiaq' in eodem content. bon' & ſufficien' in Lege exiſtunt ad ipſum Abel ad Executionem ſuam verſus ipſum Donat. habend. precludi quam quidem Materiam præd. Abel non dedicit nec ad eam aliqualit. reſpond. Et hoc parat. eſt verificare unde ut prius præd. Donatus petit Judicium & qd. præd. Abel ab Executione ſua præd. verſus ipſum Donat. habend' precludatur, &c. Et quia Cur. Domini Regis hic de Judicio ſuo de & ſuper præmiſſis reddend' nondum adviſatur Dies inde dat. eſt Partibus præd. coram dicto Domino Rege apud *the King's Court*, uſque diem Veneris prox' poſt Craſtin. Sanctæ Trinitat. extunc prox' ſequen' de Judicio ſuo de & ſuper premiſſis audiend', &c. Eo qd. Cur. dicti Domini Regis hic inde nondum, &c. Ad quem Diem coram dicto Domini Rege apud *the King's Court*, ven' Partes præd. per Attorn. ſuos præd. Et quia Cur. dicti Domini Regis de Judicio ſuo de & ſuper præmiſſis reddend' nond' adviſatur Dies inde dat. eſt Partibus præd. coram dicto Domino Rege apud le *King's Courts* uſque Diem Sabbati prox' poſt Craſtin. Animarum extunc prox' ſequen' de Judicio de & ſuper præmiſſis audiend', &c. eo qd. Cur. Domini Regis hic inde nondum, &c. Ad quem Diem coram dicto Domino Rege apud le *King's Courts* ven. Partes præd. per Attorn' ſuos præd. Et quia Cur. dicti Domini Regis hic de Judicio Joinder in Demurrer. Continuances.

dicio suo de & super præmissis reddend' nondum advisatur Dies inde dat. est Partibus præd. coram dicto Domino Rege apud le King's Courts usque Diem Lunæ prox' post Octab. Sancti Hillarii extunc prox' sequen' de Judicio suo de & super præmissis audiend' eo qd. Cur' dicti Domini Regis hic inde nondum, &c. Ad quem Diem coram dicto Domino Rege apud le King's Court vener' Partes præd. per Attorn' suos præd. super pro Visis & per Cur' dicti Dominis Regis hic plen. intellectis omnibus & singulis præmiss. maturaque Deliberatione inde habita videtur Cur' dicti Domini Regis hic qd. placitum præd. prædicti Donat. modo & Forma præd. placitat. & materia in eodem content. minus sufficien' in Lege existunt ad ipsum Abel Ram ab Executione sua præd. versus ipsum Donat. habend' præcludend' Ideo Cons. est qd. præd. Abel Ram habeat Executionem suam versus præfat' Donat. de Debito & Dampnis præd. juxta Vim, Formam & Effectum Recuperationis & Adjudicationis præd. &c.

Judgment *qd. habeat Executionem.*

Error assigned.

ff. Postea scilicet Die Lunæ prox' post tres septimanas Sancti Michaelis isto eodem Termino coram Domino Rege apud Westm. ven. præd. Donat. Obrian per Johannem Hancock Attorn' suum. Et dic' qd. in Record' & Proceff. præd. acetiam in Adjudicatione Execution. Judicii præd. manifest. est errat. in hoc videlt' quod per Recordum præd. apparet qd. Adjudicatio Executionis in Record' præd. in Forma præd. reddit. reddit. fuit pro præfat. Abel versus eundem Donat. ubi per Legem Hiberniæ præd. nulla Adjudicatio Execution. Judicii illius reddi debuisset pro præfat' Abel versus eundem Donat. Ideo in eo manifest' est Errat. Errat. est etiam in his qd. per Record' præd. tunc hic missum diminut. existit in non certificando duo Brevia dicti Domini Caroli Secundi nuper Regis Angliæ, &c. Vic. dicti nuper Regis Com. Civit. Dublin direct. ad præmuniend' præd. Donat. Obrian & præd. Elizabetham Uxor' ejus ad essend. coram ipso nuper Rege apud le King's Courts Dublin præd. ad ostend. Causam quare præfat. Abel Executionem versus eos de Debito & Dampnis præd. non haberet Acetiam in non certificando proceff. & Judic' superinde quia in Adjudicatione Executionis superinde Adjudicatio ill. reddit. fuit pro præfat. Abel versus præd. Donat. & Elizabetham Uxorem ejus ubi per Legem Hiberniæ nulla Adjudicatio Execution' Judicii præd. reddi debuisset pro præfat' Abel versus ipsos Donatum & Elizabetham Uxorem ejus acetiam in non certificando Causam vel Rationem super Recordum allegat' quare Brevia præd. emanarent versus præfat. Donatum & Elizabetham; Et in his manifest. est erratum. Et pet. idem Donat. Breve Domini Regis prædilecto & fideli Consiliario dicti Domini Regis Thome Nugent Ar. Capital' Justic. dicti Domini Regis ad placita in Cur. ipsius Domini Regis

Diminution alledg'd.

A *Certiorari* prayed.

gis coram ipſo Rege in Regno ſuo Hiberniæ tenend. Aſſign. dirigend' ad certificand' dicto Domino Regi nunc plenius inde veritatem. Et ei conceditur, &c. quod quidem Breve dictus Dominus Rex mandavit prædilecto & fideli Conſiliario ſuo Thomæ Nugent Armigero Capitali Juſticiario ſuo ad Placita in Cur. ipſius Domini Regis coram ipſo Rege in Regno ſuo Hiberniæ tenend' Aſſign' Breve ſuum clauſum in hæc Verba: *ſſ.* Jacobus Secundus, Dei Gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei Defenſor, &c. Prædilecto & fideli Conſiliario noſtro Thomæ Nugent Ar. Capital. Juſtic. noſtro ad Placita in Curia noſtra coram nobis in Regno noſtro Hiberniæ tenend' Aſſign. Salutem. Volentes de certis Cauſis certiorari de duobus Brevibus Domini Caroli Secundi nuper Regis Angliæ, &c. e Cur. dicti nuper Domini Regis coram ipſo Rege vocat. *the King's Courts* Dublin. nuper emanen' Vic. dicti nuper Regis Com. Civit. Dublin. direct' ad præmuniend' Donat. Obrian & Elizabeth. Uxor. ejus tunc nuper dict. Elizabetham Grey de Civitat. Dublin. Vid. ad eſſend. coram ipſo nuper Rege apud le *King's Courts* Dublin. præd. ad oſtend' Cauſam quare Abel Ram modo Mil. ſed tempore Emanationis præd. Brevium de Scire Fac. Abel Ram de Civit. Dublin. Alderman. Executionem ſuam verſus eos de quodam Debito octingent' Librarum nec non trium Librarum undecim Solid. & ſex Denar' pro Dampnis per ipſum Abel verſus ipſam Elizabetham dum ſola fuit in eadem Cur. recuperat. quæ quidem Elizabetha poſt Recuperationem Judicii præd. verſus ipſam nec non ante Impetrationem præd. Brevium de Scire Fac' cepit in Virum ſuum præd. Donat. Obrian quod certior. tot. Retorn. Proceſſ. & Adjudication. Execution. ſuper inde ac pro eo qd. Record. & Proceſſ. Judicii præd. ſuper quo præd. Brevia de Scire Fac. emanaver. Virtute Brevis noſtri de Error. corrigend' Cur. noſtræ coram nobis apud Weſtm. miſſ. & habit' fuer. ac ibidem de Record. jam reſident. Erroribus ſuperinde aſſign' minime diſcuſſis vobis mandamus qd. præd. duo Brevia dict' nuper Regis de Scire fac. Vic. dict' nuper Civit. Dublin. direct' unacum retorn' Proceſſ. & Adjudicatione Executionis ſuperinde nobis indilate ubicunque, &c. certifices hoc Breve noſtrum nobis remitten. Teſte Roberto Wright Mil' apud Weſtm. viii. Die Novembris Anno Regni tertio.

Henly.

And granted.

The *Certiorari* to certify the Diminution.

Breve Retorn' Proceſſ. & Adjudication. Executionis ſuperinde unde infra fit Mentio Sereniſſimo Domino Regi ubicunque, &c. humillime mitto & certifico prout interius mihi præcipitur ſic reſpond.

T. Nugent.

The Return.

Breve de Scire Fac. unde in Brevi huic Schedul. annexat' ſit Mentio.

The firſt *Scire Fac.* againſt Baron and Feme to revive the Judgment and make both liable.

Carolus Secundus, Dei Gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei Defenſor, &c. Vic. Com. Civitat. Dublin Salutem. Cum Abel Ram de Civitate Dublin Aldermannus nuper in Cur. noſtra cor' nob' apud *the King's Courts* per Billam ſine Brevi noſtro ac per Judic' ejuſdem Cur' recuperavit verſus Elizabetham Grey de Civit. Dublin. Vid. tam quoddam Debitum octingent. Libr. bonæ & legalis Monetæ Angl. quam tres Libras undecim Solid. & ſex Denar' conſimilis Monetæ quam eidem Abel in eadem Curia noſtra coram nobis adjudicat' fuer' pro Dampnis ſuis quæ ſuſtin' tam Occaſione Detentionis Debiti illius quam pro Miſ. & Cuſtag' ſuis per ipſum circa ſectam ſuam in hac Parte appoſit. unde convict' eſt ſicut nobis conſtat de Recordo. Executio tamen Judicii præd' adhuc reſtat faciend' ac præd. Elizabetha poſt Judicium præd. redditum cepit in Virum ſuum quendam Donat. Obrian Armiger' prout ex Inſinuatione ipſius Abel accepimus. Unde nobis ſupplicavit idem Abel ſibi de Remedio ſuo congruo in hac Parte adhiberi & nos eidem Abel fieri volentes quod eſt juſtum vobis præcipimus qd' per probos & legales Homines de Balliva veſtra Scire fac. præfat' Donat' & Elizabethæ qd' ſint coram nobis apud *the King's Courts* Die Mercurii prox. poſt quinque Septimanas Paſchæ prox. futur' ad oſtend' ſi quid pro ſe habeant vel dicere ſciant quare præd' Abel Executionem ſuam verſus eos de Debito & Dampn' præd. habere non debet juxta Vim, Form' & Effectum Recuperat' præd. ſi ſibi viderit expedir' & ulterius ad fact. & recept' quod Curia noſtra coram nobis de eo adtunc & ibidem conſ. in hac Parte. Et habeatis ibi Nomina eorum per quos eis Scire fac. Et hoc Breve. Teſte Roberto Booth Mil. apud *the King's Courts* ſeptimo Die Maii, Anno Regni noſtri triceſimo primo.

Cuppaidge, Savage & Ryves.

The Return.

Infranominat' Donat' & Elizabetha nihil habent aut eorum alter habet in Balliva noſtra per quod eis aut eorum alteri Scire Fac. poſſimus neque ſunt nec eorum alter eſt invent. in eadem Sic reſpond' Willielmus Cooke & Thomas Tennant Armiger' Vic.

The *Alias Sci. fa.*

Carolus Secundus, Dei Gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei Defenſor, &c. Vic. Com. Civit. Dublin Salutem. Cum Abel Ram de Civit. Dublin Aldermannus nuper in Cur. noſtra coram nobis apud *the King's Courts* per Billam ſine Brevi noſtr' ac per Judic' ejuſdem Cur. recuperavit verſ. Elizabetham Grey de Civitat' Dublin. Vid. tam quod. Debitum octingent.

Librarum bonæ & legalis Monetæ Angl. quam tres Libras undecim Solid. & ſex Denar' conſimilis Monetæ qui eidem Abel in eadem Curia noſtra coram nobis adjudicat. fuer' pro Dampnis ſuis quæ ſuſtinuit tam Occaſione Detentionis Debiti illius quam pro Miſ. & Cuſtag. ſuis per ipſum circa Sectam ſuam in hac Parte appoſit. unde convict' eſt ſicut nobis conſtat. de Recordo Executio tamen Judicii præd. adhuc reſtat. faciend. Ac præd. Elizabetha poſt Judicium præd. redditum cepit in Virum ſuum quendam Donat. Obrian Armiger' prout ex Inſinuatione ipſius Abel accepimus. Unde nobis ſupplicavit idem Abel ſibi de Remed. ſuo congruo in hac Parte adhiberi & nos eidem Abel fieri volentes quod eſt juſtum vobis præcipimus ſicut alias vobis præceperimus qd. per probos & legales Homines de Balliva veſtra Scire Fac. præfat. Donat. & Elizabethæ qd' ſint coram nobis apud le *King's Courts* Die Veneris prox' poſt Craſtin' Sanctæ Trinitatis proximo futuro ad oſtend' ſi quid pro ſe habeant vel dicere ſciant quare præd. Abel Executionem ſuam verſus eos de Debito & Dampnis præd. habere non debet juxta Vim, Formam & Effectum Recuperationis præd. ſi ſibi viderit expediri & ulterius factur. & receptur. quod Cur. noſtra coram nobis de eo adtunc & ibidem Conſ. in hac Parte & habeatis ibi Nomina eorum per quos eis Scire Fac. & hoc Breve. Teſte Roberto Booth Mil' apud *the King's Courts* viceſimo primo Die Maii, Anno Regni noſtri triceſimo primo.

Cuppaidge, Savage and Ryves.

Infranomieat' Donat' & Elizabetha nihil habent aut eorum alter habet in Balliva noſtra per quod eis aut eorum alteri Scire Fac. poſſimus neque ſunt nec eorum alter eſt invent' in eadem Sic reſpond' Willielmus Cooke and Thomas Tennant Armiger' Vic. The Return

Record' Adjudication. Executionis ſuper præd. Breve de Scire Fac.

Placita coram Domino Rege apud *the King's Courts* de Termino Sanctæ Trinitatis Anno Regni Domini noſtri Caroli Secundi Dei Gratia Angliæ, Scotiæ, Franciæ & Hiberniæ Regis, Fidei Defenſoris, &c. triceſimo primo. Teſte Roberto Booth Milite. The *Placita*

Savage & Ryves.

Dominus Rex mandavit Vic. Com. Civit. Dublin. Breve ſuum Clauſum in hæc Verba, *ſſ.* Carolus Secundus, Dei Gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei Defenſor, &c. Vic. Com. Civit. Dublin Salutem. Cum Abel Ram de Civit. Dublin Aldermannus nuper in Cur. noſtra coram nobis apud *the King's Courts* per Billam ſine Brevi noſtro ac per Judicium ejuſdem Cur. recuperavit verſus Elizabetham Grey de Civit. Dublin. Vid. tam The Entry of the *Sci. fac.* upon the Roll.

quoddam Debitum octingent' Libr' bonæ & legalis Monetæ Angl' quam tres Libr. undecim Solid. & sex Denar' consimilis Monet' qui eidem Abel in eadem Cur. nostra cor. nob. adjudicat. fuer. pro Damp. suis quæ sustin. tam Occasione Detention' Debiti il' quam pro Mis. & Custag. suis per ipsum circa Sectam suam in ea Parte apposit. unde convict' est sicut nobis constat de Recordo Executio tamen Judicii præd. adhuc restat faciend. ac præd. Elizabetha post Judicium præd. redditum cepit in Virum suum quendam Donat. Obrian Armiger' prout ex Insinuatione ipsius Abel accepimus. Unde nobis supplicavit idem Abel sibi de Remed. suo congruo in hac Parte adhiberi & nos eidem Abel fieri volentes quod est justum vobis præcipimus quod per probos & legales Homines de Balliva vestra Scire Fac. præfat. Donat. & Elizabethæ quod sint coram nobis apud le *King's Courts* Die Mercurii prox' post quinque septimanas Paschæ proximo futuro ad ostend' si quid pro se habeant vel dicere sciant quare præd. Abel Executionem suam versus eos de Debito & Dampnis præd. habere non debet juxta Vim, Formam & Effectum Recuperationis præd. si sibi viderit expediri & ulterius factur. & receptur. quod Curia nostra coram nobis de eo adtunc & ibidem Cons. in hac Parte. Et habeatis ibi Nomina eorum per quos eis Scire Fac. & hoc Breve. Teste Roberto Booth Mil' apud *the King's Courts* septimo Die Maii Anno Regni nostri tricesimo primo.

Return.

Ad quem Diem coram Domino Rege apud *the King's Courts*, ven' præd. Abel in propria Persona sua & Vic. videlicet Willielmus Cooke and Thomas Tennant Armiger' retorn' qd' præd. Donat. & Elizabetha nihil habent in Balliva sua per quod eis Scire fac. potuissent nec fuer' invent' in eadem & præd. Donat. & Elizabetha non ven. Ideo sicut alias præcept. fuit eisdem Vic. qd' per probos, &c. Scire fac. præfat. Donat. & Elizabetha qd' sint coram Domino Rege apud *the King's Courts* Die Veneris prox. post Crastin' Sanctæ Trinitatis ad ostend' in Forma præd. &c. si, &c. & ulterius, &c. idem Dies Dat. est præfat. Abel ibidem, &c.

Alias Sci. fa. awarded.

Return.

Ad quem Diem coram Domino Rege apud *the King's Courts*, ven. præfat. Abel per Faustinum Cuppaidge Attornatum suum & præfat. Vic. ut prius retorn. qd. præd. Donat' & Elizabetha nihil habent in Balliva sua per quod eis Scire fac. potuissent nec sunt invent. in eadem & præd Donat' & Elizabetha non vener. sed Defalt. fec. Ideo cons. est qd. præd. Abel habeat Executionem suam versus præfat. Donat' & Elizabetham de Debito & Dampn. præd. juxta Vim, Formam & Effectum Recuperationis præd, &c.

Judgment *quod habeat Executionem* against Baron and Feme.

Al' Breve de Scire fac. int' Abel Ram Quer' & Donat. Obrian & Elizabetham Uxor ejus Defend.

Ca-

Carolus Secundus, Dei Gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei Defensor, &c. Vic. Com. Civitat. Dublin Salutem. Cum Abel Ram de Civitate Dublin Aldermannus nuper in Cur. nostra cor' nob' apud *the King's Courts* per Billam suam sine Brevi nostro ac per Judic' ejusdem Cur' recuperavit versus Donat. Obrian Armig' & Elizabetham Obrian alias Grey Uxorem ejus tam quoddam Debitum octingent' Libr. Sterling quam tres Libras undecim Solid. & sex Denar' consimilis Monetæ quæ eidem Abel in eadem Curia nostra coram nobis adjudicat' fuer' pro Dampnis quæ sustin' tam Occasione Detentionis Debiti illius quam pro Mis. & Custag' suis per ipsum circa sectam suam in hac Parte apposit. unde convict' sunt sicut nobis constat de Recordo. Executio tamen Judicii præd' adhuc restat faciend' prout ex Insinuatione ips. Abel accepimus. Unde nobis supplicavit idem Abel sibi de Remedio suo congruo in hac Parte adhiberi & nos volentes eidem Abel fieri quod est justum vobis præcipimus qd' per probos & legales Homines de Balliva vestra Scire fac. præfat Donat' Obrian & Elizabethæ Uxor. ejus qd' sint coram nobis apud *the King's Courts* Die Sabbati prox. post Quinden. Sancti Martini prox. futur' ad ostend' si quid pro se habeant vel dicere sciant quare præd. Abel Executionem suam versus eos de Debito & Dampnis præd. habere non debet juxta Vim, Formam & Effectum Recuperationis præd. si sibi viderit expediri & ulterius factur. & receptur' quod Curia nostra coram nobis de eo adtunc & ibidem consideraverit in hac Parte. Et habeatis ibi tunc Nomina eorum per quos eis Scire fac. Et hoc. Breve. Teste Roberto Booth Mil. apud *the King's Courts* sexto Die Novembris Anno Regni nostri tricesimo secundo.

Scire Fac. against Baron upon the Judgment upon the *Scire. fac.* against them to make 'em both alike.

Cuppaidge, Savage & Ryves.

Infranominat' Donat' & Elizabetha nihil habent aut eorum alter habet in Balliva nostra per quod eis aut eorum alteri Scire Fac. possumus neq; sunt nec eorum alter est invent. in eadem. Sic respond' Johannes Coyne & Samuel Walton Armiger' Vic.

Return.

Carolus Secundus, Dei Gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei Defensor, &c. Vic Com. Civit. Dublin Salutem. Cum Abel Ram de Civit. Dublin Aldermannus nuper in Cur. nostra coram nobis apud *the King's Courts* per Billam sine Brevi nostro & per Judicium ejusdem Cur. recuperavit versus Donat' Obrian Armiger' & Elizabetham Obrian alias Grey Uxor' ejus tam quoddam Debitum octingent. Libr. Sterl. quam tres Libr. undecim Solid. & sex Denar' consimilis Monetæ quæ eidem Abel in eadem Curia nostra coram nobis adjudicat. fuer' pro Dampnis suis quæ sustinuit tam Occasione Detentionis Debiti illius quam pro Mis.

Alias Sci. fa.

Mis. & Custag. suis per ipsum circa sectam suam in hac Parte apposit. unde convict' sunt sicut nobis constat de Recordo. Executio tamen Judicii præd' adhuc restat faciend' prout ex Insinuatione ipſ. Abel accepimus. Unde nobis supplicavit idem Abel sibi de Remedio suo congruo in hac Parte adhiberi & nos volentes eidem Abel fieri quod est justum vobis præcipimus sicut alias vobis præceperimus qd' per probos & legales Homines de Balliva vestra Scire fac. præfat' Donat' Obrian & Elizabethæ Uxor. ejus qd. sint coram nobis apud *the King's Courts* Die Mercurii prox. post Octab. Sancti Hillarii prox. futur' ad ostend' si quid pro se habeant vel dicere sciant quare præd' Abel Executionem suam versus eos de Debito & Dampnis præd. habere non debet juxta Vim Formam & Effectum Recuperationis præd. si sibi viderit expediri & ulterius factur. & receptur' quod Curia nostra coram nobis de eo adtunc & ibidem Conſ. in hac Parte. Et habeas ibi tunc Nomina eorum per quos eis Scire fac. Et hoc Breve. Teste Roberto Booth Mil. apud *the King's Courts* vicesimo octavo Die Novembris Anno Regni nostri tricesimo secundo.

Cuppaidge, Savage & Ryves.

Return. Infranominat' Donat' & Elizabetha nihil habent aut eorum alter habet in Balliva nostra per quod eis aut eorum alteri Scire Fac. possumus neq; sunt nec eorum alter est invent. in eadem sic respond' Johannes Coyne & Samuel Walton Armiger' Vic.

Record' Adjudication' Execution' super præd. Breve de Scire Fac' ult' mentionat'.

The *Placita*. Placita coram Domino Rege apud *the King's Courts* de Termino Paschæ Anno Regni Domini Caroli Secundi, Dei Gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Regis, Fidei Defensoris, &c. tricesimo tertio. Test. Willielmo Davis Mil. Savage & Ryves.

The Entry of the *Scire Fac.* Dominus Rex mandavit Vic. Com' Civitat' Dublin Breve suum Clausum in hæc Verba, *ſſ.* Carolus Secundus, Dei Gratia, Angliæ, Scotiæ, Franciæ & Hiberniæ Rex, Fidei Defensor, &c. Vic. Com. Civitat. Dublin Salutem. Cum Abel Ram de Civitate Dublin Aldermannus nuper in Cur. nostra cor' nob' apud *the King's Courts* per Billam sine Brevi nostro ac per Judic. ejusdem Cur' recuperavit versus Donat. Obrian Armig' & Elizabetham Obrian alias Grey Uxorem ejus tam quoddam Debitum octingent' Libr. Sterling quam tres Libr. undecim Solid. & sex Denar' consimilis Monetæ qui eidem Abel in eadem Curia nostra cor. nob. adjudicat' fuer' pro Dampnis suis quæ sustin' tam Occasione Detentionis Debiti il' quam pro Mis. & Custag. suis per ipsum circa Sectam suam in hac Parte apposit' unde convict' sunt sicut nobis constat de Recordo Executio tamen

men Judicii præd' adhuc restat faciend' prout ex Insinuatione ipsius Abel accepimus. Unde nobis supplicavit idem Abel sibi de Remed. suo congruo in hac Parte adhiberi & nos volentes eidem Abel fieri quod est justum vobis præcipimus quod per probos & legales Homines Balliva vestra Scire Fac. præfat. Donat. Obrian & Elizabethæ Uxori ejus qd. sint coram nobis apud le *King's Courts* Die Sabbati prox' post quinden' Sancti Martini proximo futuro ad ostend' si quid pro se habeant vel dicere sciant quare præd. Abel Executionem suam versus eos de Debito & Dampn' præd. habere non debet juxta Vim, Form' & Effectu' Recuperationis præd. si sibi viderit expediri & ulterius factur. & receptur. quod Curia nostra coram nobis de eo adtunc & ibidem Cons. in hac Parte. Et habeatis ibi tunc Nomina eorum per quos eis Scire Fec. & hoc Breve. Teste Roberto Booth Mil' apud *the King's Courts* sexto Die Novemb. Anno Regni nostri tricesimo secundo.

Ad quem Diem cor' dict' Domino Rege apud *the King's Courts*. ven' præd. Abel in propria Persona sua & Vic. videlicet Johannes Coyne & Samuel Walton Armiger' retorn' qd' præd. Donat. Obrian & Elizabetha Uxor ejus nihil habuer' in Balliva sua per quod eis Scire fac. potuissent nec fuer' invent' in eadem & præd. Donat. & Elizabetha non ven. Ideo sicut alias præcept. fuit eisdem Vic. qd' per probos, &c. Scire fac. præfat. Donat. & Elizabethæ qd' essent coram Domino Rege apud *the King's Courts* Die Mercurii prox post. Octab. Sancti Hillarii ad ostend. in Forma præd. si, &c. Et ulterius, &c. idem Dies Dat. est præfat. Abel ibidem, &c.

Return.

Alias Sci. fa. awarded.

Ad quem Diem coram Domino Rege apud *the King's Courts*, ven. præd. Abel per Faustinum Cuppaidge Attornatum suum & præfat. Vic. ut prius retorn. qd. præd. Donat' & Elizabetha nihil habuer' in Balliva sua per quod eis Scire fac. potuissent neq; fuer' invent. in eadem & præd Abel optulit se quarto Die placiti vers. præfat' Donat. & Elizabetham. Et super hoc idem Donat. & Elizabetha per Henricum Daniel Attornatum suum ven' & dicunt qd. præfat. Abel Executionem versus eos de Debito & Dampn. præd. habere non debet quia dic. qd. præd. Abel infra unum Annum post Recuperat. præd. prosecut. fuit Breve Domini modo Regis adtunc Vic. Com. Civitatis Dublin. direct. de Fieri fac. de Bonis & Catallis præfat. Donati & Elizabethæ Debit. & Dampn. præd' & qd. ill. haberent hic in Curia Die Mercurii prox. post Quinden. Paschæ prox. post Recuperat. Debiti & Dampn' præd' ad reddend' præfat. Abel Ram pro Debito & Dampnis præd. & dicunt qd. iidem Vic. Virtute ejusdem Brevis apud Civitatem Dublin in Parochia Sancti Michaelis Archangeli in Warda Sancti Michaelis in Com. ejusdem Civitatis fecer' & levaver' Debitum & Dampna præd. de Bonis & Catallis ipsor. Donat. & Elizabethæ. Et hoc parati sunt verificare

The Defendants appear, and plead that the Money due upon the Judgment was levied upon a *Fi. fa.*

verificare unde petunt Judicium si prædictus Abel Executionem suam de Debito & Dampnis prædict. versus eos iterum habere debeat, &c.

Relicta Verificationis.

Postea scilicet Die Sabbati prox. post Crastin' Ascensionis Domini isto eodem Termino coram dicto Domino Rege apud *the King's Courts*, ven' Partes præd' per Attornatos suos præd. Et super hoc idem Donatus & Elizabetha per Attornatum suum præd' relict' per eos prior' Verification' per ipsos in Forma præd' superius placitat' dicunt qd. ipsi non possunt dedicere quin præd' Abel Executionem suam versus eos de Debito & Dampnis Mis. & Custag' præd. Virtute Recuperationis præd. habere debeat. Ideo considerat' est qd' præd. Abel habeat Executionem suam versus præfat Donatum & Elizabetham de Debito Mis. & Custag' præd' juxta Vim Formam & Effectum Recuperationis præd' &c. Super quo præd' Donat' ut prius dic' qd' in Record' & Proceff. præd. nec non in Adjudicatione Recuperation' præd' madifeste est erratum allegando Errores præd. per ipsum superius allegat' ac petit qd. Judicium præd' ob Errores ill' & al' in Record' & Proceff. præd' existen. revocetur adnulletur & penitus pro nullo habeatur ac qd. idem Donat' ad omnia quæ ipse Occasione Jud. præd' amisit restituatur quodq; præd' Abel ad Errores præd. rejungeret.

Judgment thereupon.

The Plaintiff counts upon his Errors.

The Defendant in the Errors pleads *in Nullo est erratum.*

Et superinde præd. Abel dicit qd. nec in Record' & Proceff. præd. nec in Redditione Judicii præd. nec in Adjudicatione Executionis super Judic' illud in ullo est erratum. Et pet' similiter qd' Curia dicti Dni. Regis nunc hic procedat tam ad Examinationem tam Record' & Proceff. præd. quam Materias præd. superius pro Errore assign' & qd. Judic. præd. in omnib. affirmetur. Sed quia Cur dict. Dni. Regis nunc hic de Judicio suo de & super premissis reddend' nond. advis. Dies inde dat. est Partibus præd. coram Domino Rege usque in Octab. Sancti Hillarii ubicunque, &c. de Judicio suo de & super præmissis audiend. eo qd. Curia dicti Domini Regis nunc hic inde nondum, &c. Ad quem Diem coram Domino Rege apud Westm. ven. Partes præd. per Attornatos suos præd. Sed quia Cur. dict. Dni. Regis nunc hic de Judicio de & super præmissis reddend. nondum advisatur Dies inde dat. est Partibus præd. coram Domino Rege usque a Die Paschæ in quindecim Dies ubicunque, &c. de Judicio suo inde audiend. eo qd. Curia dicti Domini nunc hic inde nondum, &c. Ad quem Diem coram Domino Rege apud Westm. ven. Partes præd. per Attornatos suos præd. Sed quia Cur. dicti Domini Regis nunc hic de Judic. suo de & super præmissis reddend. nondum advisatur Dies inde dat. est Partibus præd. cor. Domino Rege usq; in Crastino Sanct. Trinitat. ubicunq; &c. de Judic. suo inde audiend. eo quod Cur. dicti Domini Regis nunc hic inde nondum, &c. Ad quem Diem coram Domino Rege apud

Continuances.

Weſtm. ven' partes præd' per Attornatos ſuos præd' ſed quia Curia dicti Domini Regis nunc hic de Judicio ſuo de & ſuper præmiſſis reddend' nondum adviſatur dies inde dat. eſt partibus præd' coram Domino Rege uſque a die Sancti Michaelis in tres Septimanas ubicunque, &c. de Judicio ſuo inde audiend' eo qd' Curia dicti Domini Regis nunc hic inde nondum, &c. Ad quem diem coram Dom' Reg' apud Weſtm. ven' partes præd' per Attorn' ſuos præd' ſed quia Curia dicti Domini Regis nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend' nondum adviſatur dies inde dat' eſt partibus præd' coram Domino Rege uſq' in Octab. Sancti Hillarii ubicunq; &c. de Judicio ſuo inde audiend' eo qd' Curia dicti Domini Regis nunc hic inde nondum, &c. Poſtea ſcil' a die Paſchæ in quindecim dies extunc prox. ſequen' uſque quem diem Record' & proceſſ. prædict. antea remanen' ſine die virtute cujuſdam Act' Parliamenti confect' apud Weſtm. decimo tertio die Februarii, Anno Regni Domini Willelmi & Dominæ Mariæ nunc Regis & Reginæ Angliæ, &c. primo revivificat' continuat' & adjornat' fuit coram dicto Domino Rege & dicta Domina Regina Willielmo & Maria apud Weſtm' ven' partes præd. per Attornatos ſuos præd. ſed quia Curia dict' Domini Regis & Dominæ Reginæ nunc hic de Judicio ſuo de & ſuper præmiſſ. reddend' nondum adviſatur dies inde dat' eſt partibus præd. coram Domino Rege & Domina Regina uſq; a die Paſchæ in tres Septimanas ubicunq; &c. de Judicio ſuo inde audiend' eo qd' Curia dict' Dom' Regis & Dom' Reginæ nunc hic inde nondum, &c. Ad quem diem coram Dno. Rege & Dna. Regina apud Weſtm. vener' partes præd. per Attornatos ſuos præd' ſuper quo viſis & per Cur' dicti Dni. Regis & Dnæ. Reginæ nunc hic plenius intellect' omnibus & ſingulis præmiſſ. diligenterque examinat' & inſpect' tam Record. & proceſſ. præd. ac Judic' & adjudication' executionis ſuper eiſdem reddit' quam præd. cauſas & materias per præd. Donatum Obrian ſuperius pro Error' aſſign' videtur Curiæ Domini Regis & Dominæ Reginæ nunc hic qd. nec in Record' & proceſſ. prædict' nec in Redditione Judicii prædict' & adjudicatione executionis ſuperinde in ullo eſt errat' ac qd' Record' ill' in nullo vitioſum aut defectivum exiſtit. Ideo conſiderat' eſt qd' Judicium præd' & adjudication' executionis ſuperinde in omnibus affirmetur ac in omni ſuo robore ſtet & effectu dict' cauſis & materiis ſuperius pro Error aſſign' in aliquo non obſtante. Et ulterius per Cur. Domini Regis & Dominæ Reginæ nunc hic conſ. eſt qd' prædict' Abel Ram recuperet verſus præfatum Donatum Obrian octodecim libras eidem Abel per Curiam Domini Regis & Dominæ Reginæ nunc hic ſecundum formam Statuti in hujuſmodi caſu edit' & proviſ. adjudicat' pro miſ. cuſtag' & dampn' ſuis quæ ſuſtin' occaſione dila-

The Proceſs diſcontinued, but revived by Act of Parliament. *Stat.* 1 *W. & M.*

Continuances.

Judgment affirmed.

dilationis executionis Judicii prædict' prætextu prosecutionis prædict' Brevis de Errore. Et qd' prædictus Abel habeat inde executionem, &c.

Obrian *versus* Ram.

Whether a *Sci. fa.* will lie against the Husband alone, after the Death of the Wife, upon a Judgment had against her *dum sola.*

ERROR to reverse a Judgment given in Ireland, upon a Scire Fac. brought against the Plaintiff in the Errors, setting forth, That Debt was brought upon a Bond against Elizabeth Grey, and a Judgment was thereupon obtained for 800 l. dum sola: That the said Elizabeth afterwards intermarried with Mr. Obrian: That a Scire Facias was brought upon that Judgment against Husband and Wife, to shew Cause why the Plaintiff should not have Execution. That upon this Scire Facias there were two Nichils returned, and thereupon Judgment was had against Husband and Wife. It rested for a Year and a Day, and then the Wife died, and the Plaintiff brought a new Scire Fac. against the Husband alone, to shew Cause why he should not have Execution upon the first Judgment.

The Defendant pleaded, That there was another Scire Fac. brought against him and his Wife for the same Cause, &c. And upon a Demurrer to this Plea, Judgment was given in Ireland against him.

The Question now was, Whether this Scire Fa. will lie against the Husband alone, after the Death of his Wife?

This Case was argued by Mr. Finch and Mr. Pollexfen, that the Husband was not chargeable.

It was admitted on all Sides, That if a Feme sole is indebted and marries, that an Action will lie against the Husband and Wife, and he is liable to the Payment of her Debts.

It was agreed also, That if a Judgment be had against a Feme sole, and she marries, and afterwards dies, that the Husband is not chargeable, because her Debts before Coverture shall not charge him, unless recovered in her Life-time.

In like Manner no Debts which are due to her dum sola, shall go to the Husband by Vertue of the Intermarriage, if she die before those are recovered; but her Administrator will be entitled to them, which may be the Husband, but then he hath a Right only as Administrator, and the Reason is, because such Debts, before they are recovered, are only Choses in Action.

Rol. Abr. 351.

And from hence the Counsel did infer, That the Judgment in this Case against the Wife, dum sola, did not charge the Husband.

Then the Question will be, If the Husband is not chargeable by the Original Judgment, whether the Judgment on the Scire Fac. had not made an Alteration, and charged him after the Death of his Wife?

And as to that, it was said, That this Judgment upon the Scire Fac. made no new Charge, for 'tis only quod habeat Executionem, &c. and carries the first Judgment no farther than it was before, for 'tis introduced by the Sci. Fac.

At the Common Law, no Execution could be had upon a Judgment after a Year and a Day; and there was then no Remedy but to bring an Action of Debt upon that Judgment.

This Inconvenience was remedied by the Statute of Westm. the 2. which gives a Scire Fac. upon the Judgment, to shew Cause why Execution should not be had, which can be no more than a Liberty to take Execution upon the Original Judgment, which cannot charge the Husband in this Case, because 'tis only a Consequence of that Judgment, and creates no new Charge, for a Release of all Actions will discharge this Award of Execution. W. 2. cap. 45.

But the Reasons why the original Judgment shall not be carried farther by the Judgment in the Scire Fac. are as follow:

1. By considering the Nature of a Scire Fac. which lay not at the Common Law, but is given by the Statute in all personal Actions; the Words whereof are these, Viz. Observandum est de cætero quod ea quæ inveniuntur irrotulat', &c. 2 Inst. 469. Sid. 351.

Upon which Words it is evident, that the Execution of the first Judgment on Record is all which is given by this Act after the Year and Day, and it takes off that Bar which was incurred by the Lapse of Time, and gives a speedy Execution of the Judgment recorded.

2. The Proceedings upon a Scire Facias shew the same Thing, for the Writ recites the first Judgment, and then demands the Defendant to shew Cause why the Plaintiff should not have Execution thereon juxta Vim, Formam & Effectum, Recuperationis præd. but prays no new Thing.

3. A Scire Facias is not an Original, but a Judicial Writ, which depends purely upon the first Judgment, and a Writ of Error suspends the Execution of both; so likewise if the Original Judgment be reversed, even a Judgment obtained upon a Scire Facias will be reversed in like Manner. 1 Roll Abr. 777 pl. 6. 8 Co. 143. Dr. *Drurie's* Case.

4. The Law doth not charge a Man without an Appearance, but here is none; and the Statute can never operate upon this Case, because that extends only to such Judgments upon which there has been a Recovery; and here is nothing recovered

vered upon this Scire Facias, for 'tis only to have Execution upon the first Judgment.

If the Law should be otherwise, this Absurdity would follow, Viz. There would be a Recovery without a Record; for the Purport of the Scire Facias is only to have Execution according to the Form and Effect of the Record, and the very Record it self doth not charge the Husband.

Besides, the first Judgment did charge the Lands of the Wife, which are still liable to satisfy the Debt; why therefore must the Lands of the Husband be charged? Cannot the Administrator of the Wife bring a Writ of Error to reverse this Judgment? And if it should be reversed, shall the Husband pay the Debt, and the Administrator of the Wife be restored?

The Objections made by the Counsel on the other Side against this Opinion were, viz. That if an Action of Debt will lie upon a Judgment in a Scire Facias, the Original Judgment is by this Means carried farther, for without a new Recovery Debt will not lie; and to prove this, there is an Authority in Fitzherbert, where a Prior had Judgment for an Annuity, and brought a Scire Fac. upon that Judgment, against the Successor of the Parson who was to pay it, and obtained an Judgment upon that Scire Fac. to recover the Arrearages, and afterwards brought an Action of Debt upon the last Judgment, and the Book says suit maintein.

F. N. B. 122. E.

2 Leon. 14. 4 Leon. 186. 15 H. 7. 16.

There is another Case in 2 Leon. where 'tis held, that an Action of Debt will lie upon a Judgment in a Scire Facias upon a Recognizance.

Which Objections may receive this Answer:

First, As to the Case in Fitzherbert, 'tis admitted to be Law, but 'tis not an Authority to be objected to this Purpose, because the first Judgment for the Annuity charges the Successor; but the Original Judgment in this Case doth not charge the Husband, so the Cases are not parallel.

The like Answer may be given to the Case in Leonard, for a Recognizance is a Judgment in it self, and Debt will lie upon it without a Sci. Fa. upon that Judgment.

Econtra.

But on the other Side it was argued, that the Award of Execution is absolute against Husband and Wife; for 'tis a Recovery against both, whereas before it was only the Debt of the Wife, but now 'tis joint against the one as well as the other.

The

The Judgment upon the Sci. Fa is a distinct Action.

It cannot be denied but that if a Woman be indebted and marrieth, the Husband is chargeable during the Coverture, which shews that by the Marriage he is become the principal Creditor. Bro. Ab. tit. Baron and Feme, pl. 27. 49 Ed. 3. 35. b.

As to the Sci. Fa. 'tis true, at the Common Law, if a Man had recovered a Debt, and did not sue forth Execution within a Year and a Day, he must then bring a new Original, and the Judgment thereon had been a new Recovery; but now a Sci. fa. is given by the Statute instead of an Original; and therefore a Judgment thereon shall also be a new Judgment; for tho' 'tis a Judicial Writ, yet 'tis in the Nature of an Action, because the Defendant may plead any Matter in Bar of the Execution upon the first Judgment, and 'tis for this Reason that a Release of all Actions is a good Bar to it. 1 H. 5. 5. a 43 Ed. 3. 2. b. 1 Inst. 290. b.

Besides, an Action of Debt will lie upon a Judgment on a Sci. Fa. which shews that 'tis an Action distinct from the Original, and upon such a Judgment the Defendant may be committed to Prison several Years afterwards without a new Sci. fa. Rast. Ent. 193. 4 Leon 486 Dyer 214 b.

The Husband may have Execution of a Judgment recovered by him and his Wife, after the Death of his Wife, without a Sci. Fa. for the Judgment hath made it a proper Debt due to him, and he alone may bring an Action of Debt upon that Judgment, and it seems to be very unreasonable that he should have the Benefit of such a Judgment, and yet not be charged after the Death of his Wife, when there hath been a Recovery against both in her Life-time. 1 Mod. Rep. 179.

This is like the Case where a Devastavit is returned against Husband and Wife as Executrix, and a Judgment thereon quod Querens habeat Executionem de Bonis propriis, the Wife dies, yet the Husband shall be charged, for the Debt is altered. Moor 299. 3 Cro. 216. Cro. Car. 603. Sid. 337.

If it should be otherwise, this Inconvenience would follow, that if the Wife should die, the Husband will possess himself of her Estate, and defraud the Creditors, so that he takes her, but not cum Onere. But the Law is otherwise, for if a Feme being Lessee for Years doth marry, and the Rent is behind, and she dies, the Husband shall be charged with the Rent Arrear, because he is entitled to the Profits of the Land by his Marriage. F. N. B. 121. c. 1 Rol. Abr. 351. 10 H. 6. 11.

To which it was answered, That if a Man should marry an Executrix, and then he and his Wife are sued, and Judgment obtained against them to recover de Bonis Testatoris, and thereupon a Fi. Fa. is awarded to levy the Debt and Damages, and the Sheriff returns a Devastavit, and then the Wife dies, the Husband is not chargeable, because the Judgment is not properly against him, who is joined only for Conformity; but if up-

on the Return of the Devastavit there had been an Award of Execution de Bonis propriis, that would have been a new Judgment, and the old one de Bonis Testatoris had been discharged, and then the Husband must be charged for the new Wrong. Adjornatur.

1 Roll. Abr. 351.

Afterwards in 1 Will. & Mar. the Judgment was affirmed.

Bowyer *versus* Lenthal.

Valerent for *Valebant* good after Verdict.

INdebitatus Assumpsit quantum meruit ad insimul computasset.

The Plaintiff had a Judgment by Default in the Court of Common Pleas, and a Writ of Enquiry was brought, and entire Damages given; and now the Defendant brought a Writ of Error, and it was argued, that if any of the Promises be ill, Judgment shall be reversed; the Error now assigned was in the second Promise, viz. That in Consideration that the Plaintiff would let the Defendant have Meat, Drink and Lodging, he promised to pay so much, Quantum rationabiliter *valerent*, it should have been valebant at the Time of the Promise made, Sed non allocatur. So the Judgment was affirmed.

DE
Termino Paſchæ,
Anno 4 Jac. II. in Banco Regis, 1688.

Wright, *Chief Juſtice.*
Holloway, Powel, Allibon, } *Juſtices.*

Powis, *Attorney General.*
Wm. Williams, *Solicitor General.*

NOTA, *Wedneſday May* 2. being the firſt Day of this Term, Sir *Bartholomew Shower*, Recorder of *London*, was called within the Bar.

Heyward *verſus* Guppie.

IN an Action of Covenant, which was to make an Aſſignment to the Plaintiff, according to an Agreement made between him and the Defendant, as Counſel ſhould direct and adviſe, and for Non-performance thereof this Action was brought; the Defendant pleaded non eſt factum, and Judgment was obtained againſt him.

Covenant to make an Aſſignment as Counſel ſhould adviſe.

Upon which a Writ of Error is brought, and the common Error aſſigned. It was objected, That the Plaintiff's Counſel ſhould give the Advice, becauſe he is the Perſon intereſted.

This Objection was anſwered by Mr. Pollexfen, who ſaid, That the Defendant had likewiſe an Intereſt in this Matter, for 'tis an Advantage to him to make the Aſſignment, that his Covenant might be ſaved. 'Tis true, it had been otherwiſe if the Covenant had been to make ſuch a Conveyance as Counſel ſhould

should advise, for then the Person to whom the Covenant is made may chuse whether he will have a Feoffment, Release, or Confirmation, and then his Counsel should advise what Sort of Conveyance is proper.

But here it is to make an Assigment, and such as the Parties had agreed on.

5 Co. 23. Lamb's Case. 1 Rol. Abr. 424. pl. 8.

If a Man should be bound to give another such a Release as the Judge of the Prerogative Court shall think fit, the Person who is so bound must procure the Judge to direct what Release shall be given, because the Condition is for his Benefit, and he hath taken upon him to perform it at his Peril.

'Tis usual for Men to have Counsel on both Sides, to put their Agreements into Method; but in this Case it being left generally as Counsel shall direct, what Reason can be given why the Defendant's Counsel shall not be intended, especially when it seems by the penning of the Covenant he shall? For an Assignment is to be made as Counsel shall direct, and here being a Verdict for the Plaintiff, it must now be presumed that the Defendant's Counsel was first to give the Advice, and then he was to make the Assignment.

Econtra.

Econtra. It was argued, that first, as to the Verdict, 'tis not materially objected in this Case, because the Plea is non est factum, so that nothing of the special Matter could come in Evidence.

Now admitting this Covenant to be general, yet one of the Parties must make his Choice of Counsel, before he can entitle himself to an Action.

All Deeds are taken according to the general Intendment, and therefore by this Covenant his Counsel is to advise to whom the Assignment is to be made; for if the Counsel of the Defendant should advise an insufficient Deed, that would not have saved his Covenant.

3 Bulstr. 168.

Besides, the Plaintiff hath not averred that Counsel did not advise, and therefore the Defendant could not plead any Thing but non est factum. Adjornatur.

Anonymus.

Anonymus.

A Pleint was removed out of the Lord Mayor's Court by Habeas Corpus, the Return whereof was, That the City of London was an ancient City Incorporate, and that Time out of Mind there was a Custom, That the Portage and Unlading of all Coals and Grain coming thither should belong to the Mayor and Aldermen, &c. That there was a Custom for them to regulate any Custom within the City, &c. Exceptions to a By-Law.

Then they set forth an Act of Common Council, by which the Porters of Billinsgate were made a Fellowship, and that the Meeters of Corn should from Time to Time give Notice to the Porters to unlade such Corn as should arrive there, and that no Bargeman, not being Free of the said Fellowship, shall unlade any Corn, upon the Forfeiture of 20 s. to be recovered in an Action brought in the Name of the Chamberlain, and that the Party offending shall have no Essoin or Wager of Law.

Then they set forth the Judgment in the Quo Warranto, and the Regrant, and that the Defendant not being of the said Fellowship, did unlade one hundred Quarters of Malt, &c.

Serjeant Thompson took many Exceptions to this By-Law; but the most material were,

1. It appears upon the Return, that the City of London hath assumed an Authority to create a Fellowship by Act of Common Council, which they cannot, for 'tis a Prerogative of the Crown so to do; and they have not averred or shewed any special Custom to warrant such an Authority.

2. They have made this By-Law too general, for if a Man should carry and unlade his own Goods there, he is liable to the Forfeiture, in which Case he ought to be excepted.

3. This Act of Common Council prohibits Bargemen, not being Free of the Fellowship of Porters, to unlade any Coals or Grain arriving there, and they have not averred that the Malt unladed did arrive, &c. so they have not pursued the Words of the By-Law.

4. They say in this Law, That the Person offending shall have no Essoin or Wager of Law, which is a Parliamentary Power, and such as an inferior Jurisdiction ought not to assume. Adjornatur. Godb. 107.

Beak *versus* Thyrwhit.

Whether Trover will lie for a Ship after Sentence in *Admiralty* for the same Ship.

There was a Sentence in the Court of Admiralty, concerning the Taking of a Ship, and afterwards an Executrix brought an Action of Trover and Conversion for the same.

The Defendant after an Imparlance pleads, That at the Time of the Conversion he was a Servant to King Charles the Second, and a Captain of a Man of War called the Phœnix, and that he did seize the said Ship for the Governor of the East-India Company, she going in a Trading Voyage to the Indies contrary to the King's Prohibition, &c.

And upon a Demurrer these Exceptions were taken to this Plea:

1. The Defendant sets forth, that he was a Servant to the King, but hath not shewed his Commission to be a Captain of a Man of War.

2. That he seised the Ship going to the Indies contrary to the King's Prohibition, and hath not set forth the Prohibition it self.

It was argued by the Council contra. That it may be a Question whether this was the Conversion for which this Action is brought, for it was upon the Sea, and the Defendant might plead to the Jurisdiction of this Court, the Matter being then under the Cognizance of the Admiralty.

But as to the Substance of this Plea, 'tis not material for the Defendant either to set forth his Commission, or the King's Prohibition; he hath shewed enough to entitle the Court of Admiralty to a Jurisdiction of this Cause, and therefore this Court cannot meddle with it, for he expressly affirmeth that he was a Captain of a Man of War, and did seize the Ship, &c. which must be intended upon the Sea; so that the Conversion might afterwards be upon the Land; yet the original Cause arising upon the Sea, shall and must be tried in the Admiralty; and it having already received a Determination there, shall not again be controverted in an Action of Trover.

Cro. Eliz. 685.

The Case of Mr. Hutchinson was cited to this Purpose, who killed Mr. Colson in Portugal, and was acquited there of the Murder; the Exemplification of which Acquittal he produced under the great Seal of that Kingdom, being brought from Newgate by an Habeas Corpus to this Court; notwithstanding the King was very willing to have him tried here for that Fact; the Consideration

3 Keb. 785.

deration whereof he referred the Judges, who all agreed, That he being already acquitted by their Law, could not be tried again here. Adjornatur.

Smith *versus* Pierce.

A Special Verdict was found in Ejectment, the Substance of which was, That Robert Basket was seized in Fee of the Lands in Question, who by Will devised it to Philip Basket and others for 99 Years, with Power to grant Estates for the Payment of the Debts and Legacies of the Testator, the Remainder in Tail to John Basket his Brother; but that if he gave Security to pay the said Debts or Legacies, or should pay the same within a Time limited, that then the Trustees should assign the Term to him, &c.

A Term for Years was devised for Payment of Debts, the Remainder over in Tail, he in Remainder enters and levies a Fine, and settles the Land upon his Wife for Life, and dies, the Wife surviving, and the Debts not paid, whether this Term is barred by the Fine and Non-claim. Shower 72.

John Basket entred after the Death of his Brother, with the Assent of the said Trustees, and received the Profits, and paid all the Legacies, and all the Debts but 18 l.

The Jury find that John had Issue a Daughter only by his first Wife, after whose Death he married another Woman, and levied a Fine, and made a Settlement in Consideration of that Marriage upon himself for Life, and upon his Wife for Life, with divers Remainders over; that he died without Issue by his 2d Wife, who entred, and five Years were pass'd without any Claim, &c.

And now the Heir at Law in the Name of the Trustees brought this Action.

The Questions were,

1. Whether the Term for 99 Years thus devised to the Trustees was bound by this Fine and Non-claim or not?

2. Whether it was devested and turned to a Right at the Time of the Fine levied?

For if it was not, then the Fine could not operate upon it.

It was agreed that as a Disseisin is to a Freehold, so is a Devesting to a Term, and that a Fine and Non-claim is no Bar, but where the Party at the Time of the levying thereof had a Will to enter, and when the Estate of which 'tis levied is turned to a Right.

That in the Case at the Bar the Entry of John Basket was tortious, because the legal Estate was still in the Trustees.

But if he had gained any Right by his Entry, 'tis only a Tenancy at Will to them, for they took Notice of the Devise, and he entred by their Consent; and such a Right is not assignable, and then a Fine levied is no Bar.

9 Co. 106. To prove this, Margaret Prodger's Case was cited, where the Lord granted a Copyhold to John, Elizabeth and Mary, for their Lives, and afterwards by Deed enrolled sold the Land to John in Fee, and levied a Fine to him and his Heirs, &c. and five Years passed without any Claim; John died, his Son entred, and levied another Fine to Trustees to the Use of himself and Margaret his Wife for Life, the Remainder to his own right Heirs; the Son died, and his Wife survived, who having a Freehold for Life distrained, and the Husband of Elizabeth brought a Replevin: It was adjudged, that this Fine and Non-claim did not bar those in Remainder, because the Bargain and Sale to John did not devest their Estate and turn it to a Right; for the Lord did what he might do, and John accepted what he might lawfully take, who being in Possession by Vertue of a particular Estate for Life, could not by this Acceptance devest the Estate of her who had the Freehold; and the Fine and Non-claim could not do it; for to what Purpose should he make any Claim, when he was in actual Possession of the Thing to be demanded? And he, who is so in Possession, need not make any Claim either to avoid a Fine or a collateral Warranty.

Now though at the Common Law there must be Livery and Seisin to create an Estate of Freehold, yet any thing is sufficient to make an Estate at Will, in which neither the Inheritance or the Title of the Land is concerned, and therefore a Fine levied by such a Tenant is no Bar.

3 Co. Fermer's Case.

Sid. 458. Freeman *vers.* Barns.

'Tis true, if a Lease be made for an Hundred Years in Trust to attend the Inheritance, and Cestuy que Trust continues in Possession, and demises to another for fifty Years, and levies a Fine, and the five Years pass without Claim, he being still in Possession after the first Lease made, is thereby become Tenant at Will; and by making the second Lease, the other is devested and turned to a Right, tho' he was not a Disseisor, and so 'tis barred by the Fine, because the Cestuy que Trust of the Term of One hundred Years was also Owner of the Inheritance.

But in the Case at the Bar, John shall not be a Disseisor but at the Election of the Trustees of the Term of 99 Years, to prove which there are many Authorities in the Books.

Latch 53. 1 Leon. 121. Lit. Sect. 588.

As if Tenant at Will make a Lease for Years, and the Lessee enters, 'tis not a Disseisin, but at the Election of him who hath the Freehold; and even in such Case, if the Tenant of the Freehold should make a Grant of the Land 'tis good, tho' not made upon the Land it self, for he shall not be taken to be out of Possession but at his own Election.

'Tis

'Tis like the common Case of a Mortgagee for Years, where the Mortgagor continues in Possession twenty Years afterwards, and pays the Interest, and in that Time hath made Leases and levied a Fine, this shall not bar the Mortgagee, for the Mortgagor is but Tenant at Will to him.

The Trustees need not make any Claim in this Case, because there was no Transmutation of the Possession, so they could take no Notice of the Fine.

'Tis true John Basket entred by their Consent, but still as Tenant at Will to them; and the Acts done by him after his Entry will not devest this Term, for tho' he made a Bargain and Sale of the Lands, yet nothing will pass thereby but what of Right ought to pass.

He likewise demised the Lands to Under-Tenants for Years, but 'tis not found that they entred; but admitting they did enter, yet that could not displace the Term, for these Tenants claimed no more than for one or two Years, and made no Pretence to the whole Term.

But if by either of these Acts the Term should be devested; yet still it must be at the Election of those who have the Interest in it. Dyer 61, 62. 173.

The Case of * Blunden and Baugh, which is grounded upon Littleton's Text Sect. 588. is an Authority to this Purpose, which was, The Father was *Tenant in Tail*, and his Son was *Tenant at Will*, who made a Lease for Years, then both Father and Son join in a Fine to the Use of the Son for Life, and to *Elizabeth* his Wife for Life, the Remainder to the Heirs Males of the Body of the Son, who died without Issue Male; the Lessee being in Possession made a Conveyance of the Estate by Bargain and Sale to *Charles* Lord *Effingham*, who was Son and Heir of the Tenant in Tail, who made a Lease to the Plaintiff, who was ousted by the Defendant *Elizabeth*. * Cro. Car. 302. 1 Rol. Abr. 661.

The Question in which Case was, Whether by the Entry of the Son, who was Tenant at Will. and his making of this Lease, the Father was disseised of the Freehold? And it was held not, for it was found in that Verdict, that he occupying at Will, and entring by his Father's Assent, the Lease was also intended to be made by his Assent.

But on the other Side it was said, That this Fine was a Bar by the express Words of the Statute of H. 7. which excludes in all Cases but where there is Fraud, or the Person is incapable, or where the Right to be barred is not devested. Econtra. 4 H. 7. c. 24.

In this Case John Basket had an Interest and present Right, and tho' it be closed with a Trust, yet that will not make any Difference.

Cro Car. 550. 10 Co. 56.

1. Here is no Fraud, for the Fine was levied by Tenant in Tail in Possession; but if there had been Fraud, it ought to be found, otherwise it shall not be presumed.

This is not like Blunden's Case, for there the Son was Tenant at Will, but 'tis not found by this Verdict that John occupied at Will.

There is no Difference between this Term and a Trust of a Term to attend the Inheritance, whose Interest shall be barred by such a Fine and Non-claim, because the Trust is included in the Fine, and therefore the Trustees not making of their Claim within the five Years are for ever excluded.

5 Co. 123.

It cannot be denied but a Term for Years is such an Interest which may be barred by Fine, 'tis Saffin's Case expressly, which was a Lease for Years to commence in futuro, after a Lease then in Being should be determined; the first Lease ended; the second Lessee did not enter, but the Reversioner did, and made a Feoffment, and levied a Fine, and five Years passed without Entry or Claim by the second Lessee; it was adjudged that this Fine was a Bar to him, for when his future Interest commenced, then and not before he had such a present Interest in the Land, which might be devested, and turned to a Right.

To which it was answered, That this differs from Saffin's Case, which was an interesse Termini, and the Case of Alport, which was an executory Devise.

If John Basket had still continued in Possession, it might have altered the Case; but he died, and his Wife entred, and then the five Years passed without any Claim. Adjornatur.

Evans *versus* Crocker.

In *Ejectment*, where the Entry seems to be before the Title, yet the Declaration is good.

A Special Verdict in Ejectment was found in Ireland, and Judgment given there for the Plaintiff; and now a Writ of Error was brought in this Court, and the Common Error assigned. The Objection was to the Declaration, which was, That the Plaintiff declared upon a Demise made 12 Junii, &c. Habendum a prædicto duodecimo Die Junii (which must be the 13th Day of the same Month) usq; &c. Virtute cujus quidem Dimissionis he entred, &c. and that the Defendant, postea scilicet eodem duodecimo Die Junii, did eject him, &c. So that it appears upon the Face of the Declaration, that the Defendant entred before the Plaintiff

Plaintiff had a Title; for the Lease commenced on the 13th of June, and the Entry was on the 12th of that Month.

And it was said, that this agrees with a former Resolution in this Court, where the Lease was made the 24th of June for five Years Habendum a Die datus, which must be the 25th, by Vertue whereof the Plaintiff entered, and that the Defendant postea, scilicet 24° Junii, did eject him, which must be before the Commencement of the Lease. Siderfin. 8. 2 Co. 96.

Curia. The Plaintiff entred as a Disseisor by his own shewing, and thereupon Judgment was reversed.

Rex *versus* Kingsmill.

QUO Warranto against the Defendant, to shew Cause why he executed the Office of a Bailiff of the Hundred of Barnstaple. Grant of an Hundred, where good &c.

The Defendant pleaded, that the said Hundred was an ancient Hundred, and that the Office of Bailiff was an ancient Office, and that the Hundred Court was an ancient Court held from three Weeks to three Weeks before the Steward thereof; that the Return of Writs was an ancient Liberty and Franchise which did belong to the said Bailiff; that King Charles I. was seized of the said Franchise Jure Coronæ in Fee, who by Letters Patents dated, &c. did grant the same to one North, *Habendum* the said Hundred to him and his Heirs, and that by several mesne Assignments it came to, and was vested in the Defendant, and so he justified to have Retorna Brevium.

To this Plea the Plaintiff demurred.

And for the King it was argued, That this Claim was not good.

First, as to the Manner of the Grant as 'tis here pleaded, viz. That the King was seised in Fee, &c. and that he granted the Franchise *Habendum* the said Hundred.

That such a Grant can never include the Hundred, for nothing can pass in the Habendum, but what was mentioned in the Premisses.

2. The Defendant hath derived a Title from the Crown to this Office of a Bailiff, which must be either by Grant or Prescription.

It

It cannot be by Grant, for 'tis a Question whether the Hundred Court can now be separated from the County Court; it hath been derivative from it in former Times, when the Sheriffs did let those Hundreds to farm to several Persons, who put in Bailiffs errant to the great Oppression of the People, which was the Occasion of the making of the Statute of Ed. 3 by which such Hundreds were united and rejoined to the Counties, as to the Bailiwicks thereof, except such as were then granted in Fee by the King or his Ancestors.

14 E. 3. c. 9.

4 Inst. 267.

Now these Hundreds were usually granted to Abbots and other religious Persons, and their Possessions coming afterwards to the King by the Dissolution of their Abbies and Monasteries, are now merged in the Crown, and cannot be regranted after the making of that Statute.

31 H. 8. c. 13.

And as the Defendant cannot have a Title by Grant, so he hath not prescribed to have this Office; 'tis true, the Plea sets forth that 'tis an antient Office; but that is not a Prescription, but a bare Averment of its Antiquity.

But admitting he had alledged it by Way of Prescription, he could not do it by a Que Estate to have Retorna Brevium.

14 H. 4. 89.

A Man cannot prescribe to have Cognizance of Pleas in an Hundred Court, he may in a County Palatine, because 'tis of a mixed Jurisdiction.

Abbot de Strata Marcella.

Neither can he prescribe to have Return of the King's Writs, because they are Matter of Record.

Econtra.

Here is a good Title pleaded.

It was never yet denied, but that the King may be seized in Fee of an Hundred, and that he may grant Retorna Brevium; the Statutes are plain in it, for otherwise how came any Lords to have Hundreds in Fee, but by the King's Grants?

14 E. 3. c. 9.

And 'tis as plain, that Hundreds may be divided from the County; for else to what Purpose was the Statute of Lincoln made, which adjoins Hundreds and Wapentakes to the Counties, and provides that they shall never be separated again? This shews that they were divided at that Time.

2 E. c. 12.

The Objections which have been made are, viz. That the Defendant cannot have a Title to this Office by Grant, and he hath not made any Prescription to it.

The Reasons given why he could not have it by Grant were, because ancient Hundreds, which were united to the Counties by the Statute of Ed. 3. could never afterwards be divided from them by any Grant of the King, and those which were excepted in that Statute, as being granted in Fee by the King or his

Ancestors, when they come again to the Crown cannot be regranted, because they are merged in it.

In Answer to which it was said, That such ancient Liberties which were created by the Crown, and did subsist by the King's Grant before the Statute of Ed. 3. when afterwards they came to the King were not merged, but remained a distinct Interest in him.

The Hundred of Gartree in the County of Leicester was such a Liberty; it was an ancient Hundred, and granted by Ed. 2. to John Sedington, not in Fee, but durante beneplacito Regis; this Grant was long before the making of the Statute of Ed. 3. and yet afterwards this very Hundred was granted to several other Persons by the succeeding Kings of England, which shews it was not merged in the Crown when it came to the King.

Cole *versus* Ireland. Raym. 360.

The other Objection was, That Retorna Brevium doth not lie in Prescription.

Now as to that, tho' it be true that no Title by Prescription can be made to such Franchises and Liberties which cannot be seized as forfeited before the Cause of Forfeiture appears on Record, because Prescription being an Usage in pais, doth not extend to such Things which cannot be had without Matter of Record: Yet my Lord Coke is clear that a good Title may be made to hold Pleas, Leets, Hundreds, &c. by Prescription only, without Matter of Record.

1 Inst. 114. b.

But notwithstanding what was said to maintain this Plea, Judgment was given against the Defendant.

Rex *versus* Griffith.

Indictment for Murder, the Party was found guilty of Manslaughter, and pleaded his Pardon, and afterwards the Indictment was quashed to save the Forfeiture of his Goods.

THE Defendant was convicted of Manslaughter at the Old Bayly, and the Record being removed into this Court by Certiorari, he pleaded his Pardon, and had Judgment, Quod eat inde sine Die.

But being once convicted, the Dean and Chapter of Westminster did seize his Goods as forfeited by that Conviction, who thereupon (altho' he was out of the Court by that Judgment) yet he moved by his Counsel to quash the Indictment.

The Exceptions taken were, viz.

That the Indictment was, Per Sacramentum duodecim proborum & legalium Hominum jurat' & onerat' *præsentat' existit* Modo & Forma sequen'.

Midd. *ss.* Juratores pro Domino Rege *præsentant*, &c.

That there was no Precedent to warrant such an Indiament, for this may be the Presentment of another Jury; it being very incoherent to say that it was presented by the Oaths of twelve Men, that the Jury do present.

It ought to be, præsentat' existit quod, &c. and so is the Form of this Court, as the Clerk of the Crown informʼd them.

2. They present, that Griffith and two others did make an Assault on the Body of the Deceased, and that quidam Johannes in Nubibus did wound him with a Gun, so that 'tis uncertain who did shoot, and what Gun was discharged, which ought to be certainly laid in the Indiament.

4 Co. 44. b. Vaux's Indictment for Poisoning Ridley was, That the said Ridley not knowing the Beer to be poisonʼd, but being persuaded by Vaux, recepit & bibit, but did not say Venenum prædictum; and so it not appearing what Thing he did drink, (which ought to have been expressly alledged) the Indiament was held sufficient.

And the Reason is plain, for an Indiament for Felony being a Declaration for the King against the Life of a Subject, ought to set forth a sufficient Certainty of the Fact, which shall not be supplied either by Argument, or any Intendment whatsoever.

5 Co. 122. b. And therefore in Long's Case, the Defendant was indicted for discharging a Gun upon Long, Dans eidem Henrico Long mortale Vulnus, and doth not say percussit; for which Reason that Indictment was also held insufficient, because in all Indictments for Murder they ought expressly to alledge a Stroke given.

For these Reasons the Indiament was quashed, and a new Roll was made, on which this Indiament and Certiorari were both entered, and Judgment quod exoneretur, and this was done to avoid the Seizure.

And afterwards, in Michaelmas Term, primo Will. & Mar. it was said by the Chief Justice, that it must be intended these were two Persons, for no Court would justify such a Judgment.

Anonymus

Anonymus.

IN Assault and Battery, the Defendant pleaded a Release of all Actions, &c.

The Plaintiff replied, That the Release was gotten by Duress, &c.

After a Traverse you must not conclude to the Country.

The Defendant rejoined, and shewed Cause why it was not gotten by Duress, but that he sued forth a Capias, and did arrest him, &c. and that the Release was voluntary, &c.

The Plaintiff surrejoins, and saith, That it was gotten by Duress, absque hoc, that it was voluntary, Et hoc petit quod inquiratur per Patriam.

Upon this Issue the Cause was tried, and the Plaintiff had a Verdict; and now it was moved in Arrest of Judgment, that he ought not to conclude to the Country after a Traverse, because a Traverse it self is Negative, and therefore the Defendant ought to have joined Issue in the Affirmative; 'tis true, if Issue had been joined before the Traverse, it might have been helped by the Statute of Jeofails; but it was not so in this Case, and therefore the Judgment was arrested.

Dyer 353. a. 1 Ins. 126. a. Cro. Car. 316. Sid. 341. 2 Cro. 588. 2 Rol. Rep. 186.

Hitchins *versus* Basset, *Mil.*

IN Ejectment upon the Demise of Mr. Nosworthy, the Jury found a special Verdict.

The Substance of which was,

Viz. That Sir Henry Killigrew was seised in Fee of the Lands in Question in the County of Cornwal, and being so seised, did in the Year 1644. devise the same to Mrs. Berkley for Life, Remainder over to Henry Killigrew in Tail, and that he made Mrs. Berkley Executrix of his Will, which was found in hæc Verba.

That afterwards, in the Year 1645. the said Sir Henry Killigrew made aliud Testamentum in Writing, but what was contained in the said last mentioned Will, Juratores penitus ignorant.

They find, That Sir Henry Killigrew, in the Year 1646. died seised of those Lands, and that Mrs. Berkley and Mr. Killigrew conveyed the same to Mr. Nosworthy's Father, whose Heir he is, and that the Defendant Sir William Basset is Cousin and Heir to Sir Henry Killigrew, *&c.*

A subsequent Will which doth not appear, shall not be a Revocation of the former. Hardress 374. Infra 218, 258. Shower 137 Cases Adj. 147. 2 Salk 292.

The Question upon this special Verdict was, Whether the making of this last Will was a Revocation of the former or not?

It was argued this Term by Mr. Finch, and in Michaelmas-Term following by Serjeant Maynard, for the Plaintiff, that it was not a Revocation.

In their Arguments it was admitted, that a Will in its Nature was revocable at all Times, but then it must be either by an express or implied Revocation.

That the making of this latter Will cannot be intended to be an implied Revocation of the former; for if so, then the Land must also be supposed to be devised contrary to the express Disposition in the first Will, and that would be to add to the Record, which finds, Viz. That what the last Will was, penitus ignorant.

It is possible that a subsequent Will may be made so as not to destroy but consist with a former; for the Testator may have several Parcels of Land, which he may devise to many Persons by divers Wills, and yet all stand together.

A Man may likewise by a subsequent Will revoke Part and confirm the other Part of a former Will; and therefore admitting there was such a Will in this Case, 'tis still more natural that it should confirm than revoke the other.

If the Testator had purchased new Lands, and had devised the same by a subsequent Will, no Person will affirm that to be a Revocation of the former Will.

When a Man hath made a Disposition of any Part of his Estate, 'tis a good Will as to that Part; so is likewise the Disposal of every other Part; they are all several Wills, tho' taken altogether, they are an entire Disposition of the whole Estate.

Nothing appears here to the contrary, but that the latter Will may be only a Devise of his personal Estate, or a Confirmation of the former, which the Law will not allow to be destroyed without an express Revocation.

Cro.El. 721. The Case of Coward and Marshal is much to this Purpose, which was, a Devise in Fee to his younger Son; and in another Will (after the Testator's Marriage to a second Wife) he devised the same Lands to his Wife for Life, paying yearly to his younger Son 20 s. It was the Opinion of Anderson and Glanvil, that both these Wills might stand together, and that one was not a Revocation of the other, because it appeared by the last Will that he only intended to make a Provision for his Wife, but not to alter the Devise to his Son.

So where a Man had two Sons by several Venters, and devises the Lands to his eldest Son for Life, and to the Heirs Males of his Body, and for Default of such Issue to the Heirs Males of his second Son, and the Heirs Males of their Bodies, Remainder to his own right Heirs, and then made a Lease of 30 Years to his youngest Son, to commence after the Death of the Testator: The youngest Son entred, and surrendred the Term to his eldest Brother, who made a Lease to the Defendant, and then died without Issue; afterwards the youngest Brother entred, and avoided this Lease made by his Brother. It was held, That the Lease thus made to him was not a Revocation of the Devise of the Inheritance to his Brother, tho' it was to commence at the same Time in which the Devise of the Inheritance was to take Effect, but it was a Revocation quoad the Term only, that the elder Brother should not enter during that Time, for the Devise shall not be revoked without express Words; and that tho' the Testator had departed with the whole Fee without reserving an Estate for Life to himself, yet the Law created such an Estate in him, till the future Use should commence; and in such Case the right Heirs cannot take by Purchase, but by Descent; so that here the Inheritance in Fee-simple was not vested in the elder Brother by Descent, for then the Lease which he made would be executed out of the Fee, and the younger Brother would be bound thereby.

Cro. Car. 24. 2 Cro 690. Hodgkinson *versus* Whood. Co. Lit. 22. b. 1 Co. 104 a. 319. b.

But in the Case at the Bar there is no Colour of a Revocation.

1. Upon the Nature of the Verdict, to which nothing can be added, neither can it be diminished, for whatever is found must be positive, and not doubtful, because an Attaint lies if the Verdict be false.

Therefore the Court cannot take Notice of that which the Jury hath not found: Now here the Entry of the Judgment is; Viz. Quibus lectis & auditis, & per Curiam hic satis intellectis, &c. But what can be read or heard where nothing appears?

That Case in the Year-Book of the 2 R. 3. comes not up to this Question, it was an Action of Trespass for the taking of his Goods.

2 R. 3. f. 3

The Defendant pleaded, That the Goods did appertain to one Robert Strong, who before the supposed Trespass devised the same to him, and made him Executor, &c.

The Plaintiff replied, That the said Strong made his last Will, and did constitute him Executor.

And

And upon a Demurrer to this Replication, because he had not traversed that the Defendant was Executor, it was argued for the Plaintiff, that this last Will was a Revocation of the former, for tho' there were no express Words of Revocation, yet by the very making another, the Law revoked the former; and to prove this, two Instances were then given, viz. That if a Man devise his Lands to two, and by another Will gives it to one of them and dies, he to whom 'tis devised by the last Will shall have it.

So likewise, if the Testator by one Will giveth Lands to his Son, and by another Will deviseth the same again to his Wife, then makes an Alienation, and taketh back an Estate to himself, and dieth; and in an Assise brought between the Widow and the Son, he was compelled by the Court to shew that it was his Father's Intention that he should have the Land, otherwise the last Devisee will be entitled to it.

Now both these Instances are not sufficient to evince that the last Will in this Case was a Revocation of that under which the Plaintiff claims, because those Wills were contradictory to each other; for by one the Land was devised to the Son, and by the other to the Wife, they both had their Existence at one and the same Time, and it appeared they were made to distinct Purposes; but here no Body can tell what was designed or intended by the Testator in this subsequent Will.

Cro. Car. 51. *Eyre's* Case. Godolph. 443. Perkins 92. b.

And therefore it hath been held, That where a Man devised Legacies to his two Brothers, and afterwards in his Sickness was asked to leave Legacies to his said Brothers, he replied he would leave them nothing, but devised a small Legacy to his Godson, and died. This Discourse was set down in a Codicil, which, together with the Will, was proved in common Form: This Codicil was not a Revocation of the Legacies given to the Brothers, because the Testator took no Notice of the Will which he had made in the Time of his Health, and non constat what he intended by these Words which were set down in the Codicil.

If therefore doubtful Words shall not make a Revocation of a former Will, a fortiori, a subsequent Will, especially when the Contents of such Will do not appear, shall not revoke a former.

Econtra. It was argued for the Defendant. And

The only Objection is, That a latter Will being made, and it not appearing to the Jury what was contained in that Will, it can be no Revocation, because no express Words of Revocation can be found, or any Thing which is contradictory to the first

Will, and without the one or the other, a former Will cannot be revoked.

But this is contrary to all the Authorities in the Books, which shew that a Testament which is good in the Beginning, may become void by making of a subsequent Will, by Words of Revocation, or by Words contradicting each other; for in such Cases, 'tis not doubted but the first Will is revoked.

Linwood 175. Swinb. 7 Par. Sect. 14. 2 H. 5. 8. pl. 3. Office of Ex. 443.

But the Meaning must be, That by the very making of a latter Will the first is become void.

This may be collected from the Nature of a Will, which a Man hath Power to alter in Part, or in all, at any Time during his Life; but when he makes a new Will, it must be presumed that he declared his whole Mind in it; for if his Intentions are to alter any Part, the Law hath appointed a proper Instrument for that Purpose, which is a Codicil, but when he maketh aliud Testamentum, 'tis a Sign that he intended nothing of his former Will should take any Effect, when he had so easy a Method to alter it in Part.

Every subsequent Act of the Testator shews, that he intends a Revocation, either by Word or Deed; and there is great Reason why it should be so, because every Revocation of a Will is in the Nature of Restitution to the Heir.

It cannot be denied but that a Will may be revoked by Words without Writing, before the making of the Statute against Frauds, &c. As if a Man should say, that he would alter his Will when he came to such a Place, and he should die before he came thither, this is a Revocation.

1 Roll. Abr. 614. Dyer 310. b.

But it never was yet controverted but a Revocation may be by Deed; as if a Man devise Lands to another, and afterwards makes a Feoffment to the Use of his Will, this was always held a Revocation.

1 Rol. Abr. 614.

So it is if Lands which are well given by a Will are afterwards by another Will devised to the Poor of the Parish, tho' this last Will is void, because the Devisees have not a Capacity to take, yet 'tis a Revocation of the first Will; and shall a Will which is lost be of less Authority than such which is void?

1 Roll. Abr. 614. pl. 4.

'Tis not denied but that there may be a subsequent Will which may not contradict the first; so is Coward's Case, where both Wills did appear to be consistent; but that is not parallel with this, because the Jury hath found that the Testator made aliud Testamentum, which Word aliud imports a distinct Will from the former.

'Tis agreed also, That a Man may make many Wills, and that they may stand together; and it must also be agreed, that such are but partial Wills, because they are but Pieces of the whole, tho' written in several Papers; but when 'tis found in general that aliud Testamentum was made, it must naturally be intended of his whole Estate.

The Case in the Year-book of Richard III. is an Authority in Point, where in Trespass the Defendant justified the taking of the Goods by Vertue of a Will by which they were devised to him, and of which Will he was made Executor.

The Plaintiff replied, That the Testator made another Will, and thereby did constitute him Executor; and this was held a good Replication, without a Traverse that the Defendant was Executor, because by the making of the second Will the other was void in Law; and therefore the shewing that he was Executor was not to void the first Will (which the Law doth adjudge to be of no Force) but to make to himself a Title to the Goods taken out of his Possession.

If a Man should make twenty Codicils without Dates, they may all stand together; but if he make two Wills without Dates, they are both void; the Reason is, because by the making of the latter Will the first is destroyed; and it being incertain which is the last, rather than the Rules of Revocation should be broken, they adjudge both to be void.

It cannot be reasonably objected, That this latter Will may devise the same Lands to the same Person; for why should a Man be thought so vain? Besides, if it was so, the Plaintiff should have claimed under that Will.

But this cannot be the same Will, because 'tis contrary to the Verdict, which hath not found it to be idem, but aliud Testamentum; besides 'tis in the Case of an Heir, who shall not be disinherited by an Intendment that the latter Will is the same with the first.

Neither can the Statute of Wills have any Influence upon this Matter. 'Tis true, at the Common Law no Land could be devised by a Will, but now by the Statutes of H. 8. Lands, &c. in Socage may be devised by Will; and if held in Knights Service, then only two Parts in three, but it must be by the last Will.

32 H. 8. c. 1.
34 H. 8. c. 5.
Godolph. 299.

Now how can any Man say, that this shall be a Devise of the Lands by the last Will of the Testator, when the Jury find he made aliud Testamentum; the Contents whereof are not necessary to be shewed, because the Defendant claims as Heir, and not as Executor.

It must not be intended that this Will shall confirm or stand with the other, because the Law is otherwise; and therefore if the Plaintiff would have supported his Will by which he claims, he ought to shew the other Will, by which it must appear that nothing is contradictory to it, or that it doth confirm the first; but if Presumptions shall be admitted, it must be in Favour of the Heir, for nothing shall be presumed to disinherit him.

Afterwards in Trinity Term, 5 Willielmi, Judgment was given for the Plaintiff, and a Writ of Error was brought in the House of Peers to reverse that Judgment, but it was affirmed. Cases in Parliament 146.

Anonymus.

A Writ of Error was brought to reverse a Judgment in the Common Pleas, in an Ejectment for Lands in the County of Essex, in which a Special Verdict was found, viz. That R. F. was seised in Fee of the Lands in question, who had Issue Two Daughters, { Frances, Jane. Frances had Issue, { Philip, Frances, Anne.

What Words in a Will make Tenants in Common.

R. F. the Father devised unto Philip, Frances, and Anne, the Children of his Daughter Frances. and to Jane his other Daughter, the Rents and Profits of his Manor of Spain for thirty Years, to hold by equal Parts, viz. the three Grandchildren to have one Moiety, and his Daughter Jane the other Moiety.

And if it happen that either of them should die before the thirty Years expired, then the said Term should be for the Benefit of the Survivor; and if they all die, then the same was devised over to other Relations.

Afterwards he made a Codicil in these Words, viz.

I give Power and Authority to my Executors to let my *whole* Lands for the Term of thirty Years for the Benefit and Behalf of my Children.

Anne, one of the Grandchildren, died without Issue.

Frances, another of the Grandchildren, died, but left Issue.

The first Question was, Whether the Power given to the Executors by the Codicil will take away that Interest which was vested in the Grandchildren by the Will?

Mr. Appleton argued, That it would not, because the Executors had only a bare Authority to let it or improve it for the Benefit of the Children, there was no Devise of the Land to them.

If Power be given to Executors to sell Lands, 'tis only an Authority and not an Interest in them; but a bare Authority only to let is of much less Importance.

2. After the Testator had devised the Profits of these Lands to his Grandchildren and Daughter equally to be divided during the Term, and had provided, that if any die without Issue, that then it should survive, and if all die, then to remain over to collateral Relations, &c.

Whether Frances, being dead, but leaving Issue, her Interest shall survive to Philip, or go to such her Issue?

As to that, he held, That the Testator made them Tenants in Common by equal Parts, and therefore he devised it by Moieties, in which there can be no Survivorship.

2 Cro. 448. 1 Rol. Abr. 833. King *versus* Rumbal. Cro. Car. 185.

'Tis like a Devise to the Wife for Life, and after her Decease, to his three Daughters, equally to be divided, and if any of them die before the other, then the Survivors to be her Heirs equally to be divided, and if they all die without Issue, then to others, &c. the Daughters had an Estate Tail, and there was no Survivorship.

So in this Case it shall never go to the third Grandchild as long as any Issue of the second are living.

Econtra.

On the other Side it was argued, That they are Jointenants, and not Tenants in Common, for the Testator having devised one Moiety to his three Grandchildren jointly by equal Parts, that will make them Jointenants.

But the Court were all of Opinion, that the Words in the Will shew them to be Tenants in Common, for equally to be divided runs into the Moieties. So the Judgment was affirmed.

Wood-

Woodward's *Case*.

THE Statute of 23 H. c. 9. prohibits a Citation out of the Diocese wherein the Party dwelleth, except in certain Cases therein mentioned; one whereof is, viz. Except for any Spiritual Cause neglected to be done within the Diocese whereunto the Party shall be lawfully cited.

One Woodward and others, who lived in the Diocese of Litchfield and Coventry, but occupied Lands in the Diocese of Peterborough, were taxed by the Parishoners where they used those Lands, for the Bells of the Church, and they refusing to pay this Tax, a Suit was commenced against them in the Bishop of Peterborough's Court, who thereupon suggested this Matter, and prayed a Prohibition, because they were not to be charged with this Tax, it being only for Church Ornament.

And a Prohibition was granted, the Reason given was, because 'tis a personal Charge, to which the Inhabitants only are liable, and not those who only occupy in that Parish, and live in another; but the Repairing of the Church is a real Charge upon the Land, let the Owner live where he will.

Church Ornaments are a personal Charge upon the Inhabitants, and not upon those who live elsewhere, tho' they occupy Lands in that Parish. Godb. 134. Pl. 4. 152. Pl. 29. 154. Pl.

DE
Term. Sanctæ Trin.

Anno 4 Jac. II. in Banco Regis, 1688.

Wright *Chief Justice.*
Holloway, Powel, Allybon, } *Justices.*

The Bishops *Case.* Friday, June 15th.

THE King having set forth a Declaration for Liberty of Conscience, did on the 4th Day of May last, by Order of Council, enjoin, That the same should be read twice in all Churches, &c. and that the Bishops should distribute it through their respective Dioceses, that it might be read accordingly.

The Archbishop of Canterbury (who then was) together with six other Bishops, petitioned the King, setting forth, That this Declaration was founded upon a dispensing Power, which had been declared illegal in Parliament, and therefore they could not in Honour or Conscience make themselves Parties to the Distribution and Publication of this Declaration, who thereupon were summoned before the King in Council, and refusing there to give Recognizance to appear before the Court of King's-Bench, they were committed to the Tower by Warrant of the Council-Board.

The Attorney-General moved for a Habeas Corpus, returnable immediate, and the same Morning in which that Motion was made, Sir Edward Hales Lieutenant of the Tower returned the same, and they were all brought into the Court.

The

The Substance of the Return was, viz. That they were committed to his Custody by Warrant under the Hands and Seals of the Lord Chancellor Jefferies, and also naming more of the Lords of the Privy-Counsel, Dominos Concilii, for contriving, making and publishing a seditious Libel against the King, &c.

Then it was prayed, that the Return might be filed, and that the Information which was then exhibited against them for this Crime might be read, and that they might all plead instanter.

Serjeant Pemberton, Mr. Finch, and Mr. Pollexfen, opposed the Reading of it, and moved, that the Bishops might be discharged, because they were not legally before the Court; for it appears upon the Return, that there is no lawful Cause of Commitment, and for that two Reasons:

1. Because the Persons committing had not any Authority so to do; for upon the Return it appears, that they were committed by several Lords of the Council; whereas it should have been by so many Lords in Council, or by Order of Council.

2. They ought not to be committed for this Fact, which is only a Misdemeanour. The Bishops are Peers; and therefore the Process ought to be a Summons by way of Subpœna out of the Crown-Office, and not to commit them the first Time. If a Man comes in voluntarily, he cannot be charged with an Information; neither can a Person who is found in Court by any Process be so charged if it be illegal, as if a Peer be committed by Capias.

Justice Allybon replied, That when a Commitment was made by the Lord Chief Justice of this Court, his Name is to the Warrant, but not his Office: 'Tis not said, Committitur per Capitalem Justiciarium Angliæ, &c. for he is known to be so; and why should not a Commitment by such Persons, Dominos Concilii, be as good as a Commitment by Sir Rob. Wright, Capitalem Justiciarium? That it was enough for the Officer to return his Warrant; and when that is done, the Court will presume that the Commitment was by the Power which the Lords in Council had, and not by that Power which they had not.

To which it was answered by Mr. Finch, That the Lord Chief Justice always carries an Authority with him to commit wherever he goes in England; but the Lords of the Privy-Council have not so large a Power; for tho' they be Lords of the Counsel always, yet they do not always act in Council.

Then

Then the Statute of 17 Car. 1. cap. 10. was read, in which there is Mention made of a Commitment by the Lords of the Privy Council, &c.

But it was answered, That that Statute was to relieve against illegal Commitments, and those enumerated in that Act were such only, and none else.

And it was strongly insisted, that Peers of the Realm cannot be committed at the first Instance for a Misdemeanour before Judgment; and that no Precedent can be shewed where a Peer hath been brought in by Capias, which is the first Process for a bare Misdemeanour.

Crompt. Jurisdiction 33. Dyer 315. 4. Inst. 25. Regist. 287.

The constant Proceedings in the Star-Chamber upon such Informations were, viz. first, the Lord Chancellor sent a Letter to the Person, then if he did not appear, an Attachment went forth.

Sir *Baptist Hick's* Case. Hob.

The King's Counsel answered, That a Peer may be committed for the Breach of the Peace, for which Sureties are to be given; and can there be any greater Breach of the Peace than a Libel against the King and Government? 'Tis certainly such a Breach of the Peace for which Sureties ought to be demanded; for where there is any seditious Act, there must be a Breach of the Peace; and if Sureties are not given, then the Person must be committed.

The Objections were over-ruled by Three Judges.

Then the Information was read, which in Substance was, viz. That the King, by Vertue of his Prerogative, did on the 4th Day of April, in the third Year of his Reign, publish his gracious Declaration for Liberty of Conscience, which was set forth in hæc verba:

That afterwards, viz. 27 Aprilis, in the fourth Year of his Reign, the King did publish another Declaration, reciting the former, in which he expressed his Care, that the Indulgence by him granted might be preserved, &c. That he caused this last Declaration to be printed; and to manifest his Favour more signally towards his Subjects, on the 4th Day of May, 1688. it was ordered in Council, That his Declaration dated the 27th Day of April last, be read on two several Days in all Churches and Chapels in the Kingdom, and that the Bishops cause the same to be distributed thro' their several Dioceses, &c.

That after the Making of the said Order, *&c.* the Bishops (naming them) did consult and conspire amongst themselves to lessen the Authority and Prerogative of the King and to elude the said Order; and in further Prosecution of their said Conspiracy, they with Force and Arms did on the 18th Day of May, &c. unlawfully

lawfully, maliciously, &c. frame, compose, and write a Libel of the King, subscribed by them, which they caused to be published under the Pretence of a Petition.

Then the Petition was set forth, in hæc verba:

In Contemptum dicti Domini Regis, &c.

The King's Counsel moved, That the Defendants might plead instanter, for so (they said) is the Course of the Court when a Man is brought thither in Custody, or appears upon Recognizance.

But the Counsel on the other Side prayed an Imparlance, and a Copy of the Information, and argued, That the Defendants ought not to plead instanter, because their Plea ought to be put in Writing, and that they ought to have Time to consider what to plead; that it was impossible to make any Defence when they did not know the Accusation, and that the Practice of the Court anciently was with them.

'Tis true, when a Subpœna is taken out, and the Party doth not appear, but is brought in by Capias, he shall plead instanter; and the Reason is, because he hath given Delay to the Cause: So 'tis likewise in Cases of Felony or Treason, but not to an Information for a Misdemeanor.

Then the Clerk of the Crown informed the Court, That it was the Course to plead instanter in these following Cases, viz. when the Person appears upon a Recognizance, or in propria Persona, or is a Prisoner in Custody upon any Information for a Misdemeanor where no Process issued out to call him in.

As to the Objection, that the Defendants cannot make any Defence without a Copy of the Information; the Usage is otherwise even in Cases where a Man's Life is concerned; and what greater Difficulty can there be to defend an Accusation for a Misdemeanor, than a Charge for High Treason? Certainly the Defendants all know whether they are innocent or not.

These Points being over-ruled by the Court, the Archbishop offered a Plea in Writing; the Substance of which was, That they (naming all the Defendants) were Peers of Parliament, and ought not to be compelled to answer this Misdemeanor immediately, but they ought to appear upon due Process of Law, and upon their Appearance to have a Copy of the Information, and afterwards to imparl; and because they were not brought in by Process, they pray the Judgment of the Court.

This Plea was offered, to the end that what was denied before upon a Motion, might be settled by the Opinion of the Court, but it was over-ruled.

Then they pleaded severally Not guilty, and were tried at the Bar a Fortnight afterwards by a Middlesex Jury, and acquitted.

Lewkner *versus* Mountague. *In the* Common Pleas.

Where an Averment may be made of another Person, so as it consists with the Condition of a Bond.

AN Action of Debt was brought upon a Bond against the Defendant, in which Bond the said A. B. the elder, and A. B. the younger, were jointly and severally bound in the penal Sum of 1000l. conditioned, That if the above-bounden A. B. (omitting the Word younger) do and shall forbear knowingly and wittingly to come to or write Letters unto C. the Wife of D. that then the Obligation to be void.

The Defendant pleaded, that he did not come to or write Letters to the said C. knowingly, &c.

The Plaintiff replied, that he exhibited an Information against A.B. the younger, (shewing in what Term) and that it was agreed between them, that, in consideration that he would forbear to prosecute the same, the said A. B. the elder, together with A. B. the younger should become bound to the Plaintiff in 1000 l. that the said A. B. the younger should not knowingly or wittingly come into the Company, &c. then sets forth the Bond and the Condition thereof at large, and avers, that A. B. in the Condition mentioned is A. B. the younger; and farther, that the said A. B. the younger did afterwards knowingly come into the Company, &c.

The Defendant rejoined, and said, that the Plaintiff ought not to aver, that the aforesaid A. B. the younger is the Person in the Condition of the said Bond, &c.

And upon a Demurrer, the Question was, Whether the Plaintiff was estopped by the Words in the Condition to make such an Averment.

It was argued for the Plaintiff, that he might make such an Averment which is to reduce a Thing to a Certainty which was very incertain before, if it be not repugnant in it self; nay, sometimes an Averment doth reduce contradictory Things to a Certainty.

'Tis plain, that A. B. the younger is bound in this Bond; the Objection is, that A. B. the elder being of the Name, and being likewise bound, that the Condition might refer to either.

'Tis agreed there are many Cases where a Man shall be estopped to aver against a Record; but this Averment is not contradictory to any Thing in the Record; for it appears by the Pleadings that the Information was prosecuted against A. B. the younger, and therefore he must be intended to be bound not to come to the said C. knowingly, &c.

If an Estate should be devised to A. and the Name of the Testator omitted in the Will, yet the Devise is good by averring of the Name, and by Proof that it was his Intention to give it him by his Will. 2 Leon. 35.

So if the Plaintiff should claim a Title under the Grant of such a Person Knight, and the Jury find he was an Esquire, but that the Knight and the Esquire are both the same Person, this is a good Declaration. Lit. Rep. 181, 223.

'Tis usual to make an Allegation, even against the express Words of a Condition to shew the Truth of an Agreement; as if Debt be brought upon a Bond of 100 l. conditioned to pay 50 l. within six Months; the Defendant pleaded the Statute of Usury. The Plaintiff replied, That he lent the Money for a Year; and alledged, that by the Mistake of the Scrivener the Bond was made payable in six Months. The Defendant rejoined, That it was lent for six Months only: And upon a Demurrer this was adjudged to be a good Allegation, tho' it was against the very Words of the Condition; which is a stronger Case than this at the Bar, because the Averment consists with the Condition of the Bond. Cro Car. 501.

If a Man should levy a Fine, and declare the Uses thereof to his Son William, and he hath two Sons of that Name, then an Averment is made that he intended to declare the Uses to his youngest Son of that Name; this Averment out of the Fine hath been adjudged good for the same Reason given already, which is, because it standeth with the Words thereof, and 'tis a good Issue to be tried. 4 Co. 71. 8 Co. 155. a. Dyer 146.

It cannot be objected that the Bond is illegal, being entred into for the not prosecuting of an Information, because a Noli prosequi was entered as to that Matter, so 'tis the Act of the Court.

Lastly, It was said, that every Estoppel must be certain to every Intent, which cannot be in this Case, for by the Words of this Condition 'tis incertain which of the Obligors shall be intended.

Econtra. It was argued, That an Estoppel is as well intended by Law as express'd by Words, that if an Averment can be taken, yet this is not well, because the Plaintiff hath absolutely averred, that A. B. in the Condition is A. B. the younger; he Econtra.

should have said, that A. B. in the Condition is intended A. B. the younger, which might have been traversed, and Issue taken thereon.

No Judgment was given, for this Case was ended by Compromise.

Hoil *versus* Clerk. *In the* Common Pleas.

A subsequent Will, though not made pursuant to the Statute, is a Revocation of a former V. infra 258. Antea 203.

THIS was a special Verdict in Ejectment for Lands in Wetherfield, in the County of Essex, upon the Demise of Abigail Pheasant.

The Jury find that one John Clark was seised in Fee of the Lands in Question, who by his last Will in Writing, bearing Date the 14th Day of September, in the Year 1666. devised the same to Benjamin Clark for Life, so to his first and second Sons, &c. in Tail Mail, and for Default of such Issue, then to his two Sisters for Life, Remainder over, &c.

This Will was attested by one Witness only.

They find that the said John Clark made another, dated the sixth Day of February, 1679. which was 13 Years after the making of his first Will, and that by this last Will he revoked all former Wills and Testaments by him made.

They find an Endorsement on this Will, written by the Testator himself in these Words,

Viz. My Will and Testament dated the 6th of *February*, 1679. and then published by me in the Presence of three Witnesses.

They find that this last Will was so published and attested by three Witnesses in his Presence, but that it was not signed by the Testator in their Presence.

They find that Benjamin Clark entred, and devised the Lands to Mary Micklethwaite, who made a Lease thereof to the Plaintiff for three Years, upon whom the Defendant entred.

This Case was argued at the Bar, and in this Term at the Bench Seriatim.

29 Car. 2. cap. 3.

The single Question was, Whether this last Will not being duly executed according to the Statute, is a Revocation of the first Will, or not?

It was admitted by all, That it was a good Will to pass the personal Estate; but as to the Point of Revocation, the Court was divided.

Justice Lutwich argu'd, that 'twas not a Revocation: He agreed that if the last Will hath any Respect to the first, it must be as a

Revocation, or not at all, which Revocation must depend upon the Construction and Exposition of the fifth Paragraph in the Statute of Frauds, *&c.* the Words whereof are,

Viz. That no Devise of Lands, *&c.* or any Clause thereof, shall be *Revoked* otherwise than *by some Codicil in Writing, or other Writing declaring the same*, or by burning, cancelling, tearing or obliterating the same by the Testator himself, or in his Presence, and by his Direction or Consent. But all Devises of Lands, *&c.* shall be good, until burnt, cancell'd, torn, *&c.* by the Testator, *&c.* or unless the same be altered by some other Will or Codicil in Writing, *or other Writing of the Devisor, signed in the Presence of three Witnesses*, declaring the same,

So that the Question will be, Whether a Will which revokes a former Will, ought to be signed by the Testator in the Presence of three Witnesses?

'Tis clear, that a Will by which Lands are devised ought to be so signed, and why should not a Will which revokes another Will have the same Formality?

The Statute seems to be plain that it should, for it says that a Will shall not be revoked, but by some Will or Codicil in Writing, or other Writing of the Devisor, signed by him in the Presence of three or four Witnesses declaring the same: Which last Clause is an entire Sentence in the Disjunctive, and appoints, That the Writing which revokes a Will, must be signed in the Presence of three Witnesses, &c.

Before the making of this Act it was sufficient that the Testator gave Directions to make his Will, tho' he did never see it when made, which Mischief is now remedied, not in writing the Will, but that the Party himself should sign it in the Presence of three Witnesses; and this not being so signed, but only published by the Testator, in their Presence, 'tis therefore no good Revocation.

Justice Street was of a contrary Opinion, that this was a good Revocation: That the Words in the fifth Paragraph of this Statute which altered the Law were,

Viz. That all Devises of Lands, *&c.* shall be in Writing, and signed by the Party so devising, or by some other Person in his Presence, and by his express Directions, and shall be attested and subscribed in the Presence of the Devisor, by three or four credible Witnesses.

In which Paragraph there are two Parts:

1. The Act of the Devisor, which is to sign the Will, but not a Word that he shall subscribe his Name in the Presence of three Witnesses.

2. The Act of the Witnesses, viz. That they shall attest and subscribe the Will in the Presence of the Devisor, or else the Will to be void.

But the first Paragraph is penn'd after another Manner, as to the Revocation of a Will, which must be by some Codicil in Writing, or other Writing declaring the same, signed in the Presence of three Witnesses.

Now here is a Writing declaring, that it shall be revoked, not expressly, but by Implication and tho' that Clause in the Disjunctive which says, that the Revocation must be by some Writing of the Devisor, signed in the Presence of three Witnesses, &c. yet in the same Paragraph 'tis said that it may be revoked by a Codicil or Will in Writing, and therefore an Exposition ought to be made upon the whole Paragraph, that the Intention of the Law may more fully appear.

Sid. 328. 1 Sand. 58.

Such a Construction hath been made upon a whole Sentence, where Part thereof was in the Disjunctive; as for Instance, viz. A Man was possessed of a Lease by Disseisin, who assigned it to another, and covenanted that at the Time of the Assignment it was a good, true, and indefeasible Lease, and that the Plaintiff should enjoy it without Interruption of the Disseisor, or any claiming under him; in this Case the Disseisee re-entred, and though the Covenant was in the Disjunctive, to defend the Assignee from the Disseisor, or any claiming under him; yet he having undertaken for quiet Enjoyment, and that it was an indefeasible Lease, it was adjudged that an Exposition ought to be made upon the whole Sentence, and so the Plaintiff had Judgment.

The Chief Justice Herbert was of the same Opinion with Justice Street.

Rex *versus* Grimes *and* Thompson.

Two are indicted for a Confederacy, one is acquitted, and that is the Acquittal of the other.

THE Defendants were indicted for being Common Pawn-Brokers, and that Grimes had unlawfully obtained Goods of the Countess of, &c. and that he together with one Thompson, per Confederationem & Astutiam, did detain the said Goods, until the Countess had paid him 12 Guineas.

Thompson was acquitted, and Grimes was found guilty, which must be of the first Part of the Indictment only; for it could not be per Confederationem with Thompson, and therefore it was moved in Arrest of Judgment, that to obtain Goods unlawfully, was only a private Injury, for which the Party ought not to be indicted.

To

To which it was answered, that a plain Fraud was laid in this Indictment, which was sufficient to maintain it; and that tho' one was acquitted, yet the Jury had found the other guilty of the whole.

But the Court were of Opinion, that the Acquittal of one is the Acquittal of both upon this Indictment, and therefore it was quash'd.

King *versus* Dillifton. *Hill.* 2 & 3 *Jacobi*, *Rot.* 494.

Infant not bound by a Custom. Lutw. 765. Shower 31, 83. 1 Salk. 386.

A Writ of Error was brought to reverse a Judgment in Ejectment, given in the Common-Pleas, for one Messuage and twenty Acres of Land held of the Manor of Swafling.

There was a special Verdict found, the Substance of which was, viz. That the Land in Question was Copyhold, held of the said Manor of Swafling in the County of Suffolk, and that Henry Warner and Elizabeth his Wife, in Right of the said Elizabeth, were seised thereof for Life, Remainder to John Ballat in Fee.

That the Custom of the said Manor was, That if any Customary Tenant doth surrender his Estate out of Court, that such Surrender shall be presented at the next Court of the said Manor, and publick Proclamation shall be made three Court Days afterwards for the Party to whose Use the Surrender was made, to come and be admitted Tenant, and if he refuseth, then after three Proclamations made in each of the said Courts, the Steward of the said Manor issueth forth a Precept to the Bailiff thereof to seise the Copyhold as forfeited.

They find that Henry Warner and his Wife, and John Ballat, made this Surrender out of Court to the Use of Robert Freeman and his Heirs, who died before the next Court, and that John Freeman, an Infant, was his Son and Heir.

That after the said Surrender, three Proclamations were made at three several Courts held for the said Manor, but that the said John Freeman did not come to be admitted Tenant; thereupon the Steward of the said Manor made a Precept to the Bailiff, who seised the Lands in Question as forfeited to the Lady, who entred and made a Lease to the Plaintiff, upon whom the Defendant re-entred.

The single Question upon this special Verdict was, Whether this was a Forfeiture, and so a good Seisure to bind the Right of an Infant.

It

It was argued for the Plaintiff in the Action, that it was a good Seiture, and a Forfeiture till the Infant should come of Age; for as a Copyhold is established by Custom, so likewise 'tis Custom which obligeth the Infant to the Conditions thereof; and therefore where one under Age hath an Estate upon a Condition to be performed by him, and that Condition is broken during his Minority, the Estate is lost for ever.

8 Co. 44 b. Whittingham's *Case*. Latch. 199. Jones 157.

In this Case the Custom obligeth the Heir to be admitted, that the Lord may be entitled to a Fine, which if he should lose, because his Tenant is an Infant, then that Privilege of Infancy works a Wrong, which the Law will not permit.

'Tis true, an Infant shall not be prejudiced by the Laches of another, but shall be answerable for himself; and therefore if he is Tenant of Lands, and the Rent should be unpaid for two Years, and no Distress can be found, a Cessavit lies against him, and the Lord shall recover the Land, because of the Non-performance which arises by his own Default.

So if one under Age be a Keeper of a Gaol, and suffer a Prisoner to escape out of Execution, an Action of Debt will lie against him upon the Statute of W. 2.

2 Inst. 382.

It was agreed, that such a Custom and Non-claim will not foreclose an Heir, who is an Infant and beyond Sea at the Time of his Ancestor's Death, though he is bound by the Custom to claim it at the next Court; but that if he will come over and tender himself, though, after a Seiture, he shall be admitted; and so shall the Person in this Case, if after his Minority he offer himself to be admitted.

8 Co. 100. *Sir* Rich. Letchford's *Case*.

But it cannot be denied, but that the Lord may seize when the Heir is beyond Sea till he return and tender himself to be admitted, and by the same Reason he may also seize in this Case during the Minority.

2 Cro. 226.

A Temporary Forfeiture is no new Thing in the Law; for if a Feme Covert be a Copyholder, and her Husband makes a Lease for Years without Licence of the Lord, 'tis a Forfeiture, and shall bind her during the Coverture.

Cro. Car. 7.

So the Law is, that the Lord may seize the Land till a Fine is paid, for 'tis a reasonable Custom so to do.

Cro. El. 351.

It hath been a good Custom for the Lord to assign a Person to take the Profits of a Copyhold Estate descended to the Infant during his Minority, without rendring an Accompt when he came of Age.

1 Leon. 266. 2 Leon. 239.

So that all that is to be done in this Case is to enforce the Infant to be admitted, that the Lord may be entitled to a Fine: The Inheritance is not bound, but the Land is only seised quousque.

Econtra. It was argued that here is a general Seisure, which cannot extend to an Infant, for he is not bound in a Writ of Right, much less in an Inferior Court after three Proclamations; but if this had been a Temporary Seisure, the Jury ought to have found it so, which is not done. Econtra.

There are many Authorities in the Books which affirm that an Infant is not obliged to be admitted during his Non-age, or to tender the Fine in Order to an Admittance; that the Law was settled in this Point, and therefore without any further Argument he prayed Judgment for the Defendant. 1 Leon. 100. 3 Leon. 221.

Afterwards, in Hillary Term, 1 Will. & Mar. this Case was argued seriatim at the Bench, the Judges being of a contrary Opinion to the Chief Justice for the affirming of the Judgment.

Justice Eyre premised two Things:

1. That he could not intend but that this Verdict had found an absolute Forfeiture, the Jury having no Way qualified it as to a certain Time, and therefore he would give a Judgment upon the whole Record.

2. He agreed that a Feoffment of an Infant was no Forfeiture at the Common Law, and that as a particular Custom may bind an Infant for a Time, so it may bar him for ever; but whether this Custom, as 'tis found in general Words, shall bind an Infant after three Proclamations is now the Question, he not coming then to be admitted.

And he held that it shall not, and that for these Reasons: 1 Inst. 380.

1. The Right of Infants is much favoured in the Law, and their Laches shall not be prejudicial to them as to Entry or Claim, upon a Presumption that they understand not their Right, and therefore in a Cessavit per Biennium, which is a Remedy given by the Statute of W. 2. and which extends to Infants who have not the Lands by Descent; for if a Cesser be in that Case the Infant shall have his Age, because the Law intends that he doth not know what Arrearages to tender. 2 Inst. 401. Westm. 2. c. 31.

'Tis admitted, that if an Infant doth not present to a Church within six Months, or doth not appear within a Year, that his Right is bound, but this is because the Law is more tender of

the

the Church, and the Life of a Man, than of the Privileges of Infancy.

So if an Office of Parkship be given or descends to an Infant, if the Condition in Law annexed to such an Office (which is Skill) be not observed, the Office is forfeited.

But that a Proclamation in a base Court should bind an Infant, when he is not within the Reason of the Custom, is not agreeable either to Law or Reason.

Cro. Jac. 80. Cro. El. 879. Noy 42. 1 Rol. Abr. 568.

2. All Customs are to be taken strictly when they go to the Destruction of an Estate; and therefore a Custom was, That if a Copyholder in Fee surrender out of Court, and the Surrendree doth not come in after three Proclamations, the Lord shall seize it. A Copyholder in Fee surrendred to another for Life, the Remainder over in Fee, if the Tenant for Life will not come in, he in the Remainder shall not be barred, for the Custom shall be intended to extend only to those in Possession.

But the Infant in this Case is not within the Letter of the Custom, for 'tis found that the surrender was made to one Freeman, who died before the next Court Day; and that John Freeman the Infant was his Son and Heir, so they have found a Title in him; for the Word Heir is not here a Word of Purchase, but of Limitation.

Jones 157. Noy 92.

3. Infants are not bound by other Customs like this, as a Custom that every Copyholder who makes a Lease of his Land shall forfeit it; but this doth not conclude an Infant.

4. There is not any Necessity to construe an Infant to be within this Custom, for 'tis not found that the Lord was to have a Fine upon Admittance; and 'tis no Consequence to say that the Lord shall have a Fine, because usually Fines are taken upon Admittances; for an Infant may be admitted to a Copyhold, but not be bound to tender his Fine at any Time during his Nonage.

1 Leon. 100. 3 Leon. 221.

Justice Gregory was of the same Opinion, which he chiefly grounded upon Sir Richard Letchford's Case, between which and the Case at the Bar he said their was no material Difference, only in that Case the Heir was beyond Sea, and in this at the Bar, he was an Infant.

2 Cro. 226. Latch. 196. Godb. 365. Jones 391. Dyer 104.

'Tis very true, that the Books mention Seisure quousq; 'tis so said by Justice Williams in Croke, but he gives no Reason for it, 'tis only an Opinion obiter; but it is clear by many Authorities, that Infants may be bound by Acts of Necessity, and so they may by a Custom.

Justice Dolben of the same Opinion, which he said was agreeable to the Reason of the Law in parallel Cases: An Infant is privileged in a Fine, for he is excepted by the Statute, because he knows not how to make his Claim.

He said, this was likewise agreeable to the Custom of 26 Manors of which he was formerly Steward; for in such Cases he always marked the Court-Roll, Nulla Proclamatio quia Infans.

It cannot be a Forfeiture quousque, because an Infant is wholly exempted by the Custom, and therefore 'tis no Forfeiture at all.

'Tis an Objection of no Moment, to say that the Lord by this Means will lose his Fine, and that he hath no Remedy to make the Infant when of Age to be admitted, for no Fine is due to him before Admittance.

But this Objection will be of less Weight, if the Loss of the Infant be compared to that of the Lord, who loseth only the Interest of a Fine before Admittance; and shall this Infant, who is now but three Years of Age, lose the Profits of his Estate for 18 Years?

But there may be a Way found out that neither may lose; for if it should be, that when the Infant comes of Age, his Estate should be then forfeited, if he doth not tender himself to be admitted after three Proclamations: Now upon his Admittance the Lord may set a reasonable Fine, having Respect to the Length of Time in which it was detained from him.

Stowel's Case was no more but this, viz. a Disseisor levied a Fine with Proclamations, and lived three Years, his Heir being under Age, and the five Years incurred after the said Heir came of Age, and then he entered within a Year, and his Entry was adjudged unlawful. But that will not concern this Case, because it was Judgment upon the Statute of H. 7. for the five Years being once attached, and begun in the Life of his Ancestor, shall incur and go on, and bind the Infant, if he do not pursue his Claim within that Time after he comes of Age: Pl. Com. 356. 4 H. 7. c. 24.

But 'tis to be observed, That my Lord Dyer in the Argument of that Case said nothing of a Seisure quousque.

The Chief Justice was of a contrary Opinion from the other three Justices, and that the Judgment ought to be reversed.

Because until the Infant is admitted, the Estate remains in the Surrenderor, and without Admittance he cannot enter but by a special Custom to warrant it; and for this Reason 'tis that the Surrenderor shall have an Action of Trespass against any Yelv. 145.

Person who enters, because he shall be intended still in Possession 'till the Admittance of another.

2 Cro. 368. Yelv. 16. If so, then Infancy cannot protect an Estate to which the Infant hath no Title 'till Admittance; for 'till then he hath neither Jus in re, nor Jus ad rem.

This is a Condition annexed to the Estate to be performed by the Infant, by which he is bound notwithstanding his Nonage, otherwise his Estate is forfeited.

The Custom which obligeth him to be admitted, is to entitle the Lord of the Manor to a Fine, to which he hath a Right. Now Infancy was never yet extended to endanger that Remedy, which Men have to recover their Rights: It has been often so far extended as to delay such a Remedy, but never to destroy it; for if the Infant should die, the Lord loseth the Fine, and then another Person is to be admitted; but he cannot encrease the Fine upon him who is a Stranger for the Neglect of the Infant.

Bridg. 83. Yelv. 144. Poph. 127. 'Tis true, where an Infant hath a Right, it shall be preserved though a Fine be levied, and the five Years pass; but in this Case he hath no Right before Admittance.

If a Feme Covert be an Heir to a Copyhold Estate, where the like Custom is, and the Husband after three Proclamations will not come and be admitted, 'tis a Forfeiture during the Coverture.

Now the Reason in the Cases of Coverture and Infancy is the same; for if there shall be a Seisure during the Time the Woman is Covert, why not during the Infancy?

As to Sir Richard Letchford's Case, the Heir was beyond Sea, but when he came into England he desired to be admitted; but this Infant never yet desired to be admitted; he stands upon his Privilege of Infancy.

But upon the Opinion of the other three Justices, the Judgment was affirmed, That the Custom doth not bind the Infant.

Carter *versus* Dowrich.

Custom of Merchants, where it must be particularly set forth. Shower 127. A Covenant to pay so much Money to the Plaintiff or his Assigns as should be drawn upon the now Defendant by a Bill of Exchange, &c. the Breach was assigned in Non-Payment.

The Defendant pleaded, That the Plaintiff, secundum Legem Mercatorium, did assign the Money to be paid to A. who assigned it to B. to whom he paid 100 l. and tendred the rest drawn upon by Bill of Exchange, &c.

And upon a Demurrer, Mr. Pollexfen insisted, that this was not a good Plea, because the Defendant had not set forth the Custom of Merchants, without which all these Assignments are void, of which Custom the Court cannot take any judicial Notice; but it must be pleaded: And 'tis not sufficient to say, that the Assignment was made secundum Legem Mercatorium, but it must be secundum Consuetudinem Mercatoriam, otherwise 'tis not good.

Econtra. It was argued, That the Custom of Merchants is not a particular Custom, and local; but 'tis of an universal Extent, and is a general Law of the Land. Econtra. Litt. 182.

The Pleading it as 'tis here is good; for if an Action is brought against an Innkeeper or Common Carrier, 'tis usual to declare secundum Legem & Consuetudinem Angliæ; for 'tis not a Custom confined to a particular Place, but 'tis such which is extensive to all the King's People.

The Word Consuetudo might have been added; but it imports no more than Lex, for Custom it self is Law. 1 Inst. 182.

If the Custom of Merchants had been left out, the Defendant had then pursued his Covenant; for if a Man agrees to pay Money to such a Person or his Assigns, and he appoints the Payment to another, a Tender to that Person is a good Performance of the Covenant.

But the Court were of Opinion, That this was not a good Plea.

Panton *versus the Earl of* Bath.

A Scire Facias to have Execution of a Judgment obtained in the Court of Oliver, late Protector of England, and the Dominions and Territories thereunto belonging; and in reciting the Judgment 'tis said, That it was obtained before Oliver Protector of England, and the Dominions thereunto belonging, (leaving out the Word Territories.)

Where the Pleading is good in Substance, tho' there is a small Variation, it will not hurt.

Upon a Demurrer, Mr. Pollexfen held this to be a Variance, and like the Case where a Writ of Error was brought to remove a Record in Ejectment directed to the Bishop of Durham, setting forth, that the Action was between such Parties, and brought before the said Bishop and seven other Persons, (naming them;) and the Record removed was an Ejectment before the Bishop and eight others

Yelv. 212. Orde *versus* Moreton.

others, so that it could not be the same Record which was intended to be removed by the Writ.

Econtra. Econtra. It was said, Suppose the Word Scotland should be left out of the King's Title, would that be a Variance?

The Judicature in this Case is still the same, and the Pleading is good in Substance; and of that Opinion was the whole Court.

Hyley *versus* Hyley.

Where the Reversion in Fee shall pass in a Will by the Words, *viz.* Remaining Part of my Estate.

HYley had Issue W. his eldest Son:

Who had Issue { Peter, Charles, John.

He by Will devised 1000 l. to his eldest Son, and several Parcels of Land to other Legatees.

Then he gave to Peter Lands in Tail Male.

To John a Mansion-House (now in question) in Tail Male.

He devised another House to his Grandson Charles in like Manner.

And all the rest and remaining Part of his Estate he devised to his Three Grandsons, equally to be divided amongst them, that only accepted which he had given to *Peter*, *Charles*, and *John*, and to the Heirs of their Bodies, whom he made Executors.

Then by another Clause he devised, viz. That if either of his Executors die without Issue, then the Part or Parts of him so dying shall go to the Survivor or Survivors equally to be divided.

John, the youngest Grandson, died without Issue; and the Question was, Whether the Reversion of his House shall be divided between his surviving Brothers, or descend to his Heir.

And it was adjudged, That the Exception in the Will did comprehend the Reversion in Fee, and that it did not pass, but without such an Exception it had passed: * As where a Man devised his Manor to another for Years, and Part of other Lands to B. and his Heirs, and all the *rest* of his Lands to his Brother in Tail, it was held, that by these Words the Reversion of the Manor did pass.

* Allen 28.

Anonymus.

NOTA. An Infant having entred into a Statute, brought an Audita Querela to avoid it: He was brought into the Court, and Two Witnesses were sworn to prove his Age, and then his Appearance and Inspection were recorded: He was bound in this Case with two other Persons for 1600 l. and had no more than 200 l. for his Share.

Lydcott *versus* Willows.

IN Ejectment. A special Verdict was found, viz. That the Testator being seised in Fee of certain Houses in Bedfordbury and in Parker's-Lane, did by Will devise his Houses in Parker's-Lane to charitable Uses: Then he gave several specifick Legacies to several Persons named in the said Will; and then he devised his Houses in Bedfordbury to Edward Harris and Mary his Wife for their Lives; then follow these Words, viz. The better to enable *my Wife* to pay my Legacies, I give and bequeath *to her and her Heirs* all my Messuages, Lands, Tenements, and *Hereditaments*, in the Kingdom of *England*, not before disposed of, *&c.*

Devise of an Hereditament carries the Reversion in Fee.

The Question was, Whether this Devise would carry the Reversion of the Houses in Bedfordbury to his Wife?

Adjudged, That it did not; but that it ought to go to the Heir of the Testator, who was Plaintiff in this Case; it being found, that Harris and his Wife were dead, and that the Wife, who was Executrix, had sufficient Assets to pay the Legacies without the Reversion.

But Justice Powell was of another Opinion; for that the Word Hereditament imports an Inheritance; and if it had devised thus, viz. the Inheritance not before disposed of, the Reversion had passed.

Afterwards a Writ of Error was brought in the Exchequer-Chamber upon this Judgment, and, according to the Opinion of Justice Powel, the Judgment was reversed.

2 Vent. 285.

Nota. A Rule of Court was made, that no Certiorari should go to the Sessions of Ely, without Motion in Court, or Signing of it by a Judge in his Chamber.

But

But Mr. Pollexfen insisted, That the Sessions there did not differ from other Courts and Franchises; for the inferior Courts in London are of as large a Jurisdiction as any, and yet a Certiorari goes to them, and so it ought to go to Ely; for 'tis the Right of the Subject to remove his Cause hither.

Their Course in the Royal Franchise of Ely is to hold the Sessions there twice a Year, viz. in March and September, in which two Months the Judges are seldom in Town; and if this Court should deny a Certiorari, the Court of Common-Pleas would grant it.

Econtra.

Attorney-General contra. This Franchise of Ely is of greater Privilege and Authority than any inferiour Court, for it hath many Regalia, though 'tis not a County-Palatine.

A Certiorari will not lie to the Grand Sessions, nor to a County-Palatine, to remove Civil Causes. 'Tis true, it lieth to remove Indictments for Riots; and this Franchise being truly called Royal, hath equal Privilege with a County-Palatine, and therefore a Certiorari will lie.

But no Rule was made.

Osborn *versus* Steward.

2 Lev. 2 Lutw. 1366. Distress for an Heriot, where it may be taken.

Trespass. The Case upon the Pleadings was this, viz. A Lease was made of Land for 99 Years, if Margery and Dorothy Upton should so long live, reserving a yearly Rent and an Heriot, or 40 s. in lieu thereof, after the Death of either of them; Provided that no Heriot shall be paid after the Death of *Margery*, living *Dorothy*.

Margery survived, and is since dead.

The Question was, Whether upon this Reservation, the Beast of any Person being upon the Land, may be distreined for an Heriot?

Mr. Pollexfen argued, That it could not, because the Words in the Reservation ought to be taken very strictly, and not to be carried farther than the plain Expression.

Cro. Eliz. 217. 2 Roll. Abr. 448. Latch 99.

Where Words are doubtful, they have been always expounded against the Lessor; as if a Lease be made for Years, reserving a Rent durante Termino to the Lessor, his Executors or Assigns; the Lessor dies, his Heir shall not have the Rent, because 'tis reserved to the Executors.

But

But here is no Room for any Doubt upon these Words, for if a Lease for Years be made, in which there is a Covenant, That the Lessee shall pay the Rent without any other Words; this determines upon the Death of the Lessee.

So where a Lease was made for 99 Years, if A B. C. or any of them should so long live, reserving Rent to him and his Executors, and also at or upon the Death of either his or their best Beast, in the Name of an Heriot; provided that if B. or C. die, living A. no Heriot shall be paid after their Deaths. 2 Rol. Abr. 451. Hetley 58. Cro. Car. 314.

A. assigns his Term, and the Beast of the Assignee was taken for an Heriot, but adjudged that it could not, for the Words his or their shall not be carried farther than to the Persons named in the Limitation.

The Books that affirm that a Man may seize for an Heriot-Service, cannot be brought as Authorities in this Case, because they are all upon Tenures between Lord and Tenant, and not upon particular Reservations as this is.

The old Books say, That if a Tenant by Fealty and Heriot-Service made his Executor and died, that the Lord might seize the best Beast of his Tenant in the Hands of the Executor, and if he could not find any Beast, then he might distrain the Executor, and the Reason of this Seizure was because immediately upon the Death of the Tenant, a Property was vested in the Lord; but it was held always unreasonable to put him to distrain when he might seize. Broke Tit. Heriot 2. Plo. Com. 95.

And it is now held, that for Heriot-Service the Lord may either distrain or seize; but then if he makes a Seisure, it must be the very Beast of the Tenant; but if he distrain, he may take any Person's Cattel upon the Land. Cro. Car. 260. Jones 300.

So that admitting this to be Law, yet it proves nothing to this Matter, because such Services being by Tenure, shall not be extended to those which are created within Time of Memory, upon particular Reservations; for by those ancient Tenures the Lords had many Privileges which cannot be upon Reservations.

Besides, the Seizures in those Cases were by the Lords, who continued so to be at the very Time of the Seizure; but in our Case the Lease is determined by the Death of the last Life, so the Privilege is lost, and then it must stand upon the particular Words in the Deed. Sed adjornatur into the Exchequer-Chamber, the Judges being divided in Opinion. Vid. 2 Sand. 165.

Ship-

Shipley *versus* Chappel. Pasch. 3 Jac. *Rot.* 404.

Condition of two Parts in the Disjunctive, and one Part becomes impossible to be done, yet the other must be performed according to the subsequent Matter.

THE Plaintiff Shipley, as Administrator of Hannah his Wife, brought an Action of Debt upon a Bond against Chappel, an Attorney, for 140 l.

The Defendant craved Oyer of the Condition, which was, Viz. Whereas Hannah Goddard (who was Wife to the Plaintiff) and Thomas Chappel, of Grey's-Inn in the County of Middlesex, are Copartners (according to the Common Law) of one House, with the Appurtenances, in Sheffield, in the Possession of William White; and whereas the said Hannah Goddard hath paid unto Thomas Chappel the Father, for the Use of his Son, the Sum of 72 l. in Consideration that the said Thomas Chappel the Son, when he attains the Age of 21 Years, (which will be about Midsummer next) do by good Conveyance in the Law, at the Costs and Charges of the said Hannah Goddard, convey his said Moiety of the said House, with the Appurtenances, unto her and her Heirs. Now the Condition of this Obligation is such, That if the said Thomas Chappel the Son, shall at the Age of 21 Years convey his said Moiety of the said House, or otherwise if the said Thomas Chappel the Father, his Heirs, Executors, or Administrators, shall pay or cause to be paid the Sum of 72 l. with lawful Interest for the same, unto the said Hannah Goddard, her Executors, Administrators, or Assigns, that then this Obligation to be void.

Then he pleaded, That his Son Thomas Chappel was Coparcener with Hannah Goddard, as Coheirs of Elizabeth Goddard, that Thomas came of Age, and that before that Time Hannah died without Issue.

The Plaintiff replied, That true it is, that before Thomas Chappel the Son came of Age, the said Hannah died without Issue of her Body: That Elizabeth Goddard, before the Making of the said Bond, died seised in Fee of the said Messuage, but that she first married with one Malm Stacy, by whom she had Issue Lydia: That Malm her Husband died, and Elizabeth married John Goddard, by whom he had Issue Hannah their only Daughter and Heir; That John Goddard died, and that Lydia Stacy married the Defendant Thomas Chappel, by whom he had Issue Thomas Chappel his Son: That Lydia died in the Life-time of Elizabeth: That Thomas Chappel hath not paid the 72 l. to Hannah in her Life-time, or to John Shipley after her Death.

The Defendant demurred, and the Plaintiff joined in Demurrer.

The Question was, Since the Word Heirs in the Condition being a Word of Limitation, and not of any Designation of the Person, whether the Death of Hannah Goddard before Chappel the Son came of Age, and who was to make the Conveyance, shall excuse the Defendant from the Payment of the Money?

Those who argued for the Defendant, chiefly relied upon Laughter's Case, which was, viz. Laughter and Rainsford were bound, that if R. after Marriage with G. together with the said G. shall sell a Messuage, &c. if then R. do or shall in his Life-time purchase for the said G. and her Heirs and Assigns, Lands of as good Value as the Money by him received by the said Sale, or leave her as much Money at his Decease, then, &c. 2 Co. 21. b.

G. died, R. did not purchase Lands of an equal Value with that he sold; and upon Demurrer it was held, that where a Condition consisteth of two Parts in the Disjunctive, and both possible at the Time of the Bond made, and afterwards one is become impossible by the Act of God, there the Obligor is not bound to perform the other Part, because the Condition is made for the Benefit of the Obligor, and shall be taken most beneficially for him who had Election either to perform the one or the other, to save the Penalty of the Bond.

But the Counsel for the Plaintiff said, That the whole Intent of the Condition in that Case was to provide a Security for G. who died before her Husband; so that no Body could be hurt for the Non-performance of that Condition, there being no manner of Necessity that any Thing should be done in order to it after her Decease.

'Tis quite otherwise in the Case at Bar, for Hannah Goddard paid Money for the House, and certainly it was never intended that Chappel the Father, to whom the Money was paid, should have both House and Money.

If she had lived, the House ought to have been conveyed to her; now she is dead, the Money ought to be paid, for 'tis not lost by her Death.

In Laughter's Case, the Person who was to do the Thing was the Obligor himself; but here the Father undertakes for his Son, that he should convey when he came of Age, or to repay the Money; so that 'tis not properly a Condition in the Disjunctive, for 'tis no more than if it had been penned after this Manner:

Viz. The Father undertakes for his Son, that he shall convey at the Age of 21 Years; if he refuse, then the Father is to repay what Money he received.

Cro.El. 399. Besides, Laughter's Case is reported by Justice Croke, and therein he cites two other Cases of Chew and Baker.

That of Chew was, viz. A. promised B. that if C. did not appear at Westminster such a Day, he would pay him 20 l. The Defendant pleaded, that C. died before the Day; and ruled to be no Plea, for he ought to pay the Money, which Case is parallel to this, for 'tis the same in Reason and Sense.

That of Baker was, viz. A Man was bound that A. should appear the first Day in the next Term at the Star Chamber, or he would pay 20 l. A. died before the Day, so as by the Act of God he could not appear, yet it was adjudged that the Money must be paid.

The like Case was adjudged between Huntley and Allen in the Common Pleas, in my Lord Hale's Time; 'tis entered, Pasch. 1658. Rot. 1277.

The Rule in Laughter's Case cannot be denied, viz. Where the Condition is in the Disjunctive, consisting in two Parts, and one becomes impossible by the Act of God, the Obligor is not bound to perform the other, but then it must be governed by the subsequent Matter.

Cro El. 396. More 395. As in Greningham's Case, viz. Debt upon Bond, conditioned that if the Defendant delivered three Bonds to the Plaintiff, wherein he was bound to the Defendant, or a Release of them, as should be advised by the Plaintiff's Counsel before such a Day, then, &c.

The Defendant pleaded, that neither the Plaintiff or his Counsel did advise a Release before the Day, &c. and upon Demurrer it was adjudged that the Plea was good, for the Defendant had an Election to deliver or release as the Plaintiff should devise, which if he will not do, the Defendant is discharged by the Neglect of the Plaintiff; for the Defendant being at his Choice to perform the one Thing or the other, 'tis not Reason that the Plaintiff should compel him to perform one Thing only.

Econtra. It was argued on the other Side, that this is a Disjunctive Condition, and not only an Undertaking of the Father for the Son.

Where a Condition is to perform two Things, and if either be done, no Action will lie, such Condition is in the Disjunctive, as in this Case, if the Son had convey'd, or the Father repaid the Money.

By the Condition of this Bond, the Father did as much undertake for his Son, as Laughter did for Rainsford, viz. to convey the House, or pay the Money to Hannah Goddard; now the last

Part of the Condition being discharged by the Act of God, he is acquitted of the other.

Suppose the Condition had been single, to convey to Hannah Goddard; if she die, the Bond is void.

There is an Authority to this Purpose reported by Justice Croke, which was, An Action of Debt was brought by the Plaintiff, as Executor, &c. The Condition of the Bond was for the yearly Payment of a Sum of Money twice in a Year, viz. at Michaelmas and Lady-Day, during the Life of a Lady, or within 30 Days after either of the said Feasts: The Lady died after one of the Feasts, but within the 30 Days: It was adjudged, That by her Death that Payment which was due at the Feast preceding was discharged. Cro. Eliz. 380.

In the Case at Bar the Condition is, That if the Son should not convey when of Age, or otherwise, if the Defendant repay, &c. Now certainly these Words, or otherwise, make the Condition disjunctive.

'Tis like the common Case of Bail entred into in this Court, whereby the Parties undertake that the Defendant shall render himself to Prison if condemned in the Action, or they shall pay the Condemnation-Money; this is a disjunctive Condition, and if the Defendant die before the Return of the Second Sci' Fa', the Bail are discharged.

Justice Allibon said, That if a Condition be to make an Assurance of Land to the Obligee and his Heirs, and the Obligee dies before the Assurance made, yet it shall be made to the Heir, for this Copulative is a Disjunctive. Sed adjornatur. Roll. Abr. Tit. *Condition*, 450. Pl. 4.

Franshaw *versus* Bradshaw. Mich. 1 Jac. *Rot.* 45.

Debt upon a Judgment obtained in this Court, 34 Car. 2. setting forth the said Judgment, &c. Sicut per Recordum & Processum inde remanen' in eadem Curia nuper Domini Regis coram ipso Rege apud Westmonast' plenius liquet & apparet. And upon a Demurrer to the Declaration this Objection was made, viz. It doth not appear that the Judgment was in Force, or where the Record was at the Time of this Action brought; he should have declared, Coram ipso nuper Rege apud Westm' sed jam coram Domino Rege nunc residen', &c. plenius liquet, &c. Matter of Form not amendable upon Demurrer.

The Court held it was but Matter of Form; but being upon a Demurrer, it was not amendable.

3

Lechmere *versus* Thorowgood, *& al' Vic' London.*

When a Judgment is once executed, the Goods are in *Custodia Legis*, and shall not be taken away by an *Exchequer* Process, or Assignment of Commissioners of Bankrupts.

TRespass by the Assignes of Commissioners of Bankruptcy, for taking of their Goods: Upon Not-guilty pleaded, the Jury find a special Verdict, the Substance of which was, viz. One Toplady a Vintner on the 28th of April became a Bankrupt, against whom a Judgment was formerly obtained; the Judgment Creditor sued out a Fi' Fa', and the Sheriffs of London, by Vertue thereof, did on the 29th Day of April seize the Goods of the said Toplady: That after the Seizure, and before any Venditioni exponas, viz. 4 Maii, an Extent (which is a Prerogative Writ) issued out of the Exchequer against two Persons who were indebted to the King, and by Inquisition this Toplady was found to be indebted to them, whereupon Parcel of the Goods in the Declaration was seized by the Sheriffs upon the said Extent, and sold, and the Money paid to the Creditors; but before the said Sale, or any Execution of the Exchequer Process, a Commission of Bankruptcy was had against Toplady, and that the Commissioners on the Second of June assigned the Goods to the Plaintiff.

Cro. Car. 119, 126.

The Question was, Whether this Extent did not come too late? And it was held it did: Or, Whether the Fi' Fa' was well executed, so that the Assignees of the Bankrupt's Estate could not have a Title to those Goods which were taken before in Execution, and so in Custodia Legis? And it was held, That they had no Title.

Fitzgerald *versus* Villiers.

Infant must appear by Guardian.

29 Assise, Pl. 67. Bridge. 74. Lib.Entr.45. Hut. 92. 4 Co. 53. Lit. 92. Hetl. 52. 3 Cro. 158. Moor 434. Hob. 5.

WRit of Error upon a Judgment in Dower, and the Error assigned was, That the Tenant in Dower was an Infant, and no Warrant was alledged of the Admission of any Guardian, that it might appear to be the Act of the Court. 'Tis true, an Infant may sue by Prochein Amy, but shall not appear by Attorney, but by Guardian, because 'tis intended by Law, that he hath not sufficient Discretion to chuse an Attorney, therefore 'tis provided that he appear per Guardianum, which is done by the Court, who are always careful of Infancy, and a special Entry is made upon the Roll.

Viz. Per Guardianum ad hoc per Curiam admissum, &c.

2. The Appearance is by the Guardian in his own Name: Viz. Et prædicta Katherina Fitzgerald, per Richardum Power, Guardianum

Guardianum suum, venit & dicit, quod ipse, &c. It should have been in the Name of the Party, quod ipsa, &c. Adjornatur.

Harrison *versus* Austin.

A Settlement was made as followeth, Viz. That if I have no Issue, and in Case I die without Issue of my Body lawfully begotten, then *I give, grant and confirm*, my Land, *&c.* to my Kinswoman *Sarah Stokes*, to have and to hold the same to the Use of my self for Life, and after my Decease, to the Use of the said *Sarah*, and the Heirs of her Body to be begotten, with Remainders over, *&c.*

What Words amount to a Covenant to stand seised.

The Question was, Whether this did amount to a Covenant to stand seised, so as to raise an Use to Sarah without Transmutation of the Possession?

The Objection against it was, That Uses are created chiefly by the Intention of the Parties, and that by these Words, grant and confirm, the Feoffor did intend the Land should pass at Common Law; so it could not be a Covenant to stand seised: 'Tis like the Case where a Letter of Attorney is in the Deed, or a Covenant to make Livery, there nothing shall pass by way of Use, but the Possession, according to the Course of the Common Law; and therefore there being neither Livery and Seisin or Attornment, no Use will pass to Sarah.

Sid. 26. Moor 687. Dyer 96. 2 Rol. Abr. 786. Winch 59. Plowd. 300.

It cannot be a Bargain and Sale, for that is only where a Recompence is on each Side to make the Contract good; besides, the Deed is not inroll'd.

2 Inst. 672.

To this it was answered, That it shall be construed to be a Covenant to stand seised, tho' the formal Words are wanting to make it so; and for that Purpose it was compared to Fox's Case, who being seised in Fee, demised his Land to C. for Life, Remainder over for Life, reserving a Rent; and afterwards by Indenture, in Consideration of Money, did demise, grant and set the same Lands to D. for 99 Years, reserving a Rent: The Lessee for Life did not attorn, in which Case there was not one Word of any Use, or any Attornment to make it pass by Grant; and the Question was, Whether this Lease for Years shall amount to a Bargain and Sale, so that the Reversion, together with the Rent, shall pass to the Lessee, without Attornment: And it was held, that by Construction of Law it did amount to a Bargain and Sale, for the Words import as much.

1 Vent. 137. 8 Co. 93. Hob. 277.

And in this Case it was adjudged, That it was a Covenant to stand seised.

Hexham

Hexham *versus* Coniers.

An Ejectment will lie for a Tenement.

IN Ejectment, the Plaintiff declared de uno Messuagio sive Tenemento, and had a Verdict, but Judgment was arrested, because an Ejectment will not lie of a Tenement, for 'tis a Word of an uncertain Signification: It may be an Advowson-House or Land; but it is good in Dower: So is Messuagium sive Tenementum vocat' the Black Swan, for this Addition makes it certain that the Tenement intended is a House.

Rex *versus* Bunny.

1 Salk 190.

A Motion was made for a Melius inquirendum to be directed to a Coroner, who had returned his Inquisition upon the Death of Bunny, that he was not Compos mentis, when in Truth he was Felo de se.

But it was opposed by Serjeant Pemberton and Mr. Pollexfen, who said, That the Law gives great Credit to the Inquest of a Coroner, and that a Melius inquirendum is seldom or never granted, though it appear to the Court upon Affidavits, That the Party had his Senses. It hath been granted where any Fault is in the Coroner, or any Incertainty in the Inquisition returned.

3 Mod. 80. Mod. Rep. 82.

Cro. Eliz. 371.

3 Keb. 800.

That there is such a Writ, it cannot be denied; but 'tis generally granted upon Offices or Tenures, and directed to the Sheriff, but never to a Coroner, in the Case of a Felo de se, who makes his Enquiry super visum Corporis.

DE

DE
Term. Sancti Mich.
Anno 4 Jac. II. in Banco Regis, 1688.

In *Trinity* Vacation last, Mr. Justice *Holloway* and Mr. Justice *Thomas Powell* had their *Quietus*, and Mr. Serjeant *Baldock* and Mr. Serjeant *Stringer* were made Justices of this Court: And Mr. Justice *Allybon* (who was a *Roman* Catholick) died in the same Vacation, and Sir *John Powel*, one of the Barons of the *Exchequer*, was made a Justice of this Court; Sir *Thomas Jennor*, another of the Barons of the *Exchequer*, was made a Justice of the *Common Pleas*, and Mr. Serjeant *Rotheram* and Mr. Serjeant *Ingoldby* were made Barons of the *Exchequer*.

Wright, *Chief Justice.*
Powel, Baldock, Stringer, } *Justices.*

Shuttleworth *versus* Garnet. *Intratur Trin.* 1 Willielmi & Mariæ, *Rotulo* 965.

THE Defendant was Tenant of customary Lands held of the Manor of A. of which Manor B. was Lord; That a Fine was due to him for an Admission: That upon the Death of the said Lord, the Manor descended to W. as his Son and Heir, who died, and the Plaintiff, as Executor to the Heir, brought an Indebitatus Assumpsit for this Fine.

Indebitatus Ass. will lie for a Fine, upon an Admission, &c. 3 Levinz. 261. Shower 35.

He declared also, that the Defendant was indebted to him in 25 l. for a reasonable Fine, &c.

The

The Plaintiff had a Verdict and entire Damages; and it was now moved in Arrest of Judgment that an Indebitatus will not lie for a customary Fine, because it doth not arise upon any Contract of the Parties, but upon the Tenure of the Land; for upon the Death of the Lord there is a Relief paid, for there must be some personal Contract to maintain an Action of Debt or an Indebitatus Assumpsit; and therefore it was held, that where the Plaintiff locasset a Warehouse to the Defendant, he promised to pay 8 s. per Week. An Assumpsit was brought for this Rent, and a Verdict for the Plaintiff: And a Motion was made in Arrest of Judgment, that this was a Lease at Will, and the weekly Payment was in the Nature of a Rent; and it was agreed that an Assumpsit would not lie for a Rent reserved, because it sounds in the Realty, but because it was only a Promise in Consideration of the occupying of the Warehouse, the Action was held to be well brought.

2 Cro. 599. Jones 339.

2. Where the Cause of an Action is not grounded upon a Contract but upon some special Matter, there an Indebitatus Assumpsit will not lie; and therefore it will not lie upon a Bill of Exchange, or upon an Award, or for Rent, tho' there is a Privity both of Contract and Estate, without a special Assumpsit.

Econtra.

Econtra. It was argued, that the Action lies; for though a Fine savours of the Realty, yet 'tis a certain Duty.

In all Cases where Debt will lie upon a simple Contract, there an Assumpsit will lie likewise; 'tis true, this doth concern the Inheritance, but yet 'tis a Contract that the Tenant shall be admitted paying the Fine.

It hath been also maintained for Money had and received out of the Office of Register for the Plaintiff's Use, and for Scavage Money due to the Mayor and Commonalty of London, which is also an Inheritance.

3 Keb. 677.

'Tis a Contract implied by Law, and therefore the Action is well brought.

2 Leon. 79.

Afterwards in Michaelmas Term, 1 Willielmi & Mariæ, by the Opinion of Justice Dolben, Eyre and Gregory, Judgment was given for the Plaintiff: But the Chief Justice was of another Opinion; for he held, that if the Defendant had died indebted to another by Bond, and had not Assets besides what would satisfy this Fine, if the Executor had paid it to the Plaintiff, it would have been a Devastavit in him.

Suppose the Defendant promiseth, That in Consideration that the Plaintiff would demise to him certain Lands, that then he would pay the Rent. If the Defendant pleads Non assumpsit, the Plaintiff must prove an express Promise, or be nonsuit. Also here is no Tenure or Custom set out. Yet by the Opinion of the other three Justices, the Plaintiff had his Judgment.

Cro. Car. Action *versus* Symonds.

Rex *versus* Johnson.

INformation upon the Statute of 29 & 30 Car. 2. cap. 1. prohibiting the Importation of several French Commodities, and amongst the rest [Lace] under the Penalty of 100 l. to be paid by the Importer, and 50 l. by the Vendor, and the Goods to be forfeited.

Pardon after a Verdict for the King excuseth the Forfeiture.

The Information sets forth, That a Packet containing so many Yards of Lace was imported by the Defendant from France, and that he did conceal it to hinder the Seizure; and that he did privately sell it, contra Formam Statuti.

Upon Not guilty pleaded, the King had a Verdict; and on the 2d of October there came forth a general Pardon, in which were these Words, viz. That the Subjects shall not be sued or vexed, *&c.* in their Bodies, Goods or Chattels, Lands or Tenements, for any Matter, Cause or Contempt, *Misdemeanor*, Forfeiture, *Offence*, or any other Thing heretofore done, committed, or omitted, against us, *Except all Concealments*, *Frauds*, Corruptions, Misdemeanors, and *Offences*, whereby we or our late Brother have been *deceived* in the Collection, Payment, or Answering of our *Revenues*, or any Part thereof, *or any other Money due or to be due to us*, or received for us or him, and all Forfeitures, Penalties, and *Nomine Pœnæ*'s, thereupon arising, and all Indictments and Informations, or other Process and Proceedings now depending or to be depending thereupon.

The Question now was, Whether this Forfeiture was excused by this Pardon?

The Attorney General argued, that it was not, because an Interest is vested in the King by the Judgment, and that no particular or general Pardon shall devest it without Words of Restitution.

So was Toom's Case, who had Judgment against another, and then became Felo de se: His Administrator brought a Scire facias quare Executionem non haberet. The Debtor pleaded, that after the Judgment the Intestate hanged himself, which

1 Sand. 361.

 was

was found by the Coroner's Inquest returned into this Court. The Plaintiff replied the Act of Pardon: But it was adjudged for the Defendant; for when the Inquisition was returned, then the Debt was vested in the King, which could not be devested without particular Words of Restitution, and which were wanting in that Act of Pardon.

The most proper Word in the Body of this Pardon, which seems to Excuse the Defendant, is the Word Offence; but the same Word is likewise in the Exception, viz. Except all *Offences*, *&c.* in collecting or paying of Money due to us, and all Forfeitures, *&c.* Now the Concealing of forfeited Goods from Seizure, is an Offence excepted; for 'tis a Remedy for the King's Duty, of which he was hindred by the Concealment.

'Tis true, the first Part of the Pardon excuseth all Misdemeanors committed against the King in his standing Revenue; but this Exception takes in all Concealments and Frauds in answering of the Revenue, and this Information is principally grounded upon Fraud; so that the Exception ought to be taken as largely for the King, as the Pardon it self to discharge the Subject.

5 Co. 56.

No Fraud tending to the Diminution of the Revenue is pardoned, for it excepts not only all Concealments in collecting the Revenue, but other Money due or to be due to the King.

If therefore when the King is entitled by Inquisition, Office, or Record, there must be express and not general Words to pardon it; and since this Fact was committed before the Pardon came out, and so found by the Jury, whose Verdict is of more Value than an Inquest of Office; so that the King by this Means is entitled to the Goods by Record, and that before the Pardon; for these Reasons it cannot be revested in the Party.

Econtra.

Serjeant Pemberton and Mr. Finch contra.

The Question is, What Interest the King hath by this Verdict; for as to the Offence it self, 'tis within the Body of the Pardon, for all Misdemeanors and Offences are pardoned; and the Exception doth not reach this Case, for that Excepts Misdemeanors in answering of the Revenues. Now that which arises by a Forfeiture can never be taken to be Part of the King's Revenue, because the Revenue is properly a stated Duty originally settled on the King, and the Penalty to be inflicted for this Misdemeanor cannot be a Revenue, because the Court have not yet given Judgment; so that 'tis incertain what Fine they will set; and this appears more plain, because the King may assign his Revenue, but cannot grant over a Penalty.

4 The

The Information is not grounded upon any Act of Parliament which establishes the Revenue, but for concealing of a Thing forfeited, to prevent the Seizure thereof, which indeed may be a casual Revenue, as all Fines are; so that if this should be taken as an Offence committed against the King, in deceiving him of this Revenue, then the first Part of the Pardon dischargeth all such Offences, and the Exception pardons none.

'Tis for these Reasons that the Case cannot fall under any of the Words in the Exception; no not under these Words, viz. Money due or to be due to the King, because no Money is yet due to him. 'Tis true, the Jury have found it a Misdemeanour, which is finable; but until the Fine is set, no Money is due, because the Court may set a greater or less Fine, as they shall see Cause: And if any other Construction should be made of this Exception, then every thing for which a Fine may be set is excepted, and this will be to make the Pardon signifie nothing; for what is meant by Offences and Misdemeanours, if they should be pardoned, and yet the Fine arising thereon should not?

But admitting that all Offences relating to the Concealment of collecting of the Revenue are excepted, then this Revenue must be either antecedent, or it must arise by the Fine.

'Tis no antecedent Revenue: This appears by the Book of Rates, wherein the King's stated Revenue is set down, and no Mention of this; so that the Revenue to which this relates must arise upon the Offence; and what an absurd Thing is it to say, that all Offences are pardoned by one Part of this general Pardon, and by the Exception none are pardoned?

Besides, the Information is not grounded upon that Part of the Statute which inflicts a Penalty upon the Person who exposeth prohibited Goods to Sale, for then they would sue for the 50 l. therefore it must be upon the Forfeiture, which is expressly pardoned, and though there is a Conviction, yet nothing is vested in the King before Judgment, because it may be arrested; and therefore Toom's Case is in no wise applicable to this, for the Debt which was due to him was actually vested in the King by the Inquisition returned here, which found him to be Felo de se. Adjornatur.

Anonymus.

A Ship was pawned for Necessaries, and a Libel was exhibited in the Admiralty, though the Pawning was at the Land.

A Libel in the Admiralty against a Ship called the Sussex Ketch, setting forth, That the said Ship wanted Necessaries super altum Mare; and that the Master took up several Sums of the Plaintiff at Rotterdam, for which he did hypothecate the said Ship; and upon a Suggestion that this Contract was made at St. Katherine's infra Corpus Comitatus, Counsel moved for a Prohibition; upon which a Question did arise, Whether a Master of a Vessel can pawn it on the Coast for Necessaries, and the Person to whom 'tis pawn'd shall sue for the Money in the Admiralty here?

Syd. 453.

By the Common Law, a Master of a Ship had neither a general or special Property in it, and therefore could not pawn it; but by the Civil Law, in Cases of Necessity he may, rather than the Voyage should be lost: And if any such Cause appear, 'tis within the Jurisdiction of the Admiralty; but then the Pawning must be super altum Mare.

Cap. 15.

Now the Statute of 28 H. 8. which abridgeth the Jurisdiction of the Admiralty in Trials of Pyrates, and which appointeth Offences committed on the Sea to be tried by a Commission under the Great Seal, directed to the Admiral and others, according to the Course of the Common Law, and not according to the Civil Law, gives a Remedy in this very Case; for it provides that it shall not be prejudicial to any Person for taking of Victuals, Cables, Ropes, &c. in Cases of Necessity upon the Sea, paying for the same.

Molloy *de Jure maritimo* 62.

So that this is an excepted Case, because of the Necessity; and 'tis like the Cases of suing for Mariners Wages in this Court. The Service was at Sea, so that the Admiralty hath no proper Jurisdiction over this Matter.

Winch f. 8.

'Tis true, Prohibitions have been denied for Mariners Wages; the first is reported by Justice Winch; but the Reason seems to be, because they proceed in the Admiralty not upon any Contract at Land, but upon the Merits of the Service at Sea, and allow or deduct the Wages according to the good or bad Performance of the Services in the Voyage.

Besides, there is an Act of Parliament which warrants the Proceedings in the Court of Admiralty for Mariners Wages; for in a Parliament held in the 14th Year of Richard II. the Commons petitioned for Remedy against great Wages taken by Masters of Ships and Mariners; to which the King answered,

Cotton Abr. f. 340. nu. 37.

That

That the Admiral shall appoint them to take reasonable Wages, or shall punish them.

Now the Reason of the Civil Law, which allows the pawning of a Ship for Necessaries upon the high Sea, seems to be plain, because there may be an extraordinary and invincible Necessity at Sea, but not at Land.

So that this being a Contract beyond Sea, and at Land, the Court of Admiralty cannot have any Jurisdiction over it; for where the Common Law cannot relieve, in such Cases the Admiralty shall not, because they are limited to Acts done upon the Sea, and in Cases of Necessity; for if the Law should be otherwise, the Master may take up as much Money as he will.

4 Inst. 134. Cro. Car. 603. Latch. 11. 2 Brownl. 37.

Mr. Pollexfen contra. That Things arising upon Land may be sued for in the Admiralty is no new Thing; for so it is in all Cases of Stipulation. Mariners Wages are also recoverable in that Court, not by Vertue of any Act of Parliament, but because it grows due for Services done at Sea, which is properly a Maritime Cause, tho' the Contract for that Service with the Master was at Land: But the principal Reason why Mariners Wages are sued for in the Admiralty is, because the Ship is liable as well as the Master, who may be poor, and not able to answer the Seamen.

Rol. 530. Exton. Mant. Diræologiæ, f. 192.

Curia. Take a Trial upon the Necessity in this Case.

Anonymus.

THE Plaintiff recovered a Verdict against the Defendant in an Action upon the Case.

The Defendant now moved by his Counsel, That the Plaintiff should file the Venire Facias and Distringas, because all Writs which are returnable in this Court ought to be filed, otherwise a Damage may ensue to the Officers, and a Wrong to the King, upon the Forfeitures of Issues by the Jurors, which are always estreated upon the coming in of the Distringas.

The Court will not order a Plaintiff to file the *Venire Facias*.

The Counsel insisted upon it, That it was the Common Law of this Realm, and that it was the Right of the Subject, that all Writs which issue out of the King's Courts should be filed: That the Pannel of the Venire Facias is Part of the Record; and that an Attaint could not be brought against the Jury if these Writs were not filed, because non constat de Personis.

This

This Matter was referred to some of the ancient Clerks of the Court, and to the Secondary Aston, who reported, That the Court never ordered a Plaintiff to file a Venire facias against his Will.

Davies's *Case*.

Prescription for all the Tenants of a Manor to fowl in a Warren, good; tho' it was objected that it was too large.

TRespass against Davies and Powel, for breaking the Plaintiff's Close, and chasing and killing Fowl in his Free Warren.

The Defendant, as to all the Trespass but chasing and killing the Fowl, pleaded Not-guilty; and as to that he set forth, That the Dean and Chapter of Exeter were seized in Fee of the Manor of Brampton, of which the said Warren was Parcel, and that they, and all those whose Estates they had, &c. had Liberty for themselves, their Tenants and Farmers, to fowl in the said Warren: That the Dean and Chapter did make a Lease of Parcel of the said Manor to the Defendants for One and twenty Years, reserving a Rent, &c. and so they justify as Tenants, &c. they did fowl in the said Warren.

The Plaintiff replied, De injuria sua propria: Upon which they were at Issue, and there was a Verdict for the Defendants.

Mr. Pollexfen moved in Arrest of Judgment, because 'tis an unreasonable Prescription for an Interest in every Tenant of the Manor to fowl in that Warren: It hath been so ruled for a Common, without saying for his Cattle Levant and Couchant, for it must be for a certain Number.

Roll. Abr. 399.

In this Case the Prescription is not only in the Person of the Lord, but for all his Farmers and Tenants, who cannot prescribe to have a free Warren in alieno solo.

Econtra.

Econtra. It was argued, That such a Prescription might not be good upon a Demurrer; but 'tis well enough after a Verdict.

'Tis not an Objection to say, That this Prescription is too large, for all Tenants, as well Freeholders as Copyholders, to prescribe in the Soil of another; and so there may not be enough for the Lord himself, because this is a Profit apprender in alieno solo, and for such the Tenants of a Manor may prescribe by a Que Estate exclusive of the Lord: And of that Opinion was the Court; so the Defendant had his Judgment.

Yel. 187. 2 Cro. 256.

Anonymus.

NOTA. An Information was brought in this Court for throwing down of Hedges and Ditches, in which there were several Defendants, who pleaded especially, and the Clerk of the Crown Office demanded 13 s. 4 d. for every Name (which came to 17 l. for his Fees;) in this Plea, and by Reason of the great Charge, the Defendants did not plead, but let Judgment go by Default.

Mr. Pollexfen moved, That the Plea might be received, and that it might be enquired what Fees were due, which the Court would not try upon a Motion, but advised an Indiament of Extortion, if their Clerk was guilty.

Rex *versus* Inhabitantes de *Malden*.

Order of Sessions quashed for settling a poor Man, because he had not given formal Notice in Writing.

SErjeant Shaw moved to confirm an Order made upon an Appeal to the Quarter-Sessions of the Peace for the County of Essex. The Case was, viz.

John Pain served an Apprenticeship at Malden, where he married, and had several Children.

His Wife died. He married another Woman, who had a Term for Years of an House in the Parish of Heybridge, where he lived for a Year, and left Malden.

Afterwards he returned to Malden, was rated to the Poor, and lived there two Years, then he died.

In a short Time after his Death, his Widow and Children were removed by an Order of two Justices to Heybridge, from which Order they Appeal; and by the Order of Sessions, the first Order of the two Justices was quashed, and the Settlement was adjudged to be at Malden.

It was now moved by Mr. Pollexfen to quash it, because it doth not appear, that he gave any formal Notice in Writing to the Overseers of Malden when he returned from Heybridge, and therefore ought to be settled there, and not at Malden; for being taxed to the Poor, will not amount to Notice: and he cited a stronger Case, which was, viz. The Church-wardens of Covent Garden certified under their Hands, that such a Person was an Inhabitant within their Parish, but because no note was left with

with them, pursuant to the Statute, notwithstanding such Certificate, he was held to be no Inhabitant within their Parish, and of that Opinion was all the Court.

Anonymus.

Whether an Infant shouldmake Cognizance *per Attorn.* or *per Guardianum.*

IN Replevin, three Persons made Cognizance as Bayliffs to A. and so justify the Taking of the Cattle Damage Feasant in his Ground.

The Plaintiff replied, That the Cattle were taken in his Ground, and traverseth the Taking in the Place mentioned in the Cognizance.

There was Judgment for the Defendant; upon which a Writ of Error was brought, and the Error assigned was, That one of the Bailiffs was an Infant, and made Cognizance per Attornatum, when he ought to do it per Guardianum.

2 Cro. 441. 2 Sand. 212. 1 Rol. Abr. 228. 3 Cro. 441.

Mr. Pollexfen. This might be pleaded in Abatement, but 'tis not Error; for an Infant Administrator may bring an Action of Debt per Attornatum, because he sues in the Right of another, and so his Infancy shall be no Impediment to him.

The Bayliff in this Case is as much a Plaintiff as the Administrator in the other, for he makes Cognizance in the Right of another; and in such Case, if two are of Age, and one is not, they who are of Age may make an Attorney for him who is not.

2 Sand. 212.

So if there are two Executors, one of them of Age, and the other not, one may make an Attorney for the other.

There is no Difference between Executors and Infants in this Case; for Executors recover in the Right of the Testator, and the Bailiffs in the Right of him who hath the Inheritance.

Besides, the Avowants are in the Nature of Plaintiffs, and wherever a Plaintiff recovers, the Defendant shall not assign Infancy for Error. Adjornatur.

Capel *versus* Saltonstal.

Where there are several Plaintiffs in a personal Thing, and one dieth before Judgment, the Action is abated.

INdebitatus assumpsit in the Common Pleas; in which Action there were Four Plaintiffs; one of them died before Judgment, the others recover, and now the Defendant brought a Writ of Error in this Court to reverse that Judgment; and the Question was, Whether the Action was abated by the Death of this Person.

Those

Those who argued for the Plaintiffs in the Action held, that the Debt will survive, and so will the Action, for 'tis not altered by the Death of the Party; for where Damages are only to be recovered in an Action well commenced by several Plaintiffs and Part of that Action is determined by the Act of God, or by the Law, and the like Action remaineth for the Residue, the Writ shall not abate.

As in Ejectment, if the Term should expire pending the Suit, the Plaintiff shall go on to recover Damages; for though the Action is at End quoad the Possession, yet it continues for the Damages after the Term ended. 1 Inst. 285.

So if the Lessor bring Waste against Tenant pur auter vie, and pending the Writ Cestui que vie dieth, the Writ shall not abate, because no other Person can be sued for Damages but the Survivor.

So where Trover was brought by two, and after the Verdict one of them died, the Judgment shall not be arrested, because the Action survives to the other. 2 Bulst. 262. 1 Inst. 198.

Mr. Pollexfen contra. He admitted the Law to be, that where two Jointenants are Defendants, the Death of one would not abate the Writ, because the Action is joint and several against them.

But in all Cases where two or more are to recover a personal Thing, where the Death or Release of one shall abate the Action as to the rest, tho' 'tis otherwise when they are Defendants, and are to discharge themselves of a Personalty.

And therefore in an Audita Querela by two, the Death of one shall not abate the Writ, because 'tis in Discharge. 6 Co. 25. b. Ruddock's Case.

Now in this Case, Judgment must be entred for a dead Man which cannot be, for 'tis not consistent with Reason 2 Cro. 19.

The Case of * Wedgewood and Bayley is express in it, which was this; Trover was brought by six, and Judgment for them, one of them died, the Judgment could not be entred. 'Tis true; where so many are Defendants and one dies, the Action is not abated, but then it must be suggested on the Roll. * Raim 463.

Curia. Actions grounded upon Torts will survive, but those upon Contracts will not. The Judgment was reversed.

Fisher *versus* Wren. *In the* Common Pleas.

Prescription and Custom alledged together.

THE Plaintiff brought an Action of Trespass on the Case, and declared that he was seised of an ancient Messuage and of a Meadow, and an Acre of Land Parcel of the Demesnes of the Manor of Crosthwait, and sets forth a Custom to grant the same by Copy of Court-Roll; and that there are several Freehold Tenements Parcel of the said Manor, and likewise several customary Tenements, Parcel also thereof, grantable ad Voluntatem Domini, and that all the Freeholders, &c. Time out of Mind, &c. together with the Copyholders, according to the Custom of the said Manor, have enjoyed solam & separalem Pasturam of the Ground called Garths, Parcel of the said Manor, for their Cattle Levant and Couchant, &c. and had Liberty to cut the Willows growing there for the mending of their Houses; and the Defendant put some Cattle into the said Ground, called Garths, which did eat the Willows, by Reason whereof the Plaintiff could have no Benefit of them, &c.

Upon Not-guilty pleaded, there was a verdict for the Plaintiff.

And now Serjeant Pemberton moved in Arrest of Judgment, and took these Exceptions:

1. As to the Manner of the Prescription which the Plaintiff had laid to be in the Freeholders, and then alledged a Custom for the Copyholders, &c. and so made a joint Title in both, which cannot be done in the same Declaration, because a Prescription is always alledged to be in a Person, and a Custom must be limited to a Place, and therefore an entire Thing cannot be claimed both by a Prescription and Custom, because the Grant to the Freeholders and this Usage amongst the Copyholders could not begin together.

Vaughan 215. Carter 200. 1 Sand. 351.

2. As to the Custom, 'tis not good as pleaded to exclude the Lord, for it can never have a good Commencement, because Copyholders have Common in the Lord's Soil only by Permission to improve their Estates, which Common being spared by the Lord, and used by the Tenant, becomes a Custom; but no Usage amongst the Tenants, or Permission of the Lord, can wholly devest him of his Soil, and vest an Interest in them who in the Beginning were only his Tenants at Will.

2 Sand. 325.

3. The third Exception, and which he chiefly relied on, was, viz. That this is a Profit apprender in alieno Solo, to which all the Tenants of the Manor are entitled, and that makes them Tenants in Common; and therefore in this Action, where Damages are to be recovered, they ought all to join. 'Tis true, in real Actions Tenants in Common always sever, but in Trespasses quare Clausum fregit, and in personal Actions, they always join; and the Reason is plain, because in those Actions, though their Estates are several, yet the Damages survive to all, and it would be unreasonable to bring several Actions for one single Trespass. 1 Inst. 197. 198. Godb. 247.

Econtra. It was argued that it cannot be denied, but that there may be a Custom or Prescription to have solam & separalem Pasturam; but whether both Prescription and Custom can be joined together, is the Doubt now before the Court; and as to that he held it was well enough pleaded; for where there is an unusual Right, there must be the like Remedy to recover that Right; it was thus pleaded in North's Case. Econtra. 1 Sand. 347. 1 Vent. 383. Vaugh. 251. 1 Lev. 253, 268.

But admitting it not to be well pleaded; 'tis then but a double Plea, to which the Plaintiff ought to have demurred; and this may serve for an Answer to the first Exceptions.

Then as to the last Objection, That 'tis a Profit apprender in alieno Solo, for which all the Tenants ought to join; 'tis true, a Common is no more than a Profit apprender, &c. yet one Commoner may bring an Action against his Fellow; besides, in this Case they are not Tenants in Common, for every Man is seised severally of his Freehold. Adjornatur.

Ayres *versus* Huntington.

A Scire Facias was brought upon a Recognizance of 1000 l. to shew Cause quare the Plaintiff should not have Execution de prædictis mille Libris recognitis juxta Formam Recuperationis, where it should have been Recognitionis præd. And upon a Demurrer it was held, that the Words, juxta Formam Recuperationis, were Surplusage: The Record was amended, and a Rule that the Defendant should plead over. Amendment of the Word *Recuperatio* for *Recognitio* after a Demurrer.

Mather *and others versus* Mills.

Non damnificatus generally where 'tis a good Plea.

THE Defendant entred into a Bond to acquit, discharge and save harmless a Parish from a Bastard Child. Debt was brought upon this Bond, and upon Non damnificatus generally pleaded the Plaintiff demurred, and Tremain held the Demurrer to be good; for if the Condition had been only to save harmless, &c. then the Plea had been good; but 'tis likewise to acquit and discharge, &c. and in such Case Non damnificatus generally is no good Plea, because he should have shewed how he did acquit and discharge the Parish, and not answer the Damnification only.

Kelw. 80. b.

1 Leon. 71.

Econtra.

2 Co. 3.

2 Cro. 363, 364.

2 Sand. 83, 84.

Econtra. It was argued, That if the Defendant had pleaded that he kept harmless and discharged the Parish, such Plea had not been good unless he had shewed how, &c. because 'tis in the affirmative: But here 'tis in the Negative, viz. that the Parish was not dampnified, and they should have shewed a Breach; for tho' in Strictness this Plea doth not answer the Condition of the Bond, yet it doth not appear upon the whole Record, that the Plaintiff was dampnified, and if so, then he hath no Cause of Action.

Judgment for the Defendant.

DE

DE

Term. Sanct. Trin.

Anno 1 Gulielmi & Mariæ, Regis & Reginæ, in Banco Regis, 1689.

Memorandum, That on the 4th Day of *November* last past, the Prince of *Orange* landed here with an Army, and by reason of the Abdication of the Government by King *James*, and the Posture of Affairs, there was no *Hillary*-Term kept.

Coram, Johanne Holt *Mil. Capital' Justic.*
Gulielmo Dolben *Mil'* }
Gulielmo Gregory *Mil'* } *Justiciar.*
Egidio Eyre *Mil'* }

Kellow *versus* Rowden. *Trin.* 1 Willielmi & Mariæ, *Rotulo* 796.

IN Debt by Walter Kellow, Executor of Edward Kellow, against Richard Rowden. The Case was this, viz.

John Rowden had Issue two Sons, { John, and Richard.

John the Father being seized in Fee of Lands, &c. made a Settlement to the Use of himself for Life, the Remainder to John his eldest Son in Tail Male, the Remainder to his own right Heirs.

The Father died, the Reversion descended to John the Son, who also died, leaving Issue John his Son, who died without Issue; so that the Estate Tail was spent.

Where the Reversion in Fee is expectant upon an Estate Tail, and that being spent, it descends upon a collateral Heir, he must be sued as Heir to him who was last actually seized of the Fee, without naming the intermediate Remainders. 3 Lev. 286. Shower 244.

Richard

Richard the second Son of John the elder entred, and an Action of Debt was brought against him as Son and Heir of John the Father, upon a Bond of 120 l. entred into by his Father, and this Action was brought against him, without naming the intermediate Heirs, viz. his Brother and Nephew.

The Defendant pleaded, Quod ipse de debito præd' ut filius & hæres præd' *Johannis Rowden* Patris sui, virtute scripti obligatorii præd' onerari non debet, quia protestando quod scriptum obligatorium præd' non est factum præd' *Johannis Rowden*, pro placito idem *Richardus* dicit quod ipse non habet aliquas terras seu tenementa per descensum hæreditarium de præd' *Johanne Rowden* patre suo in feodo simplici, nec habuit die exhibitionis billæ præd' *Walteri* præd' nec unquam postea, & hoc parat' est verificare, unde pet' Judicium si ipse ut filius & hæres præd' *Johannis Rowden* patris sui virtute scripti præd' onerari debeat, &c.

The Plaintiff replied, that the Defendant die Exhibitionis billæ præd' habuit diversas terras & tenementa per descensum hæreditarium a præd' *Johanne Rowden* patre suo in feodo simplici, &c.

Upon this Pleading they were at Issue at the Assises in Wiltshire, and the Jury found a special Verdict, viz. That John Rowden the Father of Richard (now the Defendant) was seised in Fee of a Messuage and 20 Acres of Land in Bramshaw in the said County, and being so seised, had Issue John Rowden his eldest Son, and the Defendant Richard; that on the 22d of January, 18 Car. I. John the elder did settle the Premisses upon himself for Life, Remainder ut supra, &c.

That after the Death of the Father, John his eldest Son entered and was possessed in Fee-Tail, and was likewise entitled to the Reversion in Fee, and died in the 14th Year of King Charles II. that the Lands did descend to another John, his only Son, who died 35 Car. II. without Issue, whereupon the Lands descended to the Defendant as Heir of the last mentioned John, who entered before this Action brought, and was seised in Fee, &c. But whether upon the whole Matter the Defendant hath any Lands by Descent from John Rowden in Fee-simple, the Jury do not know, &c.

The Counsel on both Sides did agree, that this Land was chargeable with the Debt; but the Question was, Whether the Issue was found for the Defendant, in regard the Plaintiff did not name the intermediate Heirs?

It was argued that the Defendant ought to be sued as immediate Heir to his Father, and not to his Nephew, for whoever claims by Descent must claim from him who was last actually seised of the Freehold and Inheritance; this is the express Doctrine of my Lord

Coke in his first Institutes, and if so, the Defendant must be charged as he claims. Co. Lit. 11.

Seisin is a material Thing in our Law, for if I am to make a Title in a real Action, I must lay an actual Seisin in every Man; 'tis so in Formedons in Descender and Remainder, in both which you are to run through the whole Pedigree. 8 E. 3. 13. Bro. Assise 6. F. N. B. 212. F.

But none can be Filius & Hæres but to him who was last actually seised of the Fee-simple, and therefore the Brother being Tenant in Tail, and his Son the Issue in Tail, in this Case they were never seised of the Fee, for that was expectant upon the Estate Tail, which being spent, then John the Father was last seised thereof, and so his Son is justly and rightly sued as Son and Heir. 1 Inst. 14. b.

In some Cases the Persons are to be named, not by Way of a Title, but as a Pedigree; as if there be Tenant for Life, the Reversion in Fee to an Ideot, and an Uncle who is Right Heir to the Ideot levied a Fine, and died living the Ideot, leaving Issue a Son named John, who had Issue William, who entred: The Question was, Whether the Issue of the Uncle shall be barred by this Fine? It was the Opinion of two Judges that they were not barred, because the Uncle died in the Life-time of the Ideot, and nothing attached in him; and because the Issue claim in a collateral Line, and do dot name the Father by Way of Title, but by Way of Pedigree. March 94. Cro. Car. 524.

But Justice Jones, who hath truly reported the Case, was of Opinion, that the Issue of the Uncle were barred, because the Son must make his Conveyance from the Father by Way of Title. Jones 456.

The Jury have found, that the Reversion did descend to the Defendant, as Heir to the last John; 'tis true, it descends as a Reversion, but that shall not charge him as Heir to the Nephew, for the other was seised of the Estate Tail, which is now spent, and the last who was seised of the Fee was the Father, and so the Defendant must be charged as his Heir. Jenk's Case, 1 Cro.

'Tis likewise true, that where there is an actual Seisin, you must charge all, but in this Case there was nothing but a Reversion.

Tremaine Serjeant for the Defendant.

In this Case the Plaintiff should have made a special Declaration, for the Estate-Tail and the Reversion in Fee are distinct and separate Estates.

John

John the Nephew might have sold the Reversion and kept the Estate Tail; if he had acknowledged a Statute or Judgment, it might have been extended, and if so, then he had such a Seisin that he ought to have been named.

A Man becomes bound in a Bond and died; Debt is brought against the Heir; it is not common to say that he had nothing by Descent, but only a Reversion expectant upon an Estate Tail.

In the Case of Chappel and Lee, Covenant was brought in the Common Pleas against Judith, Daughter and Heir of Robert Rudge.

She pleaded Riens per descent. Issue was tried before Sir Francis North, then Chief Justice; and it appearing upon Evidence that Robert had a Son named Robert, who died without Issue, a Case was made of it, and Judgment was given for the Defendant: The Plaintiff took out a new Original, and then the Land was sold, so the Plaintiff lost his Debt. Adjornatur.

Afterwards in Hillary Term, 2 Gulielmi & Mariæ, Judgment was given for the Plaintiff, by the Opinion of three Justices against Justice Eyre, who argued that the Defendant cannot be charged as immediate Heir to his Father; 'tis true, the Lands are Assets in his Hands, and he may be charged by a special Declaration.

Dyer 368. pl. 460.

In this Case the intermediate Heirs had a Reversion in Fee which they might have charged either by Statute, Judgment, or Recognizance; they were so seised, that if a Writ of Right had been brought against them, they might have joined the Mise upon the Mere right, which proves they had a Fee, and tho' it was expectant on an Estate Tail, yet the Defendant claiming the Reversion as Heir, ought to make himself so to him who made the Gift.

3 Co. 42. *Ratcliff's* Case.

The Person who brings a Formedon in Descender, must name every one to whom any Right did descend, otherwise the Writ will abate.

8 Co. 88. F. N. B. 220. c. Rast. Ent. 375.

A Man who is sued as Heir, or who entitles himself as such, must shew how Heir.

The Case of Duke and Spring is much stronger than this, for there Debt was brought against the Daughter as Heir of B. She pleaded Riens per descent, and the Jury found that B. died seised in Fee, leaving Issue the Defendant and his Wife then with Child, who was afterwards delivered of a Son, who died within an Hour; and it was adjudged against the Plaintiff, because he declared against the Defendant as Daughter and Heir of the Father,

2 Roll. Abr. 709. 2 Cro. 161.

ther, when she was Sister and Heir of the Brother, who was last seised.

But the other Three Judges were of a contrary Opinion.

The Question is not, Whether the Defendant is liable to this Debt, but whether he is properly charged as Heir to his Father? or whether he should have been charged as Heir to his Nephew, who was last seised?

It must be admitted, That if the Lands had descended to the Brother and Nephew of the Defendant in Fee, that then they ought to have been named; but they had only a Reversion in Fee expectant upon an Estate Tail, which was incertain, and therefore of little Value. Now though John the Father and Son had this Reversion in them, yet the Estate Tail was known only to those who were Parties to the Settlement.

'Tis not the Reversion in Fee, but the Possession, which makes the Party inheritable; and therefore if Lands are given to Husband and Wife in Tail, the Remainder to the right Heirs of the Husband; then they have a Son, and the Wife dies, and the Husband hath a Son by a second Venter, and dies; the eldest Son enters, and dies without Issue, and his Uncle claimed the Land against the second Son, but was barred, because he had not the Remainder in Fee in Possession, and yet he might have sold or forfeited it. Bro. Tit. Descent, Pl. 30. 37 Ass. Pl. 4.

But here the Reversion in Fee is now come into Possession, and the Defendant hath the Land as Heir to his Father: 'Tis Assets only in him, and was not so either in his Brother or Nephew, who were neither of them chargeable, because a Reversion expectant upon an Estate Tail is not Assets.

Judgment was given for the Plaintiff.

DE
Term. Sancti Mich.

Anno 1 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1689.

Young *versus* Inhabitantes de *Totnam*.

AN Action was brought against the Hundred for a Robbery, in which the Plaintiff declared, That he was robb'd apud quendam locum prope Faire-Mile Gate, in such a Parish. He had a Verdict: And now Serjeant Tremaine moved in Arrest of Judgment; and the Exceptions taken were these, viz.

1. That it doth not appear that the Parish mentioned in the Declaration was in the Hundred.

2. Neither doth it appear that the Robbery was committed in the High-way.

3. The Plaintiff hath not alledged that it was done in the Day-time, for if it was not, the Hundred is not liable by Law.

But these Exceptions were all disallowed, because it being after a Verdict, the Court will suppose that there was Evidence given of these Matters at the Trial, so the Plaintiff had his Judgment.

Egglefton & *al' versus* Speke, *alias* Petit. *Intratur Trin.* 1 W. & M. *Rot.* 249.

Sho. 89. A Will shall not be revoked by a subsequent Writing, unless that be also a good Will. *V. ante* 218, 203. Shower 89.

THIS was a Trial at the Bar, by a Wiltshire Jury, in an Ejectment brought by the Plaintiffs as Heirs at Law to Anne Speke, who died seised in Fee of the Lands in Question.

Upon Not-guilty pleaded, this Question did arise at the Trial, Whether the Answer of a Guardian in Chancery shall be read as Evidence in this Court to conclude the Infant, there being some

some Opinions that it ought to be read; and the Defendants Counsel insisting on the contrary, Mr. Justice Eyres, being the Puisne Justice, was sent to the Court of Common-Pleas, then sitting, to know their Opinions, who returning, made this Report, That the Judges of that Court were all of Opinion, that such Answer ought not to be read as Evidence, for it was only to bring the Infant into Court, and to make him a Party. 2 Vent. 72.

Then the Plaintiffs proceeded to prove their Title as Heirs at Law, viz. by several Inquisitions, which were brought into Court, and by the Heralds-Office.

The Defendant's Title likewise was thus proved, viz. That the Lady Speke being seised in Fee, &c. did by Will, dated in March, 1682. devise the Lands to John Petit for Life, Remainder to the Defendant and his Heirs for ever: That the Lady Speke died so seised: That John Speke the Tenant for Life, and Father to the Defendant, was also dead, &c.

This Will was proved by several Witnesses, one of which likewise deposed, that my Lady Speke made Two other Wills subsequent to this now produced; and a Minister prov'd, that she burnt a Will in the Month of December, which was in the Year 1685.

Then the Plaintiffs produced another Will made by her at Christmas, 1685. attested by three Witnesses, but not in the Presence of my Lady; so that though it might not be a good Will to dispose the Estate, yet the Counsel insisted that it was a good Revocation of the other, for 'tis a Writing sufficient for that Purpose, within the sixth Paragraph of the Statute of Frauds.

The Case of Sir George Sheers was now mentioned, whose Will was carried out of the Chamber where he then was into a Lobby, and signed there by the Witnesses; but one of them swore that there was a Window out of that Room to his Chamber, through which the Testator might see the Witnesses as he lay in his Bed.

Upon which Evidence the Jury found this special Verdict, viz. That Anne Speke being seised in Fee, &c. did on the 12th Day of March, 1682. make her Will, and devised the Lands to John Petit for Life, and afterwards to George his Son, and to his Heirs for ever, upon Condition that he take upon him the Name of Speke.

That the 25th of December, 1685. she caused another Writing to be made, purporting her Will, which was signed, sealed and published, by her in the Presence of Three Witnesses in the Chamber where she then was, and where she continued whilst the Witnesses subscribed their Names in the Hall; but that she could not see them so subscribing.

They find, that the Lessors of the Plaintiff are Heirs at Law, and that they did enter, &c.

This Matter was argued in Easter-Term following; and the Question was, Whether this Writing purporting a Will was a Revocation of the former or not, and that depended upon the Construction of the sixth Paragraph in the Act of Frauds, viz. All Devises of Lands should be in Writing, and signed by the Party, or by some other in his Presence, and by his express Directions, and shall be attested by Three or Four Witnesses, &c. and that such Devise shall not be revocable but by some other Will or Codicil in Writing, or other Writing, &c. declaring the same.

Now the Want of Witnesses doth not make the last Will void in it self, but only quoad the Lands therein devised: It hath its Operation as to all other Purposes.

It must therefore be a Revocation of the former; and this is agreeable to the Resolution of the Judges in former Times, for there being nothing in the Statute of Wills which directs what shall be a Revocation, the Judges in Trevilian's Case did declare, that it might be by Word of Mouth, or by the very Intention of the Testator to alter any Thing in the Will, for before the late Statute, very few Words did amount to a Revocation.

32 H. 8 c. 1. Dyer 143.

If Lands are devised, and afterwards a Feoffment is made of the same, yet for Want of Livery and Seisin 'tis defective, yet this is a Revocation of the Will, tho' the Feoffment is void.

Moor 429. 1 Roll. Abr. 614, 615, 616.

Econtra.

The Counsel on the other Side argued, that this Will was not void by any Clause in the Statute of Frauds, for if this be a Revocation within that Statute, then this second Writing, purporting a Will, must be a good Will; for if 'tis not a good Will, then 'tis not a good Revocation within that Law.

No Man will affirm, that the latter Writing is a good Will, therefore the first being a Devise of Land, cannot be revoked but by the Will of Land, which the second is not.

This Statute was intended to remedy the Mischief of parol Revocations, and therefore made such a Solemnity requisite to a Revocation.

It cannot be denied but that this latter Writing was intended to be made a Will, but it wanting that Perfection which is required by Law, it shall not now be intended a Writing distinct from a Will, so as to make a Revocation within the Meaning of that Act.

If a Man hath a Power of Revocation, either by Will or Deed, and he makes his Will, in order to revoke a former, this is a Writing presently; but 'tis not a Revocation as long as the Person is living.

Therefore a Revocation must not only be by a Writing, but it must be such a Writing which declares the Intention of a Man that it should be so, which is not done by this Writing.

Upon the first Argument, Judgment was given for the Defendant, that the second Will must be a good Will in all Circumstances to revoke a former Will.

Cross *versus* Garnet.

THE Plaintiff declared, That on such a Day and Year there was a Discourse between him and the Defendant concerning the Sale of two Oxen, then in the Possession of the Defendant, and that they came to an Agreement for the same: That the Defendant did then sell the said Oxen to the Plaintiff, and did falsely affirm them to be his own, ubi revera, they were the Oxen of another Man. Shower 68.

The Plaintiff had a Verdict; and Serjeant Thompson moved in Arrest of Judgment, that the Declaration was not good, because the Plaintiff hath not alledged that the Defendant did affirm the Cattle to be his own, sciens the same to be the Goods of another, or that he sold them to the Plantiff fraudulenter & deceptive, or that there was any Warranty; for this Action will not lie upon a bare Communication. Cro. Eliz. 44. 1 Rol. Rep. 275. 2 Cro. 474. 1 Roll. Abr. 91. Moor 126. Yelv. 20. Sid. 146.

But notwithstanding, these Exceptions the Plaintiff had his Judgment. It might have been good upon Demurrer, but after Verdict 'tis well enough.

Lea

Lea *versus* Libb.

Two Witnesses to a Will, and two to a Codicil, one whereof was a Witness to the Will; these are not three Witnesses to the Will it self. Shower 68.

IN Ejectione Firmæ for Lands in Hampshire, the Jury found a special Verdict; the Substance of which was this, viz.

That the Lessor of the Plaintiff was Heir at Law to one John Denham his Ancestor, who being seised in Fee of the Lands in question, did by Will, bearing Date the 28th Day of January, in the Year 1678. devise the same to the Defendant, which he subscribed and published in the Presence of two Witnesses, and they likewise attested it in his Presence.

They find, that on the 29th Day of December, 1679. he made another Will or Codicil in Writing, reciting that he had made a former Will, and confirming the same, except what was excepted in the Codicil, and declared his Will to be, that the Codicil should be taken and adjudged as Part of his Will.

They find that he published this Codicil in the Presence likewise of two Witnesses, one of which was Witness to the first Will, but the other was a new Man.

They find that these were distinct Writings, &c.

The Question was, Whether this was a good Will, attested by three Witnesses, since one of the Witnesses to the Codicil was likewise a Witness to the Will, so that the new Man (if any) must make the third Witness.

Serjeant Thompson argued, That it was not a good Will: The Clause of the Statute is, That all Devises of Lands shall be in Writing, and signed by the Testator in the Presence of three Witnesses, and they do attest it in his Presence.

But here are not three Subscribing Witnesses in the Presence of the Testator, so that the first Will must be void, for one of the Witnesses to the Codicil did never see that Will.

Besides, the Codicil is not the same thing with the Will, 'tis a Confirmation of it; and this being in a Case wherein an Heir is to be disinherited, ought not to have a favourable Construction.

Attorney General contra. A Will may be contained in several Writings, and yet but one entire Will. 'Tis true, if it be attested only by two Witnesses, 'tis not good; but if the Testator call in a third Person, and he attests that individual Writing in his Presence, this is a good Will, tho' the Witnesses were not all present together and at the same time, for there is the Credit of Three Persons

some Persons to such a Will, which is according to the Intent of the Statute.

And therefore it cannot be objected that these are distinct Wills, or that the Papers are not annexed, for no such Thing is required by Law; for a Man may make his Will in several Sheets of Paper, and if the Witnesses subscribe the last Sheet 'tis well enough; or if he doth put all the Sheets in a blank Piece of Paper, and the Witnesses attest that Sheet, 'tis a good Will.

In these Cases the Intent of the Law-makers must and ought to be chiefly regarded, and for what Reasons and Purposes such Laws were made, and what Judgments have been given in parallel Cases.

If a Man grants a Rent-Charge to his youngest Son for Life, and afterwards devises that he shall have the Rent as expressed in the Grant: Now tho' the Writing was no Part of the Will, but of another Nature, yet the Will referring to the Deed, is a good Devise of the Rent-Charge within the Statute of Wills. 2 Cro. 144. Noy 117.

But in this Case the Codicil is Part of the Will; 'tis of the same Nature; and being made Animo testandi, the End of the Statute is performed, for both Will and Codicil joined together make a good Devise: The first was a Will to all Purposes; it only wanted that Circumstance of a third Witness to attest it, which the Testator compleated after, by calling in of a third Person for that Purpose.

Curia. If a Man makes a Will in several Pieces of Paper, and there are three Witnesses to the last Paper, and none of them did ever see the first, this is not a good Will.

Afterwards, in Hillary Term, Judgment was given that this was not a good Will.

Tippet *versus* Hawkey.

Tippet the elder and his Son covenant with John Hawkey to sell and convey Land to him free from all Incumbrances, and that they will levy a Fine, &c. and deliver up Writings. Item, 'Tis agreed between the Parties, that the said Hawkey shall pay to Tippet the younger so much Money, &c. Where two covenant, the Action may be brought in the Name of one. Yelv. 177.

The Action is brought in the Name of both; and upon a Demurrer to the Declaration it was held ill, for the Duty is vested in Tippet the younger, and he only ought to have brought this Action.

Judgment for the Defendant.

Rees

Rees *versus* Phelps.

Award. where good.

DEbt upon a Bond, conditioned for Performance of an Award.

Upon nullum fecerunt arbitrium pleaded, the Plaintiff replied, and shewed an Award, that the Defendant should pay 5 l. to the Plaintiff presently, and give Bond for the Payment of 10 l. more on the 29th Day of *November* following, and that this should be for and towards the Charges and Expences in and about certain Differences then depending between the Parties, and that they should now sign general Releases.

1 Rol. Abr. 259, 260.

And upon a Demurrer it was argued to be a void Award, because mutual Releases were then to be given, which would discharge the Bond payable in November following.

V. 2 Mod. 309, 169.

But the Court held it to be good, for the Releases shall discharge such Matters only which were depending at the Time of the Submission.

Godfrey *& al' versus* Eversden.

Prohibition denied upon Suggestion that there was a Chapel of Ease, and so ought not to repair the Parish-Church.

THere was a Parish Church and a Chapel of Ease in the Parish of Hitchin: The Defendant was taxed towards the Repairs of the Church, and a Libel was brought against him for the refusing of the Payment of that Tax.

He now suggests, That there was a Chapel of Ease in the same Parish, to which the Inhabitants do go, and that they have always repaired that Chapel, and so prayed a Prohibition.

But Serjeant Tremain moved for a Consultation, because the Parishioners of common Right ought to repair the Church; and tho' there is a Chapel of Ease in the same Parish, yet that ought not to excuse them from repairing of the Mother-Church.

Hob. 66.

He produced an Affidavit, that there had been no divine Service there for forty Years past, nor Burials or Baptism, whereupon a Prohibition was denied.

Batsomb's *Case*.

A Gentleman was convicted upon his own Confession for High Treason in the Rebellion of the Duke of Monmouth, and executed; and it was moved, that his Attainder might be reversed.

Attainder for Treason reversed.

The Judges were attended with Books, and the Exceptions taken were, viz.

1. There was no Arraignment or Demanding of Judgment. Co. Ent. 358.

2. There was Process of Ven. Fac. which ought not to be in Treason, but a Capias.

3. Because after the Confession the Judgment followed, and it doth not appear that the Party was asked what he could say why Sentence of Death should not pass upon him; for possibly he might have pleaded a Pardon.

For these Reasons the Attainder was reversed.

Mr. Parkinson's *Case*.

IT was moved for a Mandamus to restore him to a Fellowship of Lincoln College in Oxford, being a Member of a Lay-Corporation, and having a Freehold in it.

Mandamus denied for restoring of a Person to a Fellowship.

The like Mandamus had been granted to restore Dr. Goddard to the Place of one of the Fellows of the College of Physicians in London, which is a Lay-Corporation.

1 Mod. 82. 1 Sid. 71. Sid. 29. Shower 74.

But it was denied by the Court, for the Visitor is the proper Judge; and when a Man takes a Fellowship, he submits to the Rules of the College, and to the private Laws of the Founder.

It was denied by my Lord Hale in Dr. Roberts's Case, because in all Lay Corporations the Founder and his Heirs are Visitors, and in all Ecclesiastical Corporations the Bishop of the Diocese is the proper Visitor, who is Fidei Commissarius, and from whose Sentence there is no Appeal to this Court, especially in the Case of a Fellowship of a College, which is a Thing of private Design, and not at all concerning the Publick.

Anonymus.

Hill. 3 & 4 Jacobi, Rot. 1018.

A. B. nuper de Parochia Sancti *Jacobi Westm'* in Comitatu Midd. Generosus attachiatus fuit per Corpus suum ad respondend' C. D. Viduæ quæ fuit Uxor J. D. Generosi de Morte præd. J. quondam Viri sui unde eum appellat, Et sunt pleg' de pros' J. B. nuper de Parochia Sancti Jacobi Westm. in Comitatu Midd. Gen' & Johannes Doe de eadem Gen' & unde eadem Elizabetha per E. F. Attornatum suum juxta Formam Statut. in hujusmodi Casu edit. & provis. instanter appellat præd. A. B. de eo quod ubi præd. J. D. fuit in Pace Dei & dicti Domini Regis nunc apud Parochiam Sancti Jacobi infra Libertatem Westm. in Comitatu Middlesex, decimo die J. Anno Regni Domini Jacobi nuper Regis Angliæ tertio Hora prima post Meridiem ejusdem Diei ibidem scilicet apud Parochiam Sancti Jacobi infra Libertatem Westm. in Com. Midd. venit præd. A. B. & felonice ac ut felo dicti Dom. Reg. nunc voluntarie & ex Malicia sua præcogitat. & Insidiis præmeditatis contra Pacem dict' Dom' Reg' nunc Hora nona post Meridiem ejusd' Diei in & super præfat. J. D. adtunc Vi & Armis, &c. apud Parochiam Sanct. Jac. infra Libertat' Westm. præd. in Comitatu præd. insultum fecit & præd. A. B. adtunc & ibidem cum quodam Gladio, Anglice a Rapier, ad Valenciam quinque Solidorum, quod ipse idem A. B. in Manu sua dextra, adtunc & ibid. scil. prædicto decimo Die J. Anno tertio supradicto apud Porochiam Sancti Jacobi infra Libertatem Westm. prædict. in Com. Midd. præd. habuit & tenuit ipse prædict' J. D. in & super sinistram Partem Ventris ipsius J. D. prope Umbilicum, Anglice the Navel, ipsius J. D. adtunc & ibidem felonice voluntarie & ex Malitia sua præcogitata percussit & pupugit & dedit eidem J. D. adtunc & ibidem in & super prædictam sinistram Partem Ventris ipsius J. D. prope dictum Umbilicum ipsius J. D. cum Gladio prædicto unam Plagam mortalem Longitud. dimid. unius Pollicis, & Profunditat. sex Pollicium, de qua quidem Plaga mortali idem J. D. a prædicto decimo Die J. Anno tertio supradicto apud prædictam Parochiam Sancti Jacobi infra Libertatem Westm. in Comitatu Midd. prædict. languebat & languidus vixit, & adtunc scil. decimo sexto Die Junii Anno tertio supradicto apud Parochiam Sancti Jacobi infra Libertatem Westm. in Comitatu Midd. prædict ipse idem J. D. de Plaga mortali

 prædicta

prædicta obiit & sic præfat. A. B. prædictum J. D. apud Parochiam Sancti Jacobi infra Libertatem Westm. prædict. in Comitatu Midd. prædict. Modo & Forma prædict. voluntarie & ex Malitia sua præcogitata interfecit & murdravit contra Pacem dicti Domini Regis nunc Coron' & Dignitates suas, & quam cito idem A. B. Feloniam & Murdrum prædict. fecisset ipse idem A. B. fugit dictaque C. D. ipsum recenter insecut. fuit de Villa in Villam usque ad quatutor Villas propinquior' & ulterius quousque, &c. Et si prædictus A. B. Feloniam & Murdrum prædict. ei in Forma præd. imposit. velit dedicere præfat. C. D. hoc parata est versus eum probare prout Curia, &c.

The Defendant having prayed Judgment de Brevi originali, pleaded, Quod ipse A. B. per Breve illud appellat' existit per Nomen A. B. nuper de Parochia Sancti Jacobi Westm. in Comitatu Midd. Generosi ubi revera & in facto infra Comitatum Midd. prædict. est quædam Parochia vocat. & cognit. per Nomen Parochiæ Sancti Jacobi *infra Libertatem* Westm. sed in eodem Comitatu Midd. non habetur nec Die Impetrationis Brevis originalis appelli prædict. seu unquam habebatur aliqua Parochia sive Locus cognit' & nuncupat' per Nomen Parochiæ Sancti Jacobi Westm. tantum prout præd. C. D. per Breve suum superius supponit. Et hoc ipse idem A. B. parat' est verificare unde petit Judicium de Brevi illo, & quod præd. Breve cassetur.

The Plaintiff demurred, and the Appellee joined in Demurrer.

An Appeal of Murder was brought against A. B. of the Parish of St. James Westminster in the County of Middlesex Gent. for that he on the 10th Day of June, in the third Year of King James, did run the Deceased into the Left Part of his Belly with a Rapier, and that he died of that Wound three Days afterwards.

The Defendant demands Oyer of the Return, and pleads that there is a Parish known by the Name of the Parish of St. James within the Liberty of Westminster, but no such Place as the Parish of St. James Westminster only.

The Defendant pleaded in Abatement to an Appeal of Murder, and did not plead over to the Felony.

And upon a Demurrer it was argued that this Plea was not good, for it being in Abatement, the Appellee ought to have pleaded over to the Murder; so it was adjudged in the Case of Watts and Brain, the Pleadings of which Case are at large in my Lord Coke's Entries. Cro. El. 694.

2. He ought to have pleaded in Person, and not by Attorney; the Statute of Gloucester is plain in this Point.

Curia. If the Plea is in Abatement, and the Party doth not answer over to the Murder, yet that doth not oust him of his Plea, but the Appellant ought to have prayed Judgment.

'Tis a Question whether he ought to plead over to the Felony or not, for the Precedents are both Ways; there is no Judgment entred.

Proud *versus* Piper.

Mortuary due only by Custom. 21 H. 8. c. 6.

There was a Libel brought in the Spiritual Court for a Mortuary.

The Defendant suggests, that by the Statute of H. 8. no Mortuary ought to be paid, but in such Places where it had been usuall paid before the making of that Statute, and that there was no Custom in this Place to pay a Mortuary, and it was thereupon moved for a Prohibition; for Mortuaries are not due by Law, but by particular Custom of Places.

Cro. El. 151.

2 Inst. 491. 1 Cro. 237. Seld. of Tithes 287. * Sid. 263.

'Tis true, a Prohibition was denied in the Case of * Mark and Gilbert, but it was because it was admitted that there a Mortuary was due by Custom, but they differed in the Person to whom it ought to be paid.

Curia. Prohibitions have been granted and denied upon such Suggestions, therefore the Defendant was ordered to take a Declaration in a Prohibition as to the Mortuary, and to try the Custom at Law.

Lutwich *versus* Piggot.

Lease, whether made pursuant to the Power in the Reservation.

In Ejectment for Lands in Northumberland, tried at the Bar, the Case was thus, Viz.

Peter Venables was seised in Fee of the Manor of Long Witton in the said County, and being so seised made a Settlement thereof, by Lease and Release, to the Use of himself for Life, without Impeachment of Waste, then to the Trustees for seven Years to raise Portions for Daughters, then to William Venables and the Heirs Male of his Body, and if he die without Issue, then to Ann his Daughter for Life, with Remainders over.

In which Settlement there was this Proviso, viz.

 Provided

Provided that it shall be lawful for *William Venables* by Will or Deed to dispose of any Part of the said Manor to his Wife for Life.

And another Proviso to this Purpose, viz.

Provided that it shall and may be lawful to and for the said *William Venables*, by any Deed in Writing under his Hand and Seal, to demise *for 3 Lives or 21 Years*, or under, or for any Time or Term of Years, upon one, two, or three Lives, or as Tenant in Tail in Possession may do, all or any Part of the said Manor, Lands, *&c.* which were in Lease for the Space of Forty Years last past.

The Defendant's Title was a Lease for 99 Years, made by the said William Venables to one Mary Venables, if three Lives should so long live.

And the Question was, Whether that Lease was pursuant to the Power in the last Proviso?

It was objected that it was not, for it ought to be a Lease for 21, and not 99 Years, determinable for three Years.

But the Plaintiff was Nonsuit.

Rex *versus* Fairfax *&* *al'*.

Who shall be bound to take an Apprentice in Husbandry. Shower 76.

An Order made at the Quarter-Sessions of Gloucester, was moved hither, confirming another made by the Justices there, for placing of a poor Boy to be an Apprentice in Husbandry, and it was moved that it might be quashed.

Mr. Pollexfen argued, that the Justices had no Power given them by the Law to compel a Man to take such an Apprentice, and this will depend upon the Construction of such Statutes which relate to this Matter.

The first is that of Queen Elizabeth, which enacts, That for the better advancing of Husbandry and Tillage, and to the Intent such who are fit to be made Apprentices to Husbandry may be bound thereunto, that every Person being an Housholder, and having or using half a Plough-land at the least in Tillage, may take any to be an Apprentice above ten, and under eighteen Years, to serve in Husbandry, until the Party be of the Age of twenty one, or twenty four Years, the said Retainer and taking of an Appentice to be by Indenture. 5 El. cap. 4 *Paragraph* 25.

Now before the making of this Statute, the Practice of putting out poor Children was only in Cities, and great Towns, to particular Trades and Employments.

The

The next Statute is 43 Eliz. by which, Power is given to the Church-Wardens or Overseers of the Poor, to raise weekly or otherwise, by Taxation of every Inhabitant, such competent Sum or Sums of Money as they shall think fit, for Relief of the Poor, and putting out of Children to Apprentice.

43 El. c. 2.

And then in the fifth Paragraph Power is given to them by the Assent of two Justices of Peace, to bind poor Children where they shall see convenient, *&c.* which Words were the Foundation for the making of this Order.

But the Construction thereof can be no otherwise than, viz. Whereas before the making of this Act poor Children were bound Apprentices to Tillage, now the Church-Wardens may raise Money to bind them out to Trades; for if they could compel Men to take them, What Need was there of raising Money to place them out?

This must be the natural Construction of that Law, which appears yet more plain by the Words of a subsequent Statute, which continues that of the 43d of Eliz. with this Addition, That all Persons to whom the Overseers of the Poor shall (according to that Act) bind any Children to Apprentice, may take, receive and keep them as Apprentices.

1 Jac. cap. 25. *Paragraph* 23.

'Tis true, the general Practice of putting out poor Children seems to warrant this Order; but this hath been occasioned upon a Mistake in Mr. Dalton's Book, who reported the Resolution of the Judges in 1633. to be, That every Man who by his Calling, Profession, or Manner of Living, and who entertaineth and must use Servants of the like Quality, such must also take Apprentices.

Dalt. 114.

By this Resolution the Justices of Peace have been governed ever since. But Justice Twisden would often say, that those were not the Resolutions of the Judges, as reported by Mr. Dalton, and therefore the Book was mistaken.

2. The Order it self doth not mention, that the Party, to whom this poor Boy was bound Apprentice, did occupy any Land in Tillage, for so it ought to be, otherwise the Overseers of the Poor, may bind him to a Merchant or to an Attorney, which he called a Free Quarter; for by such Means, Diseases may be brought into a Family, and a Man hath no Security either for his Goods or Money.

This was the Opinion of Justice Twisden in Coutrell's Case; and it seems to be very natural, and therefore the chief Reason why Power was given by the Statute to the Overseers to raise Money, was that they might place poor Children to such who were

Sid. 29.

willing to take them for Money, for otherwise they might compel a Man to receive his Enemy into his Service.

He relied on the Case of the King and Price, Hillary 29, and 30 Car. 2. which was an Order of the like Nature moved to be quashed: And Justice Twisden said in that Case, That all the Judges of England were of Opinion that the Justices had not such a Power, and therefore that Order was quashed.

'Tis plain, that by the Statute of 43 Eliz. the Justices may place out poor Children where they see it convenient, and so the constant Practice hath been; so is the Resolution of the Judges in Dalton, which was brought in by the Lord Chief Justice Hyde, but denied so to be by Justice Twisden, for no other Reason but because Justice Jones did not concur with them. Econtra.

In Price's Case this Matter was stirred again, but there hath been nothing done pursuant to that Opinion.

Since then the Justices have a Power to place out poor Children, 'tis no Objection to say, that there may be an Inconvenience in the Exercise of that Power, by placing out Children to improper Persons; for if such Things are done, the Party hath a proper Remedy by Way of Appeal to the Sessions.

Three Justices were of Opinion that the Justices of Peace had such a Power, and therefore they were for confirming the Order; and Justice Dolbin said, it was so resolved in the Case of the King and Gilliflower, in the Reign of King James the First, Foster being then Chief Justice, tho' the Judges in Price's Case were of another Opinion. Reym. 66.

The Chief Justice was now likewise of a different Opinion, for the Statute means something when it says, That a Stock shall be raised by the Taxation of every Inhabitant, &c. for putting out of Children Apprentices. 1 Vent 325.

There are no compulsory Words in the Statute for that Purpose, nor any which oblige a Master to take an Apprentice, and if not, the Justices have not Power to compel a Man ta take a poor Boy, for possibly such may be a Thief or Spy in the Family.

But this Order was quashed for an apparent Fault, which was, That the Statute has entrusted the Church-wardens and Overseers of the Poor, by and with the Approbation of two Justices, to bind Apprentices, &c. And the Church-wardens are not mentioned in this Order.

DE
Term. Sancti Hill.

Anno 1 Gulielmi & Mariæ, Regis & Reginæ, in Banco Regis, 1689.

Thirsby *versus* Helbot.

Award void where a Person who is a Stranger to the Submission is ordered to be a Surety. Shower 82.

DEBT upon a Bond for Performance of an Award: Upon Nullum Arbitrium pleaded, the Plaintiff replied and shewed an Award made, which amongst other things was, That the Defendant should be bound with Sureties, such as the Plaintiff should approve, in the Sum of 150 l. to be paid to him at such a Time, and that they should seal mutual Releases, and assigned a Breach in not giving of this Bond.

There was a Verdict for the Plaintiff, and now Serjeant Pemberton moved in Arrest of Judgment, that this was a void Award, because 'tis that the Defendant shall be bound with Sureties, &c. and then Releases to be given; now the Sureties are Strangers to the Submission, and therefore the Defendant is not bound to procure them.

He relied upon the Case of Barnes and Fairchild, which was an Award that all Controversies, &c. should cease, and that one of the Parties should pay to the other 8 l. and that thereupon he should procure his Wife and Son to make such an Assurance, *&c.* This was held to be void, because it was to bind such Persons who were not Parties to the Submission.

1 Rol. Abr. 259.

Tremain Serjeant contra. That Cause doth not come up to this at the Bar, because by this Award the Party was to sign a general Release, whether the Defendant paid the Money or not.

Econtra.

But the Court was of Opinion, that the Award was void, because it appointed the Party to enter into a Bond with such Sureties as the Plaintiff shall like, and Releases then to be mutually given. Now if the Plaintiff doth not like the Security given, then he is not to seal a Release, and so 'tis but an Award of one Side.

Savier *versus* Lenthal.

ASsisa ven' recogn' si Willielmus Lenthal Armiger, Henricus Glover Armiger, Johan. Philpot Generosus, Thomas Cook Generosus, & Samuel Ellis Generosus, injuste, &c. disseisiverunt Thomam Savier de libero Tenemento suo in Westm. infra triginta Annos, &c. Et unde idem Thomas Savier per Jacobum Holton Attornatum suum queritur quod disseisiverunt eum de Officio Marr' Maresc' Domini Regis & Dominæ Reginæ coram ipso Rege & Regina cum pertin', &c. Assise.

The Cryer made Proclamation, and then called the Recognitors between Thomas Savier Demandant, and William Lenthal Tenant, who were all at the Bar, and severally answered as they were called.

Then Mr. Goodwin of Greys-Inn arraigned the Assize in French, but the Count being not in Parchment upon Record, the Recognitors were for this Time discharged, and ordered to appear again the next Day.

But the Counsel for the Tenant relied on the Authority in Calvert's Case, that the Title ought to be set forth in the Count, which was not done now, and therefore the Demandant ought to be nonsuited. Plo. Com. 403. 4 E. 4. 6.

But the Writ being returnable that Day, was ex Gratia Curiæ adjourned to the Morrow afterward; and if the Demandant did not then make a Title, he must be nonsuited.

The next Day the Jury appeared: Then the Cryer called Thomas Savier the Demandant, and then the Tenants, and afterwards the Recognitors; and the Assize being arraigned again, the Demandant set forth his Title.

Then Sir Francis Winnington, of Counsel for Mr. Lenthal, one of the Tenants appeared after this Manner, Vouz avez icy le dit Williem Lenthal & jeo prye oyer del Brief & del Count.

Then the other Tenants were called again three Times, and they not appearing, Process was prayed against them.

Doe *versus* Dawson.

Bail liable if the Principal had two Terms after an Injunction dissolved.

BAil was put in to an Action brought by the Plaintiff, and before he declared, the Defendant obtained an Injunction to stay proceedings at Law, which was not dissolved for several Terms afterwards.

Then the Injunction was dissolved, and the Plaintiff delivered his Declaration, and had Judgment by Default; and now he brought a Scire Fac. against the Bail, who pleaded that no Declaration was delivered or filed against the Principal within two Terms after the Action commenced and the Bail entred, and upon a Demurrer the Plaintiff had Judgment against them, for the Bail are liable, so as the Plaintiff in the Action declare soon after the Injunction dissolved; and it's no Fault in the Plaintiff that he did not declare sooner, for if he had, he would have been in Contempt of the Court of Chancery for a Breach of the Injunction.

Anonymus.

Error to reverse a Recovery, there must be a *Scire Fac.* against the Heir and Tertenants Dyer 321.

A Writ of Error was brought to reverse a Recovery suffered in the grand Sessions of Wales.

The Question now was, Whether there ought to be a Scire Fac. against the Tertenants and the Heir?

It was said that 'tis discretionary in the Court, and that the first Case of this Nature was in my Lord Dyer, where a Writ of Error was brought in B. R. to reverse a Fine levied in the County Palatine of Chester, and a Scire Facias was brought against the Heir, but not against the Tertenants.

But the Heir in this Case is an Infant, so that if he be admitted to be a Defendant, he ought not to appear during his Minority, and there is no Remedy 'till his full Age.

Ante 119.

Curia. 'Tis not necessary in Point of Law, but it seems to be the Course of the Court, and that must be followed; and 'tis reasonable it should be so, because the Errors upon a Recovery should not be examined before all the Parties are in Court, therefore there should be a Scire Facias against the Heir and the Tertenants.

Sid. 213.

Lambert *versus* Thurston.

TRespass, Quare Vi & Armis Clausum fregit, &c. which the Plaintiff had laid to his Damage of 20 s.

The Defendant demurred to the Declaration, and for Cause shewed, that B. R. hath not Cognizance, either by the Common Law, or by the Statute of Gloucester, to hold Plea in such an Action, where the Damages are laid to be under 40 s.

Trespass, *Quare Vi & Armis*, lies for small Damages. 2 Inst. 311.

But the Court were of another Opinion, That an Action of Trespass, Quare Vi & Armis, will lie here, let the Damage be what it will. So the Plaintiff had Judgment.

DE
Termino Paſchæ,

Anno 2 Gulielmi & Mariæ, Regis & Reginæ, in Banco Regis, 1690.

Whitehal *verſus* Squire.

1 Salk. 195. What ſhall be a Converſion, what not.

TRover for a Horſe; the Defendant pleaded Not-guilty, and a ſpecial Verdict was found, viz. That John Mathers was poſſeſſed of this Horſe, who on the 4th Day of December, in the firſt Year of King James II. put him to Graſs to the Defendant, who kept him till the firſt Day of May following.

That John Mathers died Inteſtate, and before Adminiſtration was granted, the Plaintiff deſired the Defendant to bury the ſaid Mathers, and that he would ſee him ſatisfied for his Expences, and accordingly the Defendant did bury him.

Then the Plaintiff gave this Horſe to the Defendant in Part of Satisfaction for the Charges of the Funeral, and a Note under his Hand to pay him 3 l. more.

The Plaintiff afterwards took out Adminiſtration, and brought his Action againſt the Defendant for this Horſe; and whether this was a Converſion or not, was the Queſtion.

Juſtice Dolben and Eyre held that it was not, but the Chief Juſtice was of another Opinion.

Cole

Cole *versus* Knight. *Hill.* 1 & 2 *Gulielmi*, *Rot.* 810.

SCire Fac. upon a Judgment of 6000 l. brought by the Plaintiffs Knight and Donning, as surviving Executors of John Knight, against the Defendant Cole and his Wife, as Executrix of John Lawford, setting forth, That Sir John Knight, Mr. Eyre and John Knight, had recover'd a Judgment of 6000 l. against John Lawford; That John Knight survived, who made his Will, and appointed John Kent, Thomas Knight and William Donning, to be his Executors; that he died, the Debt and Damages not being satisfied, that they the said Knight and Donning proved the Will, that John Kent died; and that John Lawford made his Will, and appointed his Daughter Mary, now the Wife of Thomas Cole, to be sole Executrix, and soon after departed this Life; that Cole proved Lawford's Will, and that the Debt was not yet paid.

Release by one Executor of a Legacy, is not a good Bar to a *Sci. Fa.* upon a Judgment. 3 Lev. 269, 273. Shower 150.

The Defendant Cole, and his Wife pleaded a Release from Donning, one of the Plaintiffs, by which he acknowledged to have received of the said Cole and his Wife, as Executrix of the last Will and Testament of John Lawford, the Sum of 5 l. being a Legacy given to him by Lawford, and then in general Words he released the said Cole and his Wife of the Legacy, and of all Actions, Suits and Demands whatsoever, which he had or might have against the Defendants Cole and his Wife, as Executrix of John Lawford, or may or can have for any Matter or Thing whatsoever.

To this Plea the Plaintiff demurred, and the Question was, Whether the Release is a good Bar or not?

It was argued to be no Bar, for it being given upon the Receipt of the Legacy, is tied up to that only, and shall not be taken to release any other Thing. Tho. Jones 104.

If a Man should receive 10 l. and give a Receipt for it, and doth thereby acquit and release the Person of all Actions, Debts, Duties and Demands, nothing is released but the 10 l. because the last Words must be limited to those foregoing. 2 Roll. Abr. 409.

'Tis no new Thing in the Law for general Words to be restrained by those which follow; as for Instance, if a Release be of all Errors, Actions, Suits, and Writs of Error whatsoever, it hath been held that an Action of Debt upon a Bond was not released, but only Writs of Error. Het. 15.

And this seems to be the Intent of the Parties here, that nothing but the Legacies should be released; and therefore, those general Words which follow must be confined to the true Meaning and Intention of him who gave the Release.

Yelv. 156. So 'tis if a Man promise to pay 40s. to another during Life, a Release of all Quarrels, Controversies and Demands, which he had or may have, will not discharge this Annuity, because the Execution of the Promise was not to be 'till the Rent should be due.

1 Sid. 141. So likewise a Release of all Demands will not discharge a growing Rent.

2. If this should be a good Release, it discharges only such Actions which he hath in his own Right; for by the Words, all Actions which he had are released: Now if an Executor grant omnia Bona sua, the Goods which he hath as Executor do not pass.

Cro. El. 6. 1 Leon. 263.

Econtra. Econtra. It was argued that this is a good Bar, for by the first Words the Legacy is released, then the subsequent Words, viz all Actions, Suits and Demands whatsoever, which he had against the Defendant as Executor of Lawford, must mean something.

'Tis true, where general Words are at the Beginning of a Lease, and particular Words follow, if the general Words agree with those which are particular, the Deed shall be construed according to the special Words: But where there are such Words at first, and the Conclusion is with general Words, as 'tis in this Case, both shall stand; for the Rule is, Generalis Clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa.

8 Co. 154. b.

These Words do also release not only such Actions which he had in his own Right, but also as Executor to Mr. Lawford.

If a Man hath a Lease in Right of his Wife, as Executrix to her former Husband, and he grants all his Right and Title therein; by this Grant, the Right which he had by his Wife doth pass, for the Word [His] doth imply a Propriety in Possession.

Curia. But per totam Curiam, Judgment was given for the Plaintiff.

If an Executor hath Goods of the Testators, and also other Goods in his own Right, and then grants omnia Bona sua, in Strictness the Goods which he hath as Executor do not pass, because they are not Bona sua, but so called because of the Possession which he hath, and therefore it must be a great Strain to

to make general Words which are properly applicable to Things which a Man hath in his own Right, to extend to Things which he hath as Executor.

It was never the Intent of the Party to release more than what he had in his own Right, and that appears by the Recital of the Legacy of 5 *l.* and therefore the Words which follow must have a Construction according to the Intent of Donning at the Time of the making the Release, and shall be tied up to the foregoing Words, and then nothing will be discharged but the Legacy.

As if a Lease for Years be made, and the Lessor enters into Bond, that he will suffer the Lessee quietly to enjoy during the Term, without Trouble of the Lessor, or any other Person; if an Entry should be made upon the Lessee, without the Procurement or Knowledge of the Lessor, the Condition is not broken, for the last Words are tied up to the Word suffer. Dyer 255.

If the Legacy had not been released by particular Words, it would not have been discharged by a Release of all Actions and Demands whatsoever; and therefore there would be a great Inconvenience if these general Words should be construed to release any Thing besides this Legacy; for suppose there are two Executors, and one refuseth to administer, but meeting with a Debtor of the Testator, gives him a Release of all Actions: Will this amount to an Acceptance of the Administration? Certainly it will not.

The Words in this Case are not of that Extent as to release Actions as an Executor; for 'tis a Release which goeth to the Right.

'Tis like the Case where one of the Avowants released the Plaintiff after the taking of the Cattle which was adjudged void upon a Demurrer, because he had not then any Suit or Demand against the Plaintiff, but had distreined the Beasts as Bailiff, and in Right of another. 1 Rol. Rep. 246.

Justice Dolben cited a Case adjudged in B. R. in the Year 1669. it was between Stokes and Stokes. 1 Vent. 435. 1 Lev. 272.

The Plaintiff released all which he had in his own Right, there was a Bond in which his Name was used in Trust for another; and afterwards he brought an Action of Debt upon that Bond, to which the Release was pleaded.

The Plaintiff replied, that the Release was only of all such Actions which he had in his own Right, and not such which he had in the Right of another; upon this they were at Issue, and the Plaintiff had a Verdict, and Mr. Sympson moved in Arrest of

Judg-

Judgment, that this Bond must be in his own Right: But the Court affirmed the Judgment.

Anonymus.

Words, where actionable without a *Colloquium*.

AN Action on the Case was brought for these Words, viz. He stole the Colonel's Cupboard-Cloth. It was made a Question whether these Words were actionable, there being no precedent Discourse laid in the Declaration, either of the Colonel or his Cupboard-Cloth.

But the Court held the Words actionable, for 'tis a Charge of Felony, and if such Words, as now laid in this Declaration, are not actionable, any Person may be scandalized; for 'tis and must be actionable to say of a Man, that he stole my Lord's Horses, or the Parson's Sheep, tho' it doth not appear to what Lord or Parson they did belong.

Rex *versus* Silcot.

Conviction for keeping a Gun, not having 100 *l. per Annum*, and doth not say when. 33 H. 8. c. 6.

THE Defendant was convicted before a Justice of the Peace, upon the Statute of H. 8. for keeping of a Gun, and upon Proof it did appear that he had not 100 l. per Annum.

The Record of the Conviction was removed into B. R. and this Exception was taken to it, viz. Non habuisset 100 l. per Annum, but doth not say when, for it may be that he had one Hundred Pound per Annum at the Time when he kept a Gun, but not when he was convicted.

It was answered, That the Words, non habuisset, shall relate to all Times past, and is as much as to say, nunquam habuit, and the Conclusion being contra Formam Statuti, must explain such Words which seem to be doubtful.

This was compared to the Case where Debt was brought upon the Statute of R. 3. for taking away of Goods before the Plaintiff was convicted of the Felony laid to his Charge, contra Formam Statuti, he being only committed upon Suspicion; now tho' he did not alledge that the Goods were taken, for this Cause it shall be intended they were so taken, when no other Cause is shewed.

1 R. 3. c. 3.

Cro. El. 749.

Curia. This is a Conviction before a Justice of the Peace, and therefore the Time when the Offence was committed should be cer-

certainly alledged, viz. That the Defendant prædict' Die & Anno had not 100 l. per Annum, for which Reason it was quashed. 1 Sand. 263. 1 Vent. 33, 39.

Bisse *versus* Harcourt. *Hill.* 1 *Gulielmi. Rot.* 217.

THE Plaintiff brought an Action for 400 l. for so much Money had and received of him by the Defendant. Salk. 177. Replication not well concluded.

The Defendant pleaded an Attainder of High Treason in Abatement, and therefore ought not to answer the Declaration.

The Plaintiff replied, That after he was attainted, and before this Action brought, he was pardoned; and concludes thus: Unde petit Judicium, & *Dampna sua.*

The Defendant demurs, and for Cause shewed, that the Replication is not well concluded, for dampna sua ought to be left out; and of that Opinion was the Court, and therefore a Rule was made, that he might discontinue this Action without Costs. Rast. Ent. 663. b. 681. Co. Ent. 160.

Mordant *versus* Thorold. *Hill.* 1 & 2 *Gulielmi. Rotulo* 340.

THE Plaintiff brought a Scire Fac' upon a Judgment, The Case was thus, viz. Anne Thorold recovered in Dower against Sir John Thorold, in which Action Damages are given by the Statute of Merton. 1 Salk. 252. 3 Lev. 275. Shower 97. 20 H. 3. c. 1.

Sir John Thorold brought a Writ of Error in B. R. and the Judgment was affirmed.

Then the Plaintiff in Dower brought a Writ of Enquiry for the Damages, and married Mr. Mordant, and died before that Writ was executed.

Mr. Mordant takes out Letters of Administration to his Wife, and brought a Sci' Fa' upon the Judgment; and the Question was, Whether it would lie?

This depended upon the Construction of the Statute of King Charles II. which enacts, That in all personal Actions, and real and mixt, the Death of either Party between the Verdict and the Judgment shall not hereafter be alledged for Error, so as such Judgment be entred within two Terms after such Verdict. 17 Car. 2. c. 8.

Serjeant Pemberton insisted, that this was a judicial Writ, and that the Administrator had a Right to it, tho' the Wife died before the Profits were ascertained by the Writ of Enquiry; 'tis no more than a plain Sci' Fa' upon a Judgment, which an

Executor may have, and which was never yet denied, tho' this seems to be a Case of the first Impression.

The Counsel on the other Side argued, That 'tis true, an Executor may have a Scire Facias upon a Judgment recovered in the Life of the Testator, by reason only of such Recovery; but this Scire Facias is brought for what never was recovered, because the Wife died before any Thing was vested in her; for the Judgment will stand so as to effect the Lands, but not for the Damages.

Curia. When a Statute which gives a Remedy for mean Process is expounded, it ought to be according to the Common Law. Now where entire Damages are to be recovered, and
8 & 9 W. 3. the Demandant dies before a Writ of Enquiry executed, the Executor cannot have any Remedy by a Scire Facias upon that Judgment, because Damages are no Duty 'till they are assessed. Sed adjornatur.

DE

DE
Term. Sanct. Trin.

Anno 2 Gulielmi & Mariæ, Regis & Reginæ, in Banco Regis, 1690.

Shotter *versus* Friend & *Uxor'*.

Hill. 2 Gulielmi. Rot. 39.

THE Plaintiff and his Wife declared upon a Prohibition, setting forth, That John Friend, on the 13th of October, 22 Car. 2. made his Will, by which he bequeathed to Mary Friend 10 l. to be paid to her within two Years after his Decease, and that he made Jane, the Wife of the Plaintiff Shotter, Executrix, and died: That the said Executrix, while sole and unmarried, paid the said Legacy to Mary Friend, who is since dead: That Thomas Friend, the Husband of the said Mary, did after her Death demand this Legacy in the Consistory Court of the Bishop of Winton: That the Plaintiff pleaded Payment, and offered to prove it by one single Witness, which Proof that Court refused, though the Witness was a Person without Exception; and thereupon Sentence was given there against the Plaintiff, which Sentence was now pleaded; and upon Demurrer to the Plea,

2 Salk 547. Proof by one Witness good in the Spiritual Court. Shower 158.

The Question was, Whether upon the whole Matter the Defendant should have a Consultation? Or, Whether a Prohibition should be granted, because the Proof by one Witness was denied by that Court.

It was argued, That the Defendant should not have a Consultation, because Matters Testamentary ought to have no more Favour than Things relating to Tythes, in which Cases the Proof by one Witness hath been always held good.

So 'tis in a Release to discharge a Debt, which is well proved by a single Testimony; and it would be very inconvenient if it should be otherwise, for Feoffments and Leases may come in Question, which must not be rejected, because proved by one Witness.

A Modus decimandi comes up to this Case, upon the Suggestion whereof Prohibitions are never denied; and the chief Reason is, because the Spiritual Court will not allow a Modus to be any Discharge of Tythes of Kind.

The Courts of Equity in Westminster-Hall give Relief upon a Proof by one Witness; so likewise do the Courts of the Common Law, if the Witness is a good and credible Person.

'Tis true, a Prohibition shall not go upon a Suggestion that the Ecclesiastical Court will not receive the Testimony of a single Witness; if the Question is, upon Proof of a Legacy devised, or Marriage or not, or any other Thing, which originally doth lie in the Cognizance of that Court; but Payment or not Payment is a Matter of Fact triable at the Law, and not determinable there: If therefore they deny to take the Evidence of a single Witness, a Prohibition ought to go.

2 In6. 608.

2. The Sentence is no Obstacle in this Case, because the Plaintiff had no Right to a Prohibition until the Testimony of his Witness was denied, and Sentence thereupon given; and this is agreeable to what hath been often done in Cases of like Nature.

Cro.Eliz.88. Moor.

As for Instance, Prohibitions have been granted where the Proof of a Release of a Legacy by one Witness was denied.

Cro. Eliz. 666. Moor 413.

So where the Proof of Payment of Tythes for Pidgeons was denied upon the like Testimony.

2 Rol. Rep. 439. 2 Rol. Abr. 300. Pl. 9. 299. Pl. 14, 17. Yelv. 92. Latch. 117. 3 Bulf. 242. Hutt. 22. 12 Co. 65.

So where a Suit was for Substraction of Tythes, and the Defendant pleaded, that he set them out, and offered to prove it by one Witness, but was denied, a Prohibition was granted.

And generally the Books are, That if the Spiritual Court refuse such Proof, which is allowed at the Common Law, they shall be prohibited.

There is one Case against this Opinion, which is that of Roberts, in 12 Co. Rep. but it was only a bare Surmise, and of little Authority.

Econtra.

Those who argued on the other Side held, That a Consultation shall go, and that for two Reasons:

1. Because a Prohibition is prayed after Sentence.

2. Because the Ecclesiastical Court hath an original Jurisdiction over all Testamentary Things.

As

As to the first Point, 'Tis plain, that if that Court proceed contrary to those Rules which are used and practised at the Common Law, yet no Prohibition ought to go after Sentence, but the proper Remedy is an Appeal.

2. It cannot be denied, but that that Court had Cognizance of the principal Matter in this Case, which was a Legacy; and Payment or not is a Thing collateral. Now wherever they have a proper Jurisdiction of a Cause, both that and all its Dependencies shall be tried according to their Law, which rejects the Proof by a single Witness.

This was the Opinion of Justice Popham and Williams in those Times, when most of the Cases cited on the other Side were under Debate.

In the Case of Brown and Wentworth, a Revocation of a Will was offered to be proved by a single Witness in the Spiritual Court, which being denied, a Prohibition was prayed in B. R. but denied, because the Will being the principal Matter of which that Court had an original Jurisdiction, therefore the Revocation thereof, which was a collateral Matter, but depending upon the Principal, shall be tried there; for when the Original belongs properly to their Determination, all Dependances thereon shall follow it, and be tried by them according to their Law. Yelv. 92.

In Easter-Term, 4 Car. 1. this came to be a Question again: It was upon a Libel for a Legacy, and Plene administravit pleaded, which they endeavoured to prove by the Testimony of a single Witness, and denied: In that Case Croke and Yelverton Justices were against the Prohibition, because a Suit for a Legacy was a Thing meerly Spiritual, and Payment thereof is of the same Nature; so that the Ecclesiastical Court hath a proper Jurisdiction both of the Matter and the Proof. 2 Cro. 264. 12 Co. 67.

By these Instances it may be seen, that 'tis not yet a settled Point that a Proof by one Witness in that Court is good; for Prohibitions have been both granted and denied. Het. 87 Sid. 161.

It cannot be a Reason to grant a Prohibition to the Spiritual Court for refusing such Proof which is allowed at the Common Law, because though the Proof by a single Witness is allowed at the Law, yet 'tis not a conclusive Evidence, because the Jury, who are of the Vicinage, are supposed to know the Fact, and may give a Verdict upon that Knowledge without Proof or Witness, as well as where there is but one.

In Michaelmas-Term following the Court were all of Opinion, That no Consultation ought to go, for as where the Ecclesiastical Court proceeds upon Things meerly Spiritual, no Prohibition is to be granted as in Suits about Probates of Wills, &c. so where they meddle with Temporal Matters, or refuse to admit such Proof which is allowed at the Common Law, no Consultation shall go.

If the Law should be otherwise, it would be inconvenient for all Executors and Administrators, for if they should be compelled to prove Payment of Debts by two Witnesses, they might often fail of that Proof, and so pay the Money twice.

Such Proof which is good at the Common Law ought to be allowed in their Court, and at the Common Law 'tis not necessary to prove a Payment of a Debt by two Witnesses.

They may follow their own Rules concerning Things which are originally in their Cognizance; but if any collateral Matter doth arise, as concerning a Revocation of a Will, or Payment of a Legacy, if the Proof be by one Witness, they ought to allow it.

Tythes are of Ecclesiastical Cognizance. Now if a Libel should be brought for Substraction of Tythes, and the Defendant proves by one Witness, that he set them out from the nine Parts, though the Parson had not any Notice of it, (which he is not to have at the Common Law, though 'tis otherwise by their Law) that Court must allow this Proof, otherwise a Prohibition must go.

2. As to the other Point, a Prohibition may be granted as well after as before Sentence; but the Sentence in this Case is the very Ground of the Prohibition.

1 Vent. 281. Justice Dolben cited a Case between Richardson and Desborow, in B. R. Hill 16[illegible]5. which was a Devise of a Legacy of 100 l. The Executor was sued, who pleaded, That the Testator ow'd another Person the like Sum of 100 l. upon Bond, which being paid, he had not Assets ultra: And upon Proof in the Spiritual Court it appeared there was but one Witness to the Bond, which not being a good Proof of it in their Law, there was a Sentence for the Payment of the Legacy, and afterwards a Prohibition was granted upon the suggesting of this Matter.

Ashcomb *versus* Inhabitantes Hundredi de Elthorn.

Hill. 1 *Gulielmi.* *Rot.* 901.

AN Action was brought upon the Statute of Winton for a Robbery done in the Parish of Hamondsworth, in Longford-lane, in the said Hundred. The Case was thus, viz.

2 Salk. 613. A Person was robbed, who refused to make Oath; whether the Hundred may be sued. Shower 94, 241.

The Plaintiff employed one Coxhead his Servant to sell fat Cattle in Smithfield, who sold them for 106 l. which Money he delivered tied up in two Bags to one Strange a Quaker, who was robb'd in the Company of Coxhead, he being also robb'd of 12 s.

They both gave Notice of this Robbery to the Inhabitants of the next Village, and Coxhead, was examined by the Justice of the Peace dwelling in the County and Hundred where the Robbery was committed, pursuant to the Statute, &c. before whom he made Oath, that he did not know any of the Robbers; but Strange, being a Quaker, refused to be examined upon Oath.

27 El. c. 13.

Mr. Ashcomb, the Master, brought an Action against the Hundred; and all this Matter was found specially.

Now the Question was, Whether the Action was well brought in the Name of the Master? And so, Whether the Hundred should be liable to pay the Money of which the Quaker was robbed, he refusing to be examined upon Oath?

In this Case, the Statute of Queen Elizabeth was consider'd which was made in Favour of the Hundred; for it enacts, That the Party robb'd shall not maintain any Action against the Hundred, except he give Notice of the Robbery with convenient Speed to the Inhabitants of some Town, Vill, or Hamlet, near the Place where he was robb'd; and except, within twenty Days next before the Action brought, he be *examined upon Oath* before a Justice of the County inhabiting in the Hundred where the Robbery was committed, or near the same, whether he knew the Parties who robbed him, or either of them.

It was agreed, that the Master may have an Action for a Robbery committed upon the Servant; but that is by Vertue of the Statute of Winton. The Case of Jones against the Hundred of Bromley is to that Purpose, which was a Robbery upon himself, Wife, and Servant, the Money being taken from the Servant, and the Master made Oath, that he did not know any of the Robbers; but it happened the Servant did know one of them, whose Name was Leonard, of which he did then inform his Master; and this Matter appearing to the Jury, it was found

Mich. 1658.

found specially, and upon the Argument of that special Verdict, these Points were resolved:

1. That the Oath of the Master, without the Swearing of his Servant, is good, because the Servant had only the bare Custody of the Money.

2. That the Information then given by the Servant to the Master, of his Knowledge of one of the Robbers, did not oblige the Master, because the Money shall be said to be in his Possession, and not of the Servant, the Master being then present, which is all the Difference between that Case and this at the Bar; so that the Master is the Person robbed, within the Meaning of the Statute of Winton, altho' the Money be in the Hands of the Servant.

Suppose the Servant had received 1000 l. and not being able to carry it himself, had employed ten Men, each to carry 100 l. and they had been all robbed, the Owner may have an Action against the Hundred upon the Affidavit of one of the Persons robb'd: The Reason is, because the Possession shall follow the Property; and the Possession of the Whole will follow every Part.

2 Rol. Abr. 685. There are Authorities to prove, That if the Servant is robb'd, the Master may give Evidence what Money was delivered to him, tho' that might be as well proved by another Witness.

Now tho' all this be admitted, yet an Action will not lie against the Hundred by the Master in the Case at the Bar; for the Statute of Queen Elizabeth being made so much in Favour of the Hundred, ought to be pursued.

The Reasons why an Oath is enjoined by that Statute are:

1. That the Person robb'd should enter into a Recognizance to prosecute the Robbers, if he knew them or any of them.

2. That the Hundred might be excused upon the Conviction of such Person or Persons.

3. To prevent a Robbery by Fraud.

Now suppose the Servant is entrusted with Money, and robb'd by Confederacy, shall the Hundred be answerable because the Servant hath broke his Trust? No, the Servant ought to be sworn for the Purposes mentioned in that Act, which if he refuse, the Master hath lost his Action.

Cro. Eliz. 142. 1 Leon. 323. Stile 156. 319.

But if the Servant is robb'd in the Company or Presence of his Master, the Money is still, in Judgment of the Law, in the Possession of the Master; and that was the Reason of the Judgment in Jones's Case.

This is not like the Case of a common Carrier, who tho' he may be said to be a Servant, yet he is entrusted by this Law.

Curia. This Action might have been well brought for the whole by Coxhead alone, (but 'tis now too late, the Year being expired) for where a Servant is robbed of Part of his Master's Goods and Part of his own, he may have an Action, and recover Judgment for the whole; and therefore at another Day the Plaintiff had Judgment for 26 s. only. Brownl. 155.

Pain *versus* Patrick *and others.*

Pasch. 2 *Gulielmi, Rot.* 43.

THIS was a special Action on the Case brought by Isaac Pain against Edward Patrick and William Boulter for hindring the Plaintiff to go over a Ferry. The Declaration sets forth, That the Hill of Littleport in the Isle of Ely is an ancient Hill, within which there is a River called Wilner River, over which there was an ancient Passage in a Ferry-Boat from the North-East Part of the said Hill to the End of Ferry-Lane, and from thence to another Place called Adventurers Bank; that this Passage was for all People at a certain Price, &c. excepting the Inhabitants of *Littleport* living in ancient Houses there, who by reason of an ancient Custom in the said Hill were to pass ad Libitum suum without paying Toll, &c.

1 Salk. 12. 2 Salk. 718. Action on the Case will not lie for disturbing or hindring a Passage in a Common High-way, but it must be by Indictment. Shower 243, 255.

That the Plaintiff was an Inhabitant in an ancient Messuage in the said Hill, and that there was an ancient Ferry-Boat kept there by the Owners thereof 'till the first Day of May in such a Year; after which Day the Defendants did not keep the same, per quod the Plaintiff lost his Passage, &c.

The Defendants protestando that the Passage was not in a Ferry-Boat, prostando etiam that there was no such Custom, &c. and that the Plaintiff was not an Inhabitant in an ancient Messuage in Littleport; Pro placito dicunt that before the exhibiting of the Bill they did erect a Bridge over the said River, where the Passage was anciently, and this was done and maintained at their own Costs, and that the Plaintiff melius & celerius could pass over the said Bridge, &c. This was pleaded in Bar.

The Plaintiff replied, That he per aliquem Pontem Libertatem Passagii trans & ultra Rivum prædict' secundum Consuetudinem præd. in Narratione mentionat' habere non permissus fuit contra Consuetudinem præd. Et hoc paratus est verificare, &c.

The Defendants demurred, and the Plaintiff joined in Demurrer.

The Questions were:

1. Whether this was a good Custom, as laid in the Declaration, for the Inhabitants of a Mill to claim to be discharged of Toll Ratione Comorantiæ.

2. If the Custom is good, then whether the Defendants Plea in Bar is also good to discharge themselves from keeping of the Boat.

3. Whether the Plaintiff can maintain this Action.

This Case was argued now, and in Easter-Term following by Counsel for the Defendants, and in the same Term by Counsel for the Plaintiff.

Those who argued for the Defendants said, That as to the first Point, tho' this is set forth by Way of Custom, yet 'tis in the Nature of a Prescription, which is always alledged in the Person, but here 'tis for the Inhabitants of a Mill, &c.

Now this cannot be good by Way of Prescription, because in such Case there must be a certain and permanent Interest abiding in some Person, which cannot be here; for a meer Habitation or Dwelling in an House will not give a Man such an Interest.

1 Leon. 142. 3 Leon. 41. That which makes a Prescription good is Usage and Reasonableness, but it cannot be ex rationabili Causa to prescribe ad Lebitum suum, for the Ferry-man hath neither any Consideration or Recompence for the keeping of his Boat, when the Inhabitants may pass over at their Pleasure without paying Toll.

'Tis true, a Man may prescribe to have Common sans nombre, which in Strictness is to put in as many Cattle as he will; but if he lays his Prescription ad Libitum suum, 'tis not good.

If therefore this is not good by Way of Prescription, it cannot be supported by Custom, because that also must extend to what hath some Certainty, and which must likewise have a reasonable Beginning.

Hob. 86. 6 Co. 60. Now there can be no Certainty in this Custom, because the Plaintiff claimeth it only during his Comorancy in a Messuage, in which he had neither a certain Time or Estate, and this is such a transitory Interest, which is not allowed in the Law.

1 Rol. Rep. 32. And therefore it hath been adjudged, that a Custom for an Infant to sell his Land when he can measure an Ell of Cloth is void, because 'tis incertain of what Age he may then be, and 'tis equally as incertain how long a Man may live in one of these ancient Houses.

Such

Such a Custom might be good in Point of Tenure, for it might have a reasonable Commencement between Lord and Tenant; but this cannot be good as laid in this Declaration, for several Reasons:

1. Because 'tis not alledged that the Defendants of Right ought to keep a Boat there, or that it was necessary for them to be always attending, for possibly it might require the Use of skilful Men; and therefore in all Actions brought for not repairing of Ways 'tis alledged that the Defendant reparare debuit.

2. Because it brings a Charge without any Recompence, and this must be very unreasonable. 'Tis true, that a Custom for Fishermen to dry their Nets upon another Man's Ground is good, which may seem to be a Charge upon the Land without any Reward; but the Reason is, because the Catching of Fish is for the publick Benefit, and every Man may have Advantage by it. 8 E. 4. 18. Br. Tit. Customs pl. 46.

A Custom to have solam & separalem Pasturam, hath been formerly doubted whether good or not; but 'tis now held to be good, because the Lord of the Soil might have some other Recompence for it.

3. Because 'tis unlimited, for the Tenants may pass and repass ad Libitum, according to this Custom, but it ought to be laid for their necessary Occasions, for otherwise the Defendants may be deprived of their Freehold, because the Tenants may always keep the Boat in Use.

The 2d Point was not much insisted on, which was as to the Matter of the Plea; only it was said, that it was not so well to take away the whole Prescription, that the Plea might have been good if it had been quousque the Bridge fall or decay, then the Prescription doth revive again.

The 3d Point. Then supposing the Declaration to be sufficient, yet as this is upon the Record the Plaintiff could not have this Action, because he had set forth this to be a publick and common Ferry for all People to pass, and that he was hindred, but doth not shew any particular Damage, and therefore can have no Cause of Action.

'Tis like the Case of a Common High-way which is out of Repair, for which no Man can bring an Action, unless he hath a particular Damage or Loss more than the rest of the People passing that Way, but the Party ought to be indicted, and this is to prevent Multiplicity of Suits; for if one Man may have an Action, every Person travelling that Way may have the like. 27 H. 8. 27 a. 1 Inst. 56. Moor 108. Cro. El. 664. 5 Co. 104.

Another Exception was taken to the Declaration, viz. That all the Custom is laid to be, for the Inhabitants of an ancient Mill

to pass Toll-free from Ferry-Lane to Adventurers-Bank, and they do not allege that Bank to be within the Mill.

Econtra. Those who argued for the Plaintiff held this to be a good Custom, as set forth by him, and as such 'tis not confined to the same Rules with a Prescription, which must have a lawful Commencement; but it is otherwise in a Custom, for 'tis sufficient if it be certain and reasonable.

The Cases cited on the other Side are not to this Purpose, because they concern only such Customs which relate to some Interest or Profit in the Land of another Person, but this Custom is only in a Matter of Exemption and Easement.

6 Co. This was the very Difference taken by the Judges in Gatewood's Case, where it was held to be a good Custom for every Inhabitant of a particular Town to have a Way over such Lands to go to Church or Market, because this was Matter of Easement and no Profit.

Now a Passage over a River is no more than a Way, and may be tied up to one or more Persons according to their Comorancy.

Since therefore no Interest is claimed by the Plaintiff, but only an Easement, this Prescription need not be laid in the Owners, but in the Inhabitants of the Mill of Littleport. It may be compared to a Case where a Custom was laid for the Inhabitants of a Town to pay a Modus in Discharge of Tythes; this was held good, because it was by Way of Discharge in the Persons Lands, without claiming any Profit in that of another.

Hob. 118. Yelv. 163.

'Tis also like the common Case of a Market, when a Man has pitched his Stall there, no Person can remove it, for he hath a Right Ratione Comorantiæ

Then as to the first Objection upon the first Point, That a Custom to pass and repass ad Libitum, cannot be good; it was answered, this Passage was in the Nature of a High-way, over which a Man may pass as often as he will; and therefore 'tis well enough as laid in the Declaration.

2. As to the Objection, That it ought to be laid in some Person, and not in the Inhabitants; it was said this was an Easement to the Plaintiff, and no such Thing can be to one Man but it makes another a Trespasser, and 'tis no Interest in the Plaintiff to be discharged of a Charge.

A Custom to grind at the Lord's Mill discharged of Toll, rules this Case; for is it not as much Charge for a Lord of a Manor to keep a Mill, as for the Defendant to keep a Boat?

If

If the Plaintiff had prescribed, then this had come within the Rules of Gatewood's Case.

But he hath alledged a Custom, and when such Allegations are made, they ought not to be too narrowly searched for: No Reason can be given why an Infant at 15 Years of Age shall be capable to make a Feoffment in one Town and not in another. 18 Ed. 4. 3. a.

3. Then as to the Third Point, that this being laid to be a common Ferry, the Plaintiff ought to shew some special Damage to maintain an Action.

To which it was answered, That the Right was on the Plaintiff's Side, and that was sufficient to maintain the Action.

'Tis not like the Case of a common High-way, as mentioned on the other Side, because this Action is confined to Littleport alone, and no Man is entitled to it but such who inhabit that Hill, so that every Man cannot bring an Action.

As to the Exception to the Form of the Declaration, that Adventurers-Bank is not laid to be in the Hill, it was said that the Plaintiff only claimed a Right of Passage over the River, which is laid to be in the Hill of Littleport, the Bank is only the Terminus ad quem; 'tis like the Cause where the Defendant covenanted to repair a Mill and the Water-courses in a Parish, and also the Banks belonging to the Mill, in which Case the Plaintiff had Judgment, tho' he did not shew in what Hill the Banks were, because it shall be intended to be in the same Hill where the Mill was. 2 Cro. 555, 557.

Afterwards, in Trinity-Term, 3 Willielmi, Judgment was given for the Defendant, absente Dolben Justice, who was also of the same Opinion. Judicium.

It was held that the Custom was well alledged, both as to the Manner and Matter; 'tis true, all Customs must have reasonable Beginnings, but it would be very difficult to assign a lawful Commencement for such a Custom as this is, so it would be for the Custom of Gavelkind, or Burrough English, which are circumscribed to particular Places; and since it is sufficient to alledge a Custom, by reason of the Place where 'tis used; it may be as reasonable in this Case to say that there hath been an ancient Ferry-Boat kept in this Place; 'tis but only an Inducement to the Custom, which did not consist so much in having a Right to the Passage, as to be discharged of Toll.

This might have a lawful Beginning, either by a Grant of the Lord to the Ancestors of the Defendant, or by the Agreement of the Inhabitants.

Cro. Car. 419. Co. Lit. 110. b. Cro. Eliz. 746. 1 Roll. Rep. 216.

A Custom alledged for all the Occupiers of a Close in such a Parish to have a Foot-way, &c. is not good; the Reason is, because the Plaintiff ought to prescribe in him who hath the Inheritance; but where a Thing is of Necessity, and no Manner of Profit or Charge in the Soil of another, but only a Thing in Discharge, or for a Way to a Market, or to be quit of Toll, in such Cases not only a particular Person, but the Inhabitants of a Will may alledge a Prescription.

This may be as well alledged, as a Custom to turn a Plow upon another Man's Land, or for a Fisherman to mend his Nets there.

'Tis good as to the Matter, for 'tis only an Easement; 'tis like a Custom alledg'd for a Gateway or Watercourse, and for such Things Inhabitants of a Will, or all the Parishoners of a Parish, may alledge a Custom or Usage in the Place.

Cro. El. 441.

2. Point. But as to the Plea in Bar, 'tis not good, because the Erecting of a Bridge is not laying out a Way; 'tis a voluntary Act, and no Man by reason of his own Act can be discharged of what he is to do, upon the Interest he hath in the Ferry.

If the Defendant had petitioned the King to destroy the Ferry, and got a Patent to erect a Bridge, and had brought a Writ ad quod Dampnum, and it hath been found by Inquisition to be no Damage to the People, then he might safely have built this Bridge.

3. But notwithstanding the Plea is not good, yet the Plaintiff can have no Advantage of it, because he bannot have an Action on the Case for this Matter, for by his own shewing, 'tis a common Passage, which is no more than a common High-way: Now for disturbing him in such a Passage, no Action on the Case will lie, unless he had alledged some particular Damage done to himself; for if he could maintain such an Action, any other Person is entitled to the like, and this would be to multiply Suits, which the Law will not allow, but hath provided a more apt and convenient Remedy, which is by Presentment in the Leet.

Cro. Car. 132, 167. 1 Inst. 56. a. Cro. Eliz. 664. 13 Co. 33. Davis 57.

F. N. B. 94. 22 H. 6. 12.

If Toll had been extorted from him, then an Action on the Case had been the proper Remedy, but no such Thing appeared upon this Declaration.

Prince's *Case*.

THE Suggestion in a Prohibition was, that Prince was seised of the Rectory of Shrewsby, ut de Feodo & Jure, and that he being so seised, de Jure, ought to present a Vicar to the said Place, but that the Bishop of the Diocese had, of his own Accord, appointed a Person thereunto.

This Exception was taken to it, viz. He doth not say that he was Impropriator, but only that he was seised of the Rectory in Fee, so it not appearing that he had it Impropriate, he ought not to present the Vicar.

Justice Dolben replied, That in several Places in Middlesex, the Abbots of Westminster did send Monks to say Mass, and so the Vicaridges were not endowed, but he put in and displaced whom he pleased.

That he had heard my Lord Chief Justice Hale often say, That the Abbot had as much Reason to displace such Men as he had his Butler or other Servant.

Curia. Declare upon the Prohibition, and try the Cause.

Harrison *versus* Hayward.

Pasch. 2 *Gulielmi*, *Rot.* 187.

AN Agreement was made to assign a Stock upon Request, and for Non performance an Action was now brought, setting forth the Agreement, and that the Plaintiff did request the Defendant at such a Time, &c.

The Defendant pleaded, that he was ready to assign the Stock after the Promise made, &c. and upon a Demurrer it was ruled, if the Thing was not to be done upon Request, then the Defendant was bound to do it in a convenient Time after the Promise; but it being to be done upon Request, the Time when the Plaintiff will require the Performance of the Agreement, is the Time when the Defendant must do it.

Judgment pro Quer.

When a Thing is to be done upon Request, the Performance must be when the Person requires it, and the Defendant cannot plead that he was ready to assign after the Promise made.

Thompson

Thompson *versus* Leach.

2 Salk. 517, 618. Surrender not good without Acceptance of the Surrendree. 2 Vent. 198. 3 Lev. 284. Cases in Parliament 150. Shower 296.

WRit of Error upon a Judgment in Ejectment given in the Common Pleas; the Case upon the special Verdict was thus: Viz.

Simon Leach was Tenant for Life of the Lands in Question, with Remainder in Contingency to his first, second and third Son in Tail Mail, Remainder to Sir Simon Leach in Tail &c. This Settlement was made by the Will of Nicholas Leach, who was seised in Fee,

The Tenant for Life, two Months before he had a Son born, did in the Absence of Sir Simon Leach, the Remainder-man in Tail, seal and deliver a Writing, by which he did Grant, Surrender and Release, the Lands which he had for Life, to the Use of Sir Simon Leach, and his Heirs, and continued in Possession five Years afterwards, and then, and not before, Sir Simon Leach did accept and and agree to this Surrender, and entred upon the Premises.

But that about four Years before he thus agreed to it, Simon Leach, the Tenant for Life, had a Son born named Charles, Lessor of the Plaintiff, to whom the Remainder in Contingency was thus limited,

The Tenant for Life died, then Sir Simon Leach suffered a Common Recovery in order to bar those Remainders.

1. The Question was, Whether this was a legal and good Surrender of the Premises, to vest the Freehold immediately in Sir Simon Leach, without his Assent, before Charles Leach the Son of Simon Leach the Surrenderor was born, so as to make him a good Tenant to the Precipe, upon which the Recovery was afterwards suffered.

If so, then the contingent Remainders to the first and other Sons is destroyed,

2. If the Estate was not vested in the Surrendree 'till his actual Assent, such Assent shall not relate (tho' after the Execution of the Deed) so as to pass the Estate at the very Time it was sealed and delivered.

Judgment being given in the Common-Pleas, by the Opinion of three Justices against Justice Ventris, that the contingent Remainder was not destroyed by this Surrender, because it was not good without the Acceptance, and 'till the actual Assent of the Surrendree, this Writ of Error was now brought upon that Judgment.

This

This Case depended several Terms; and those who argued to maintain the Judgment insisted, that here was neither a mutual Agreement between the Parties, or Acceptance or Entry of the Surrendree, which must be in every Surrender, these being solemn Acts in such Cases required to the Alteration of Possessions, and to prevent Frauds.

That the Law hath a greater Regard to the Transmutation of Possessions, than to the Alteration of personal Things, and therefore more Ceremonies are made requisite to that, than transfer a Chattel from one to another.

In all Feoffments there must be Livery and Seisin; so in Partitions and in Exchanges, which are Conveyances at the Common Law, no Estate is changed until an actual Entry, tho' in the Deed it self such Entry is fully express'd.

Quere, for if Tenant for Life surrender to him in Reversion, the Surrendree hath a Freehold in Law before Entry. Co. Lit. 266. b.

Here the Surrendree is a Purchaser of the Estate, and yet did not know any Thing of it, than which nothing can be more absurd.

'Tis admitted, that every Gift and Grant enures to the Benefit of the Donee and Grantee, but not where the Assent of the Parties is required to compleat the Act.

Assent and Dis-assent are Acts of the Mind: Now 'tis impertinent to say, that a Man gave his Assent to a Thing which he never heard. 1 Inst. 266. b.

A Lease for Years is not good without Entry, nor a Surrender without Acceptance. Lane 4.

'Tis no new Thing to compare a Surrender to a Resignation of a Benefice: Now if an Incumbent should resign to the Ordinary, and the Patron should afterwards present to that Living, such Presentation is void, if the Ordinary had not accepted the Resignation; the Reason is, because a Resignation doth not pass the Freehold to the Bishop, but puts it only in Abeyance 'till his Acceptance: and 'tis not an Objection to say, that this is grounded upon an Ecclesiastical Right, and not at the Common Law, or that a Formedon will not lie of a Rectory; for tho' tis of Ecclesiastical Right, yet 'tis of Temporal Cognizance, and shall be tried at Law. 3 Cro. 43. 2 Cro. 198. Dyer 294. Br. Abr. tit. Bar. 81. Yelv. 61. Sid. 387.

The Precedent in Rastal may be objected, where the surviving Lessee for Years brought an Action of Covenant against the Lessor for disturbing him in his Possession, and the Lessor pleaded a Surrender to himself, without an Acceptance; but the Plaintiff in that Case said nothing of a Surrender. Rast. Ent. tit. Covenant 136. b. Owen 97. Dyer 28.

In the same Book a Surrender was pleaded, ad quam quidem sursum redditionem the Plaintiff agreavit: So in Fitzherbert's Abridgment Issue was joined upon the Acceptance; which shews 'tis a material Point. Rast. Ent. tit. Debt 183. 176. b. 177. a. Br. Sur. 39. Cro. Car. 101. Fitz. Abr. tit. Bar. 262. Co. Ent. 335.

No Inconvenience can be objected, that an Assent is made a Legal Ceremony to a Surrender, for 'tis not inconvenient even in the Case of an Infant, who by reason of his Non-age is not capable to take such a Conveyance, because he cannot give his Assent; but he may take the Land by Way of Feoffment, or Grant, or any Conveyance of like Nature, without his Assent.

Co. Lit. 337. b. Bro. Tit. Surrender, Pl. 45. Dyer 110. b. Fitz. 39.

By the very Definition of a Surrender it plainly appears, that there must be an Assent to it; for 'tis nothing else but a Yielding up of an Estate to him who hath the immediate Reversion or Remainder, wherein the Estate for Life or Years may drown by mutual Agreement between the Parties.

'Tis true, an Agreement is not necessary in Devises, nor in any other Conveyances, which are directed by particular Statutes, or by Custom; but 'tis absolutely necessary in a Surrender, which is a Conveyance at the Common Law: 'Tis such an essential Circumstance, that the Deed it self is void without it: 'Tis as necessary as an Attornment to the Grant of a Reversion, or an Entry to a Deed of Exchange, which are both likewise Conveyances at the Common Law.

Cro. Eliz. 488. Ow. 97. 31 Ass. Pl. 26.

There are various Circumstances in the Books which declare what Acts shall amount to an Acceptance or Agreement; but it was never yet doubted but that an Acceptance was necessary to a Surrender.

Fitz. Tit. Debt. 149. 9 E. 3. 7. b. *contra.* Ras. En. 136. Kelway 194, 195. Dyer 358. Pl. 48.

So in the Entries, a Surrender is sometimes pleaded without an Acceptance; but 'tis always that the Surrendree, by Vertue of the Surrender, expulit & ejecit the Plaintiff, which amounts to an Agreement.

The Law is so careful in these Conveyances, that it will not presume an Assent without some Act done: If therefore a Deed cannot operate as a Surrender without an Acceptance, then in this Case no such shall be presumed, because the Jury have found it expressly otherwise: Then by the Birth of Charles Leach, the contingent Remainder is vested in him, which arising before the Assent of the Surrendree, makes such Assent afterwards void, for there can be no intermediate Estate.

Besides, if an Assent should not be necessary to a Surrender this Inconvenience would follow, viz. If a Purchaser should take in several Mortgages and Extents, and keep them all on foot in a third Person's Name, (which is usual) to prevent mean Incumbrances, and the Mortgagor should afterwards surrender his Estate without the Assent of the Purchaser, if this should be held a good Conveyance in Law, it would be of very mischievous Consequence.

2. If

2. If the Estate is not immediately transferred to the Surrendrее at the Sealing of the Deed, without the Assent of the Surrenderor, it shall not pass afterwards when he gives his Consent, and that by Way of Relation, for if that should be allowed, then the Surrenderor might have kept the Deed in his Pocket, as well fifty as five Years after the Execution thereof, which would be so prejudicial, that no Man could be assured of his Title.

'Tis true, when a Bargain and Sale is made of Land such a Day, &c. and two Days afterwards the Bargainor enters into a Recognizance, then the Deed is inrolled within the Six Months; by this Means the Conusee of the Statute is defeated; for after the Inrolment the Land passeth ab initio, and the Bargainee in Judgment of Law was seised thereof from the Delivery of the Deed, but not by way of Relation, but by immediate Conveyance of the Estate, by Vertue of the Statute of Uses. 2 Inst. 675. 3 Co. 30.

But the Law will not suffer contingent Remainders to waver about, and to be so incertain, that no Man knows where to find them, which they must be, if this Doctrine of Relation should prevail.

Now suppose the Surrendrее had made a Grant of his Estate to another Person before he had accepted of the Surrender, and the Grantee had entred, Would this subsequent Assent have devested this Estate, and made the Grant of no Effect? If it would, then here is a plain Way found out for any Man to avoid his own Acts, and to defeat Purchasers.

Therefore 'tis with great Reason that the Law provides, that no Person shall take a Surrender but he who hath the immediate Reversion, and that the Estate shall still remain in the Surrenderor until all Acts are done which are to compleat the Conveyance.

Those who argued against the Judgment, held, that the Estate passed immediately without the Assent of the Surrenderor; and that even in Conveyances at the Common Law, 'tis devested out of the Person, and put in him to whom such Conveyance is made, without his actual Assent. Eo contra.

'Tis true, in Exchanges the Freehold doth not pass without Entry, nor a Grant of a Reversion without an Attornment, but that stands upon different Reasons from this Case at the Bar; for in Exchanges the Law requires the mutual Acts of the Parties exchanging, and in the other there must be the Consent of a third Person.

But in Surrenders, the Assent of the Surrendrее is not required, for the Estate must be in him immediately upon the Execution of the Deed, if he doth not shew some Dissent to it.

If a Man should plead a Release, without saying, ad quam quidem Relaxationem, the Defendant agreavit, yet this Plea is good, because the Estate passeth to him upon the Execution of the Deed.

It may be a Question, Whether the actual Assent must be at the very Time that the Surrender was made; for if it should be afterwards, 'tis well enough, and the Estate remaineth in the Surrendrее till Disagreement.

Presumption stands on this Side, for it shall never be intended that he did not give his Assent; but on the contrary, because 'tis for his Benefit not to refuse an Estate.

Hob. 203. Therefore where a Feme Sole had a Lease, and married, the Husband and Wife surrendred it to another, in Consideration of a new Lease to be granted to the Wife and her Sons, &c. this Estate vests immediately in her, though a Feme Covert, and that without the Assent of her Husband, for the Law intends it to be her Estate till he dissent. 'Tis true, in that Case his Assent was held necessary, because the first Lease could not be devested out of him without his own Consent.

2 Leon. 224. So a Feoffment to Three, and Livery made to one, the Freehold is in all till Disagreement.

So if a Bond be given to a Stranger for my Use, and I should die before I had agreed to it, my Executors are entituled to an Action of Debt, and will recover.

1 Rol. Rep. 401, 441. A Feme Covert and another were Joint-Tenants for Life: She and her Husband made a Lease for Years of her Moiety, reserving a Rent during her Life, and the Life of her Partner; then the Wife died: This was held to be a good Lease against the surviving Joint-tenant till Disagreement, which shews that the Agreement of the Parties is not so much requisite to perfect a Conveyance of this Nature, as a Disagreement is to make it void.

And this may serve as an Answer to the second Point, which was not much insisted on, That Men's Titles would be incertain and precarious, if after the Assent of the Surrendrее, the Estate should pass by Relation, at the very Time that the Deed was executed, and that it was not known where the Freehold was in the mean Time, for if he had agreed to it immediately, it had been altogether as private.

Then as to the Pleadings; 'tis true, that generally when a Surrender is pleaded, 'tis said, ad quam quidem sursum redditionem the Party adtunc & ibidem agreavit, which implies that the

the Surrendree was then present; and in such Case he ought to agree or refuse. Besides, those Actions to which an Agreement is thus pleaded were generally brought in Disaffirmance of Surrenders, and to support the Leases: Upon which the Plaintiffs declared, and then the proper and most effectual Bar was to shew a Surrender and express Agreement before the Action brought.

It might have been insufficient Pleading not to shew an Acceptance of the Surrendree, but 'tis not Substance; for if Issue should be taken, Whether a Surrender or not, and a Verdict for the Plaintiff, that Defect of setting forth an Acceptance is aided by the Statute of Jeofails. Cro. Eliz. 249.

In this Case there is not only the Word Surrender, but * Grant and Release, which may be pleaded without any Consent to it; and a Grant by Operation of Law turns to a Surrender, because a Man cannot have two Estates of equal Dignity in the Law at the same Time.

Neither can it be said, that there remained any Estate in Simon Leach after this Surrender executed; for 'tis an absurd Thing to imagine, that when he had done what was in his Power to compleat a Conveyance, and to devest himself of an Estate, yet it should continue in him.

Therefore the Remainder in Contingency to the Lessor of the Plaintiff was destroyed by this Surrender of the Estate to him in Reversion, for by that Means, when it did afterwards happen, there was no particular Estate to support it.

But notwithstanding the Judgment was affirmed; and afterwards, Anno quarto Gulielmi & Mariæ, upon a Writ of Error brought in the House of Lords, it was reversed.

Idem versus eundem.

Surrender by a Person *Non compos* is void.

This Point having received a legal Determination, the same Plaintiff brought another Action of Trespass and Ejectment against the same Defendant; and at a Trial at the Bar in Easter-Term, nono Gulielmi Regis, another special Verdict was found, upon which the Case more at large was, viz.

That Nicholas Leach being seised in Fee of the Lands in Question, made his Will in these Words, viz.

In the Name of God, *Amen, &c.* I devise my Manors of *Bulkworth*, *Whitebear*, and *Vadacot*, in *Devonshire*, and *Cresby Goat* and *Cresby Grange* in *Northallerton* in *Yorkshire*, unto the Heirs Males of my Body begotten; and for want of such Issue Male, I devise the same unto my Brother *Simon Leach* for Life, and after his

Decease, to the first Son of the Body of the said *Simon Leach* my Brother, lawfully to be begotten, and to the Heirs Males of the Body of such first Son lawfully to be begotten, with like Remainder in Tail Male to the second, third, fourth, *&c.* Sons; and for Default of such Issue, to Sir *Simon Leach* my Kinsman, being Son and Hear of *Simon Leach*, of *Cadley* in the County of *Devon*, Esq; deceased, and to the Heirs Males of his Body lawfully to be begotten; and for Default of such Issue, to the right Heirs of me the said *Nicholas Leach* for ever.

They find, that Nicholas Leach died without Issue: That Simon Leach his Brother and Heir, with Remainder over in Contingency as aforesaid entered, and afterwards married Anne the Daughter of Unton Croke, and that after the said Marriage, viz. 20 August, 25 Car. 2. he executed a Deed, purporting a * Surrender of the said Lands and Tenements to Sir Simon Leach, in Manner following, viz.

* Two Months before a Son was born.

To all Christian People, *&c.* I *Simon Leach*, of *Elsefield* in the County of *Oxon*, Esq; send Greeting. Know ye, That I the said *Simon Leach*, for divers good Causes and valuable Considerations me hereunto moving, have granted, *surrendred*, remised, released, and for ever quit claimed and confirmed, and by these Presents to grant, surrender, remise, release, and for ever quit claim and confirm, unto Sir *Simon Leach*, of *Cadley* in the County of *Devon*, Knight of the *Bath*, and his Heirs and Assigns for ever, all and every the Manors, *&c.* To have and to hold the same to the said Sir *Simon Leach* for ever.

They find, that Simon Leach, Brother of the Testator, was not compos mentis at the Time of the Sealing and Delivery of the said Surrender.

That on the 10th Day of November, 25 Car. 2. (which was two Months after this Surrender made) the said Simon Leach had Issue of his Body Charles Leach, who is his Son and Heir: That he after the Death of his Father entred, and made a Lease to Thompson, by Vertue whereof he was possessed until the Defendant, Sir Simon Leach, entred upon him, &c.

Two Questions were made upon this Special Verdict:

1. Whether this Surrender by a Person Non compos mentis was void ab initio, and so could pass no Estate to the Surrendree; for if so, then though the Ideot himself is stopped by his own Act, yet that can be no Bar to him in the Remainder, because the Act being void, the Estate in Law still remains in him.

2. If it is not void in it self, then whether 'tis voidable after the Death of the Party by Charles Leach, he claiming by Vertue of a collateral Remainder, and not as Heir at Law to the Devisor.

As

I

As to the first Point, it was argued, that the Cases of Lunaticks and Infants go Hand in Hand, and that the same Reasons govern both: That the Law is clear that a Surrender made by an Infant is void; therefore a Surrender made by a Person Non compos mentis is also void: The Reason is, because they know not how to govern themselves. And as Fleta saith, Semper judicabuntur infra ætatem. If he makes any Conveyance of his Land, the Law hath provided a remedial Writ even for himself to avoid his own Alienation.

Fleta, lib. 1. c. 11. nu. 10. F.N.B.202.a. Reg. 238. b.

His Feoffments are void: and if Warranties are annexed, those are also void. If he granteth a Rent-Charge out of his Land, that is also void: And if the Grantee should distrain for this Rent after the Death of the Grantor, his Heir shall have an Action of Trespass against him; and therefore by Parity of Reason, this Surrender must be void.

39 H. 6. 42. Bract. f. 12. no. 5. f. 100, 120. Brit. cap. 34. fol. 88. Perk. 5. Pl. 21.

In Fitzherbert, Tit. Guarantee, Pl. 80. there is a Case to this Purpose, viz. An Assize was brought against the Tenant, supposing that he had no Right of Entry unless under a Disseisor by whom the Brother of the Demandant was disseised.

The Tenant pleaded, That the supposed Disseisor was the Father of the Demandant, whose Heir he then was; and that his said Father made a Feoffment of the Land to the Tenant, with Warrantry, and demanded Judgment, &c.

The Demandant replied, that his Father at that Time was Non compos mentis, and the Tenant was compelled to rejoin, and take Issue upon the Insanity; which shews, that if he was Non compos, he could not have made such a Feoffment.

So if he maketh a Feoffment in Fee, and afterwards taketh back an Estate for Life, the Non compos shall be remitted to his ancient Title; which shews likewise, that such Feoffment was void, for the Remitter supposeth a former Right.

Fitz. Remitter, pl. 23.

'Tis incongruous to say, that Acts done by Persons of no Discretion shall be good and valid in the Law, such are Infants and Lunaticks; and it stands with great Reason, that what they do should be void, especially when it goes to the Destruction of their Estates.

Therefore 'tis held, That if a Person Non compos releaseth his Right, that shall not bar the King in his Life-time, but he shall seize the Land; and if he die, his Heir may bring the Writ Dum non fuit compos mentis, and may enter.

'Tis for this Reason that a Release made by an Infant Executor is no Bar, because it works in Destruction of his Interest: The Reason is the same where a Person Non compos maketh a Feoffment, for that likewise destroys his Estate.

5 Co. 27. Russel's Case. 34 Ass. Pl. 10.

Cro. Car. 502.

So likewise an Infant can neither surrender a future Interest by his Acceptance of a new Lease, nor make an absolute Surrender of a Term of which he is possessed, for such a Surrender by Deed is void.

'Tis agreed, that if a Man Non compos maketh a Feoffment by Letter of Attorney, 'tis meerly void, because 'tis not deliver'd to the Feoffee by the Hands of the Feoffor: But 'tis said, that if it be delivered by him in Person, then 'tis only avoidable at any Time by Action or Entry: And of this Opinion was Sir Henry Finch in his Discourse of the Law, who in the Margin of his Book quotes several Authorities in the Year-Books to justify this Opinion; and amongst the rest he cites Sir Anthony Fitzherbert's Natura Brevium, who taking Notice of the old Authorities, seems to reject their Reasons, who affirm a Person Non compos shall not avoid his own Act when he recovers his Memory, because he cannot then tell what he did when he was in his former Condition.

Finch's Law 102.

35 Ass. Pl. 10.

But certainly when he recovers his Judgment, he is then of Ability to consider what was done during his Insanity, and to avoid such Acts, by shewing how his Indisposition came by the Visitation of God, by which he was disabled for a Time to do any reasonable Thing whatsoever; and this may be as well done as to plead duress from Men, which the Law allows to make compulsory Acts void.

4 Co. 123.

My Lord Coke, in Beverly's Case, taking Notice of the great Reason of the Civil Law in Cases of this Nature, which maketh All Acts done by Ideots void without their Curator's Concurrence; and that it was objected as a Defect in the Common Law, that Tutors were not assigned to such Persons: He answereth, that our Law hath given the Custody both of them and their Lands to the King, which is directly contrary to his own Opinion in his 2d Institutes, where paraphrasing upon the fourth Chapter of Magna Charta, which prohibits Waste in the Land of Wards, from thence he infers, that at that Time the King had no Prerogative to entitle him to the Lands of Ideots, for if he had, that Act would have as well provided against Waste in their Lands as in those of Wards. He farther adds, that the Guardianship of Ideots did belong to the Lords, according to the Course of the Common Law.

2 Inst. 14.

Be it how it will, 'tis clear by all the Books, that both by the Common and Civil Law their Acts are void: And my Lord Coke esteemed it as a very unreasonable Thing, that they should not be avoided even during the Life of the Party himself; but it was never yet denied that they may be avoided after his Death by his

Heir or Executor, and by Parity of Reason the Law will prevent Strangers from being prejudiced by such Acts.

There is an Objection, that some Acts done by Ideots are unavoidable, as Fines levied by them, &c.

'Tis true, such are not to be avoided, not because they are good in themselves, but the Reason is, because they are upon Record, against which the Law will not suffer any Averment to be made, presuming that the Courts and Judges in Westminster-Hall would not admit an Ideot or Infant to levy a Fine.

This being therefore a void Surrender by a Person Non compos, the Estate is still in the Surrenderor, and so the contingent Remainder upon his Death is well attached in Charles Leach, the Lessor of the Plaintiff.

But supposing 'tis not void, yet there will be Scintilla Juris left in Simon Leach to support the Contingency; and to prove this, the Case of Lloyd and Brookin was relied on, which was this, viz. Thomas Bradshaw was Tenant for Life, the Remainder in Tail to his first Son, &c. the Remainder to Paul for Life, the Remainder to his first, second, and third Sons in Tail. 1 Mod. 92. 1 Vent. 188. 2 Keb. 81.

Thomas accepted a Fine from Paul, who had then a Son born, then he made a Feoffment, and afterwards Paul had another Son born.

His eldest Son died without Issue, and it was adjudged that the contingent Remainder to his second Son was not destroyed by this Feoffment, because it was preserved by the Right of Entry which his elder Brother had at the Time it was made.

2. If this Surrender is only voidable, then whether Charles Leach claiming by a collateral Title can void it?

It was argued that he may, for it would be absurd that he should have a Right to the Remainder, and yet have no Remedy to recover it.

My Lord Coke in Beverly's Case tells us, that there are four Sorts of Privities:

1. In Blood, as Heir.
2. In Representation, as Executor.
3. In Estate, as Donee in Tail, the Reversion or Remainder in Fee.
4. In Tenure, as Lord by Escheat.

He affirms, that the two first may shew the Disability of their Ancestor and Testator, and avoid their Grants.

'Tis true, in the third Article he is of Opinion that Privies in Estate shall not avoid the Acts of their Ancestors, and he puts the Case of a Donee in Tail making a Feoffment in Fee within Age, and dying without Issue, the Donor shall not enter, because no

Right did accrue to him by the Death of the Donee, there being only a Privity of Estate between them.

Pahn. 254. But this Opinion is denied to be Law by Justice Dodderidge, in his Argument of the Case between Jackson and Darcy, who said, that the Donor might enter, because otherwise he would be without Remedy, for he could not maintain a Formedon, because the Feoffment made by the Infant was no Discontinuance.

Besides, 'tis not possible there should be any Privity in Blood between the Donee in Tail and the Reversioner in Fee, so that Article must be intended where they are Strangers in Blood and Privies in Estate, which doth not at all concern the Case in Question, because William Leach is Privy in Blood to his Father, who made the Surrender: And my Lord Coke tells us in the first Article of his Distinction, that such a Privy may avoid the Acts of his Ancestor.

It may be objected, That this Distinction was not then the Judgment of the Court; for it was not material to the Point in Issue, which was no more than thus, viz.

Snow gave Bond to Beverley, and exhibited his Bill in the Court of Requests to be relieved against it, because at the Time of the Sealing and Delivery thereof he was Non compos mentis.

8 Co. 42. But the like Distinction was made in Whittingham's Case many Years afterwards, which was thus, viz.

Whittingham being seised of Lands held of the Queen in Soccage, devised the same to Prudence, his Bastard Child, and her Heirs; she during her Infancy made a Feoffment thereof to another, and died in her Nonage without Issue: The Question then was, Whether that Feoffment should prevent the Queen of the Escheat? And adjudged it should not.

In which Case it was held, That Privies in Blood inheritable shall take Advantage of the Disabilities of their Ancestors; as if an Infant who is seised in Fee maketh a Feoffment, and afterwards dieth, his Heir may enter and avoid it.

The Law is the same in the Case of one Non compos mentis, as in that of an Infant, as to the Avoiding of the Acts of their Ancestors; so that Mr. Leach being Privy in Blood, according to my Lord Coke's Opinion in those Cases, shall avoid the Acts of his Father, he being Non compos at the Executing of this Surrender.

If it should be objected, That this Part of the Distinction ought to be taken restrictively, and must be tied up to such an Heir at Law who takes an immediate Possession by Descent from his Ancestor: The Answer is, That if this Surrender is avoided, Mr. Leach will take by immediate Descent from his Father; for tho' nothing but a Reversion in Fee descended to him, yet he is a compleat Heir.

But after all, this Distinction made by my Lord Coke is founded upon no Manner of Authority: 'Tis only his extrajudicial Opinion; for there is no Reason to be given why Privies in Estate should not avoid such Acts done by their Ancestors, as well as Privies in Blood, because the Incapacity of the Grantor goes to both.

Those who argued on the other Side held, That the Acts of Infants and Persons Non compos were not void in themselves, but only voidable. Econtra.

'Tis true, some Deeds made by an Infant are void, not meerly because executed by him, for some are good, and those only are void which are made to his Prejudice. Cro. Car. 502.

Such also are void which give Authority to a third Person to do an Act; as if an Infant enter into a Bond, and give it to a Stranger to deliver to the Obligee when he shall attain his full Age, this is void, because the Person derived his Authority from an Infant, who by reason of his Nonage could not give such a Power; but if the Infant himself had delivered the Bond to the Obligee, it had been only voidable. Park. Sect. 139. March 141. Lit. Sect. 259.

The Father of the Demandant was an Infant when he sold his Estate; his Son brought the Writ dum fuit infra ætatem against the Alienee, and it was held good; which would not have been allowed if the Grant had been void. 46 E. 3. 34.

All the old Authorities prove, that the Acts of Infants and Ideots are not void, but voidable.

If an Infant is bound in an Obligation, 'tis not void, for he may agree to it when of Age: He cannot plead Non est factum; and he may refuse to plead his Infancy. Cro. Eliz. 127. 2 Inst. 483.

If he be entitled to a Term for Years, and maketh a Surrender by the Acceptance of a new Lease, 'tis good, if 'tis for his Advantage, either by the Lessening of the Rent, or the Encreasing of the Term; but if he hath no Benefit by it, 'tis voidable only. Cro. Eliz. 126. Cro. Car. 520.

So he may purchase Lands, because the Law intends it for his Benefit; and he can receive no Damage by such a Purchase, for he may either perfect or avoid it at his full Age; which shews that such Acts are not void ab initio, but only voidable as the Case shall require.

The Statute of 23 H. 6. enacts, That Sheriffs shall take no Bonds upon an Arrest, but for the Appearance of the Party, and to themselves only; and that a Bond otherwise taken Colore Officii shall be void, (that is) not in it self, but by Pleading the Statute, for 'tis not to be avoided by Pleading Non est factum. 23 H. 6. c. 10.

1 H. 5. c. 5. 1 Co. 59. a. So upon the Statute of Additions, where a Man is outlawed, without the Addition of his Condition or Place of Abode in the original Writ, such Outlawry shall be void, not of its self, but it may be avoided by Writ of Error.

In like Manner there are many Authorities to prove that the Acts of a Person Non compos are not void, but voidable.

So is the first Resolution in Beverly's Case, that a Deed or Feoffment made by him is to be avoided by any other Person, but not by himself.

35 Ass. pl. 10. Thus stood the Law in the Time of E. 3. for in an Assize the Defendant pleaded, That the Plaintiff had released to him by Deed; who replied, That at the Time of the Making of the Deed he was Non compos. The Court of Common-Pleas seemed then to be of Opinion, that the Replication was not good; which shews, that the Deed in it self was not void. 'Tis true, the Assize was then adjourned, because that Opinion was directly against the Register, which is, that the Writ of Dum non fuit compos may be brought by the Person himself, notwithstanding his own Alienation.

Cro. Eliz. 398. But this hath since been denied to be Law, for in Debt upon Bond the Defendant pleaded, That he was Non compos; and upon a Demurrer the Plea was over-ruled.

And of this Opinion was Sir William Herle, Chief Justice of the Common-Pleas, in 5 E. 3. which was long before the Booke of Assize. 5 E. 3. 70.

35 H. 6. f. 42. So the Law continued 'till the Reign of H. 6. viz. That the Person himself could not avoid his own Feoffment, either by Entry or Action,

The Writs de Ideota inquirendo and Dum non fuit compos import the same Thing, viz. That Acts done by them are not void, for the first recites, that the Ideot alienavit; and the other, that the Lunatick * Dimisit terras. Now if their Acts had been void ab Initio, then they cannot be supposed either to alien or lease their Lands; which shews that such Acts are only voidable.

* *Dimisit* is there intended where the Estate is conveyed by *Livery* or for Life; and *Alienavit* is a Conveyance by Feoffment.

And as a farther Argument to enforce this, the Statute de Prærogativa Regis was mentioned, which gives the Custody of the Ideots Lands to the King during their Lives; provided that afterwards it be given to their right Heirs, ita quod nullatenus per eosdem Fatuos alienetur. Now to what Purpose were these Words added, if such an Alienation was void in it self?

17 E. 2. Stamf. Prærog. 34. Besides, the Case of Ideots (mentioned on the other Side) and Lunaticks are not parallel; for an Ideot hath a different Incapacity from one Non compos: 'Tis perpetual in an Ideot; and for that Reason the Law gives the King an Interest in him.

5 But

But a Person Non compos may recover his Senses; he may purchase Lands, may grant a Rent-Charge out of his Estate, and shall not plead his Insanity to defeat his own Act. Co. Lit. 2. b. Fitz. Tit. Issue 53.

If therefore this Surrender was not void at the Time of the Execution thereof, but voidable only during the Life of the Surrenderor by Office found; then the Question cannot properly be, Whether the Lessor of the Plaintiff shall avoid it, for that would be to revest the Estate in some Body; but the Surrender was good, and the Estate for Life was utterly determined; so that nothing being left to support the contingent Remainders, those are also destroyed.

And to prove this, Chudleigh's Case was relied on, which was; Sir R. C. was seised in Fee of the Manor of Hescot in Devon, and having Issue Christopher and three other Sons, made a Feoffment to the Use of himself and his Heirs, on the Body of Mary, then the Wife of Mr. Carew, to be begotten, and for Default of such Issue, then to the Use of his last Will, &c. for ten Years, and after the Expiration of that Term, then to his Feoffees and their Heirs, during the Life of Christopher, Remainder to the Issue Male of Christopher in Tail, with like Remainder to his other Sons, Remainder to his own right Heirs. Co. 120.

He died without Issue by Mrs. Carew.

But before Christopher had any Son born, the said Feoffees made a Feoffment of the Land in Fee, without any Consideration: afterwards Christopher had Issue two Sons.

Now the Uses limited by the Feoffment of Sir R. C. being only contingent to the Sons of Christopher, and they not being born when the second Feoffment was made to their Father, the Question now was, Whether they shall be destroyed by that Feoffment before the Sons had a Being in Nature? or whether they shall arise out of the Estate of the Feoffees after their Births?

And it was adjudged in the Exchequer-Chamber, That the last Feoffment had devested all the precedent Estates, and likewise the Uses whilst they were contingent, and before they had an Existence; and that if the Estate for Life which Christopher had in those Lands had been determined by his Death, before the Birth of any Son, the future Remainder had been void, because it did not vest whilst the particular Estate had a Being, or eo instanti that it determined.

So in this Case Mr. Leach cannot have any future Right of Entry, for he was not born when the Surrender was made, so that the Contingency is for ever gone.

Suppose a Feoffment in Fee, to the Use of himself and his Wife, and to the Heirs of the Survivor.

The

Cro. Car. 102.

The Husband afterwards makes another Feoffment of the same Lands, and dies, and the Wife enters, the Fee shall not vest in her by this Entry, for she had no Right: The Husband has destroyed the contingent Use by the last Feoffment, so that it could not accrew to her at the Time of his Death.

Nay, though the particular Estate in some Cases may revive, yet if the Contingency be once destroyed, it shall never arise again.

2 Sand. 380.

As where the Testator being seised in Fee of Houses, devised the Inheritance thereof to such Son his Wife should have, (after her Life) if she baptized him by his Christian and Sir-name; and if such Son died before he attain the Age of 21 Years, then to the right Heirs of the Devisor.

He died without Issue: The Widow married again; then the Brother and Heir of the Testator, before the Birth of any Son, conveyed the Houses thus, viz.

To the Husband and Wife, and to their Heirs, and levied a Fine to those Uses.

Afterwards she had a Son baptized by the Testator's Christian and Sir-name.

Then the Husband and Wife sold the Houses to one Weston and his Heirs, and levied a Fine to those Uses.

It was adjudged, That by the Conveyance of the Reversion by the Brother and Heir of the Testator to the Baron and Feme before the Birth of the Son, her Estate for Life was merged; and tho' by reason of her Coverture she might waive the Jointenancy, and reassume the Estate for Life, yet that being once merged, the contingent Remainders are all destroyed.

2 Roll. Abr. 796. Wigg *versus* Villiers.

Cro. Car. 502.

Curia. The Grants of Infants, and of Persons Non compos, are parallel both in Law and Reason; and there are express Authorities that a Surrender made by an Infant is void, therefore this Surrender by a Person Non compos is likewise void.

If an Infant grants a Rent-charge out of his Estate, 'tis not voidable, but ipso facto void; for if the Grantee should distrain for the Rent, the Infant may have an Action of Trespass against him.

In all these Cases which have been cited, where 'tis held, That the Deeds of Infants are not void, but voidable, the Meaning is, that Non est factum cannot be pleaded, because they have the Form, tho' not the Operations of Deeds, and therefore are not void upon that Account, without shewing some special Matter to make them of no Efficacy.

Therefore if an Infant maketh a Letter of Attorney, tho' 'tis void in it self, yet it shall not be avoided by pleading non est factum, but by shewing his Infancy.

Some have endeavoured to distinguish between a Deed which giveth only Authority to do a Thing, and such which conveys an Interest by the Delivery of the Deed it self, that the first is void, and the other voidable.

But the Reason is the same to make them both void, only where a Feoffment is made by an Infant 'tis voidable, because of the Solemnity of the Conveyance.

Now if Simon Leach had made a Feoffment in Fee, there had still remained in him such a Right which would have supported this Remainder in Contingency.

This Surrender is therefore void, and all Persons may take Advantage of it.

Afterwards a Writ of Error was brought to reverse this Judgment in the House of Lords, but it was affirmed. Cases Adj. 150.

Hall *versus* Wybank.

THE Statute of Limitations is, That if any Person be entituled to an Action, and shall be an Infant, Feme-Covert, imprisoned, or beyond Sea, that then he shall bring the Action at full Age, Discovert, of sane Memory, at large, and returned from beyond Sea. 2 Salk. 420. Statute of Limitations, whether it extendeth to the Defendant being beyond Sea six Years. 21 Jac. c. 16. Shower 98.

The Plaintiff brought an Indebitatus Assumpsit, to which the Defendant pleaded Non assumpsit infra sex Annos.

The Plaintiff replied, That the Defendant was all that Time beyond Sea, so that he could not prosecute any Writ against him, &c.

And upon a Demurrer, Serjeant Tremaine argued, That the Plaintiff was not barr'd by the Statute which was made to prevent Suits, by limiting personal Actions to be brought within a certain Time; and it cannot be extended in Favour of the Defendant, who was a Debtor, and beyond Sea, because 'tis incertain whether he will return or not; and therefore there is no Occasion to begin a Suit 'till his Return.

'Tis true, the Plaintiff may file an Original, and outlaw the Defendant, and so seise his Estate; but no Man is compell'd by Law to do an Act which is fruitless when 'tis done; and such this would be, for if the Plaintiff should file an Original, 'tis probable the Defendant may never return, and then if the Debt was 1000l. or upwards, he would be at a great Expence to no

no Purpose, or if the Party should return, he may reverse it by Error.

'Tis a new Way invented for the Payment of Debts, for if the Debtors go beyond Sea, and stay there six Years, their Debts would by this Means be all paid.

The Words of the Statute do not extend to this Case, for the Proviso is, That if the Plaintiff be beyond Sea when the Cause of Action doth accrew, that then he shall have Liberty to continue it at his Return; yet 'tis within the Equity of Law for him to bring his Action when the Defendant returns) who cannot be sued 'till then.

Cro. Car. 246, 333.

That Statutes have been expounded according to Equity, is not now a new Position; for Constructions have been made according to the Sense and Meaning, and not according to the Letter of many Statutes.

2 Rol. Rep. 318.

As the Statute of Westm. 2. which gives an Action of Debt against a Gaoler for an Escape, and that per breve, yet by the Equity thereof it hath been adjudged that a Bill of Debt will lie.

W. 2. c. 11.

For the Statute of R. 2. gives the like Action against the Warden of the Fleet for the Escape of a Prisoner in Execution, which by Construction hath been adjudged to extend to all Gaolers and Sheriffs.

1 R. 2. c. 12.

1 Sand. 38.

If this Statute should not be expounded according to Equity, then if the Plaintiff himself should be beyond Sea six Years after the Cause of Action, and die there, his Executor or Administrator cannot sue for a Debt.

Curia. This Case is out of the Equity of the Statute which provides a Remedy when the Plaintiff is beyond Sea, but not when the Defendant is there: It was never intended to make any Provision for him, since the Plaintiff might file an Original, and sue him to the Outlawry.

But Justice Dolben making some Doubt, adjornatur.

DE

DE

Term. Sancti Mich.

Anno 2 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1690.

Hobbs, *qui tam, &c. versus* Young.

AN Information was brought upon the Statute of the 5th of Eliz. for exercising the Trade of a Cloth-worker, not being an Apprentice to the same, and likewise for setting People to work at that Trade, not having served an Apprenticeship to it.

2 Salk. 610. Employing Workmen in a Man's own House, he being not Apprentice to the Trade, is an Exercising that Trade within the Statute, 5 Eliz. 4. Shower 241, 266.

Upon Not-guilty pleaded, the Jury found a Special Verdict to this Purpose, viz.

That the Defendant was a Merchant, who exported Cloth to Turkey, and that for the Space of a Month he had employed Men in his House in the Trade of a Cloth-worker, which Men had been educated in the said Mystery for the Space of 7 Years; that he provided Materials for them, and paid them weekly Wages, but that he himself was not an Apprentice to the said Trade.

That it was a Trade at the Time of the making of the Statute, &c.

The Question was, Whether this should be accounted Exercising of a Trade within the Meaning of the Statute or no?

Those who argued for the Plaintiff said, That true it is, any Man might exercise what Trade he thought fit at the Common Law; but this Confusion had been remedied by several Statutes.

The first is the Statute of Edw. 3. that Merchants shall not engross Goods to enhance the Prices, nor use but one Sort of Merchandize. 37 E. 3. c. 5.

Afterwards in the 38th of Edw. 3. the former Statute was repealed, and Liberty given to Merchants only to use what Merchandize they would. 38 E. 3. c. 2.

Then comes the Statute of Queen Elizabeth; and the Remedies intended by that and the former Acts were, viz.

1. The Restraining of ignorant Pretenders to Trade.

2. To make a Distinction of Trades, and to fit them to different Ranks of Men.

3. To encourage those who had undergone an Apprenticeship, by prohibiting others to exercise their Trades.

The Words of this latter Statute are, That no Person, other then such who do now lawfully use or exercise any Art or Mystery, or manual Occupation, shall exercise any Craft, Mystery, or manual Occupation, now used within this Realm, except he shall be brought up therein seven Years at the least as an Apprentice, *nor set any Person on work* in such Mystery, *&c.* being not a Workman at the Time of making the Statute, except he shall have been an Apprentice as aforesaid, or else having served as an Apprentice, shall become a Journeyman, or *hired by the Year*, under the Pain of 40 s. *per* Month.

'Tis plain by this Law, that he who cannot use a Mystery himself is prohibited to employ other Men in that Trade, for if this should be allowed, then the Care which hath been taken to keep up Mysteries, by erecting Guilds and Fraternities, would signify little.

In the Case of Morstyn and Nightingale, 3 Jac. 2. upon this Statute, it was proved, That the Defendant employed none but Pinmakers in that Trade; yet not having served an Apprenticeship himself, the Plaintiff had a Verdict.

Econtra. It was insisted on the Defendant's Behalf, That as this Offence is laid in the Information, it was not within the first Branch of that Clause in the Statute; for no Man will say that when the Defendant sets other Persons to work, such Employing them was an Exercising the Trade within the first Branch of that Paragraph.

Neither is it within the second Branch; the Meaning whereof is, That no Person shall be employed but such as have served an Apprenticeship, &c.

Now the Person who sets such People to work is not punishable by this Law, but the Men themselves who do work not being qualified, and those are not punishable in this Case, because the Verdict hath found that they were Apprentices, and had served seven Years to the Trade.

'Tis not material to say, that the Men thus employed by the Defendant in this Trade are his Servants, and that by their working the Company of Clothworkers may be damnified, for the

Act is not restrained to particular Companies, but taketh Care in general that the Work should be well done.

No Man will say that a Merchant is within this Statute, for the Preamble it self shews 'tis for the Reformation of Trades and Manual Occupations; so that as a Merchant is not within the Letter, neither is he within the Meaning of the Law, because he is of a superior Order and Degree of Men.

The chief Design therefore of this Law being, that unskilful Men should not employ themselves in Trades; and the Defendant having set none to work but such who were of that Trade, and Artists in it, the Meaning of the Act is fully pursued, and no Injury is done to any Person.

Besides, it doth not appear by this Verdict, that any Thing was done by the Defendant but in his own Family, and probably it might be for their Use, and then 'tis no Offence.

But if it is a Crime in the Defendant, then all the Petty-Chapmen in England are within this Statute, for they use several Goods belonging to particular Trades, and few of them have been Apprentices to any Trade.

It was said by some of the Counsel who now argued this Case, that they had formerly attended my Lord Hale upon the like Matter, whose Opinion was, That such Petty-Chapmen were not within the Statute, but that they were warranted by the Custom of those Places where they lived.

Afterwards in Trinity-Term, 3 Gulielmi & Mariæ, Judgment was given for the Plaintiff by the Opinion of three Judges.

The Questions are two:

1. Whether this is a Setting up of a Trade within the express Words of the Statute?

2. Whether the Working of these Cloths in the Defendant's House will be using a Trade, &c.

It cannot be denied but that at the Common Law a Man might exercise what Trade he would, therefore the Statute is penn'd in the Negative, to prevent many Inconveniences which happened before the Making of this Law.

Some Authorities there are where Informations have been brought upon this Statute; and the Defendants have pleaded the Custom of London, for a Man educated in one Trade to exercise another; and upon Demurrer such Pleas have been over-ruled: But Reason in this Case is the best Authority. Cro. Car. 347. 1 Sand. 312.

Journeymen who work for Hire cannot be within the Meaning of this Statute; but the Defendant by employing such had an Influence upon the Trade, and so 'tis found, viz. That he provided Materials, and paid the Workmen, and therefore he (and not the Master-Workman, who is but a Journeyman) is the Person who did exercise the Trade, not being an Apprentice: The Management was for his Profit; the Workmen had no more but their Wages; and it would be very mischievous if the Statute should be otherwise construed.

Hutt. 132. A Widow shall not exercise her Husband's Trade, unless she is enabled by the Custom of the Place, and possibly she might live so long with him as to be very skilful in it; but the Act being penn'd in the Negative, must have a large Construction, and therefore an Usage against it will not take away its Force.

Paying the Wages is as much as Using the Trade himself: 'Tis properly his Driving the Trade by the Hands and Labour of his Servants. And it seems plain by the Statute of 1 Jac. 1. that this may be done, for that Statute enacts, That no Person using the Mystery of Tanning Leather by himself, or any other Person, shall exercise the Craft of a Shoemaker, &c. which shews that the Trade may be carried on by Servants and Workmen.

1 Jac. 1. c. 22.

A Goldsmith never makes his own Plate; he only provides Materials for the Workmen, but yet he is a Trade within the Statute, because he makes Profit of the Plate.

An Inn-keeper who sells Beer, Bread, &c. in his House is not within this Statute, because 'tis Part of his Trade to provide such Things for his Guests; but if he sells any Quantities out of Doors, he is then within the Reach of this Law, which ought to have a very beneficial Construction, because 'tis made to maintain skilful Men in Trades, which is for the publick Good of Mankind.

2 Bulst. 187.

2. 'Tis plain, that he who useth one Trade cannot exercise another; therefore a Coach-maker shall not make his own Wheels, if he doth, 'tis exercising the Trade of a Wheel-wright; and so of the Iron and Leather, and the other Materials which make up a Coach.

Voy 133. Hunter *versus* Moon. In Mr. Attorney Noy's Reports, there is a Case of an Information brought upon this Statute against the Defendant, being a Felt-maker, for dying of his own Hats, and it was adjudged for him, that 'tis Part of his Trade; but this is but a single Authority, and many have been against it since that Time.

At the Assizes at Cambridge the like Information was tried against a Comb-maker, for exercising the Trade of a Horner. It was insisted on, that it was Part of his Trade, for he fitted the Horn

Horn for his Use in making of Combs; but there was a Verdict for the Plaintiff, for it was held to be an Exercising of the Trade of an Horner; and the Counsel for the Defendant, who were learned Men, did acquiesce under that Judgment.

He who is a Servant, who undergoes no Hazard, but is to have a certain Reward for his Labour, doth not exercise a Trade, but 'tis the Master who employs him, who hath all the Profit, and who in this Case sells at the same Rate as if he paid the Clothworker.

The Statute saith, That none who hath not served as an Apprentice in any Mystery, *&c.* shall use the same, *&c.* Now he who employs Men in his House useth the Trade, &c. for suppose a Merchant should hire Journeymen-Shoemakers to work in his House for the Plantations, this can be no other Thing than the Exercising of the Trade of a Shoemaker.

Private Usage is not within the Meaning of this Law; but if what is done be for Profit and Gain, and not confined to a particular Family, 'tis an Exercising of a Trade within the Intention of this Statute.

If the Defendant had sold these Cloths in England, he had been a Draper; and having exported them, he is a Merchant: Wherefore for these Reasons Judgment was given for the Plaintiff.

But Justice Dolben was of another Opinion: He said, That no Encouragement was ever given to Prosecutions upon this Statute, and that it would be for the common Good if it was repeal'd, for no greater Punishment can be to the Seller than to expose Goods to Sale ill wrought, for by such Means he will never sell more.

In this Case there is no Inconvenience to the Company of Clothworkers, because the Trade is a Manual Occupation for Hire. The Master-Workman is the Person who useth the Trade; and the Defendant hath done nothing but what is the proper Work of a Merchant in his own House, which cannot be a publick Use of the Trade.

The Intent of the Making of this Statute was to prevent Idleness, and that there might be generally a good Manufacture. Now the Defendant hath well answered both these Ends, for he hath employed Men in the Working, and not only so, but such Men who were bound Apprentices, and served seven Years in that very Trade, such who could work well, and to whom he gave good Wages.

'Tis the Interest of a Merchant that his Cloth be well wrought; but the Clothworker careth not how 'tis done, so he hath his Wages: And by this Care nd Industry of the Defendant,

fendant, that Trade which was almost lost abroad, is now come into Reputation again.

Bradburn *versus* Kennerdale.

Mich. 4 *Jac. Rot.* 640.

Replication, whether good without a Traverse.

ERror to reverse a Judgment in an inferior Court at Chester in Replevin for the taking of a Cow.

The Defendant made Cognizance as Bayliff to Sir Peter Warburton, setting forth, That before the taking, &c. Sir Peter was seised in Fee of the Manor of Arkey, of which the locus in quo was Parcel, and for that the Cow was there Damage-Feasant he took it, &c.

The Plaintiff in Bar to the Avowry confesseth, That Sir *Peter Warburton* was seised in Fee, *&c.* but that before that Time Sir George Warburton his Father was seised of the said Manor, and likewise of one Messuage in Fee, &c. and being so seised, made a Lease thereof for three Lives, viz. for the Life of G. H. the Father, and for the Lives of his two Sons, George and John, & alterius eorum diutius viventis: That one of them was dead, and that the other entred, and was seised as Occupant, and let the Land to the Plaintiff until, &c. Et hoc paratus est verificare.

The Defendant demurred to this Replication, and had Judgment.

The Matter now in Debate was upon Exceptions to the Bar.

1. For want of a Traverse that Sir Peter Warburton was seised in Fee at the Time of the taking, &c.

2. For want of a sufficient Title alledged in the Plaintiff, for that by the Statute of Frauds all Occupancy is now taken away.

Co. Ent. 504. 2 Vent. 212.

It was argued, that the Replication was good without a Traverse, for where the Plaintiff hath confessed and avoided, as he hath done here, if he had traversed likewise, that would have made his Replication double.

He confesseth, That Sir P. W. was seised in Fee of the Manor, but afterwards the Seisin was expressly alledged to be in Sir George the Father, and that the Place where was Parcel thereof, which is a Confession and an Avoidance.

The Avowant should have traversed this Lease, but the Traverse of the Plaintiff upon him had made it a worse Issue.

Agreeable to this Case in Reason is that which was adjudged in this Court in Michaelmas-Term, 10 Car. 1. It was in Trespass: The Defendant pleaded, That the Locus in quo was the sole Freehold of *John*, *&c.* and justified by his Command. Cro. Car. 384.

The Plaintiff replied, That the Land was Parcel of the Manor of Abbots-Anne, and that W. was seised in Fee, and levied a Fine to the Use of himself and Wife for their Lives, the Remainder to E. for 100 Years if he lived so long, who after the Death of the Cognizors entred and made a Lease to the Plaintiff.

And upon a Demurrer to this Replication the same Exception was then taken as now, viz. That the Plaintiff did not confess and avoid the Freehold of *John*; but the Plaintiff had Judgment, for the Bar being at large, and the Title in the Replication being likewise so too, the Plaintiff may claim by a Lease for Years, without answering the Freehold.

The not concluding with a Traverse is but a Form, and the Court will proceed according to the Right of the Cause without such Form: 'Tis a Defect which after a Joinder in Demurrer is expressly helped by the Statute of Jeofails, which enables the Court to amend Defects and Want of Forms other than such for which the Party hath demurred. 27 Eliz. c. 5.

The Case of Edwards and Woodden is in Point; it was in Replevin: The Defendant made Cognizance as Bayliff to Cotton, for that the Place where, &c. was so many Acres, Parcel of a Manor, &c. That Bing was seised thereof in Fee, who granted the Rent-charge out of it to Sir Robert Heath in Fee, who sold it to Cotton, *&c.* Cro. Car. 323. 6 Co. Heyley's Case. Dyer 171. b. 1 Leon. 77, 78. contra.

The Plaintiff in Bar to the Conusance replied, and confessed that the Land was Parcel of the Manor, &c. and that Bing was seised in Fee, *prout*, *&c.* and granted the Rent to Sir R. H. but that long before the Seisin of Bing, *&c.* one Leigh was seised thereof in Fee, who devised it to Blunt for a Term of Years, which Term by several Assignments came to Claxton, who gave the Plaintiff Leave to put in his Cattle, &c.

And upon a Demurrer to this Replication an Exception was taken to it, for that the Plaintiff did not shew how the Seisin and Grant of Bing to Sir R. H. was avoided; for having confessed a Seisin in Fee, prout, &c. that shall be intended a Fee in Possession; and notwithstanding he had afterwards set forth a Lease for Years in Leigh, by whom it was devised to Blunt, *&c.* and so to Claxton, it may be intended that the Grantor was only seised in Fee of the Reversion, and therefore the Plaintiff ought to have traversed the Seisin aliter vel alio modo.

But

But three Judges seemed to incline, that the Replication was good, and that the Plaintiff had well confessed and avoided that Seisin in Fee which was alledged by the Defendant, for he had shewed a Lease for Years precedent to the Defendant's Title, and which was not chargeable with the Rent; and his pleading that the Grantor Bing was seised in Fee, must be only of a Reversion expectant upon that Lease.

But if his Confession that Bing was seised in Fee, prout, &c. shall be intended a Seisin in Fee in Possession, yet the Replication is good in Substance, because the Charge against the Plaintiff is avoided by a former Estate; and in such Case 'tis not necessary to take a Traverse.

But after all it was held, That if it be a Defect, 'tis but Want of a Form, which is aided by the Statute, and that is this very Case now in Question.

The Want of a Traverse seldom makes a Plea ill in Substance but a naughty Traverse often makes it so, because the Adversary is tied up to that which is material in it self, so that he cannot answer what is proper and material; and therefore in Ejectment upon a Lease made by E. I. the Defendant pleaded, That before E. I. had any Thing to do, &c. M. I. was seised in Fee, after whose Death the Land descended to his Heir, and that E. entred, and was seised by Abatement.

Yelv. 151. Bedel *versus* Lull.

The Plaintiff replied, and confessed the Seisin of M. but saith, that he devised it in Fee to E. I. who entred, absque hoc, that E. I. was seised by Abatement, and upon a Demurrer this was held to be an ill Traverse, for the Plaintiff had confessed the Seisin of M. and avoided it by the Devise, and therefore ought not to have traversed the Abatement, for having derived a good Title by the Devise to his Lessor, 'tis an Argument that he entred lawfully, and it was that alone which was issuable, and not the Abatement; therefore it was ill to traverse that, because it must never be taken but where the Thing traversed is issuable.

Then it was said, That the Conusance was informal, because the Avowant should have said, that the Locus in quo, &c. contained so many Acres of Ground, &c. He only saith, that it was Parcel of a Manor: Besides, he never prays Damages, nor Retorn' Habend'.

2. As to the 2d Point, it was said, That the Statute of Frauds doth not take away all Occupancy; it only appoints who shall be a special Occupant.

Besides, here is a Title within the Statute, for a Lease for Lives is personal Assets, so is a Term in the Hands of an Executor de son tort; and in this Case the Entring of one Brother

after the Death of the other made him an Executor de son tort; and it was never yet doubted, but that there may be such an Executor of a Term. Whereupon it was concluded that the Bar was good, both as to the Form and Title set forth, but no Judgment was then given.

More 126. Sid. 7.

Boson *versus* Sandford.

THE Plaintiff declared, That the Defendant and seven other Persons were Proprietors of a Vessel, in which they used to carry Goods for a reasonable Hire from Port to Port.

That he had loaded the said Vessel with Boards, which were agreed to be safely transported from London to Topsam, and that the Defendant by neglect suffered them to be dampnified, &c.

Upon Not-guilty pleaded, a special Verdict was found, the Substance whereof was, viz.

That the Plaintiff did load the Ship with Boards, of which Ship the Defendant and seven other Persons were Proprietors; that the said Ship did usually carry Goods for Hire; that the Plaintiff delivered the Goods to Daniel Hull, who was Master of the Vessel, and that they were loaded therein, but that none of the Proprietors were present.

That there was no actual Contract between the Plaintiff and the Proprietors, or any Negligence in them, but the Boards were dampnified by the Neglect of the said Master, &c.

The Questions upon this special Verdict were two:

1. Whether this Action would lie against the Defendant alone as one of the Proprietors, or whether it must be brought against them all?

2. If the Action ought to be brought against them all, then Not-guilty was not a proper Plea, because the Defendant ought to have pleaded in Abatement, that the rest of the Owners super se susceperunt simul cum the Defendant, absque hoc quod he super se suscepit tantum.

2 Salk. 440. Where there are several Proprietors of a Vessel, and Goods are dampnified by Carriage, the Action must be brought against them all.

3 Lev. 258. Shower 29, 201.

It was argued for the Plaintiff, that the Action may be well brought against any single Person of the Proprietors, because 'tis grounded upon a Tort as well as upon a Contract, which in this Case is only an Inducement to the Action, and therefore the Plaintiff hath Liberty to bring it either the one Way or the other, for 'tis both joint and several.

So it is in Trover, where a Man declares that he was possessed of such Goods, that the Defendant found them and promised to deliver them, but converted them to his own Use; the Contract is but Inducement, for the Cause of Action arises upon the Conversion.

This is a Remedy given by the Construction of the Law, and if so, it must be certain and effectual to all Intents; and therefore it hath been ruled in an Action brought against a common Carrier upon the Assumpsit in Law, and likewise upon the Tort, that the Declaration was ill, and tho' the Plaintiff had a Verdict, yet the Judgment was arrested, becauſed he had declared both Ways.

Sid. 244.

Agreeable to this was that Judgment which was given upon the Statute of 2 Ed. 3. for not setting out of Tythes in an Action of Debt brought against two Tenants in common, it happen'd that one of them set out the Tythes, and the other carried them away, and because the Action was brought against both, it was held to be ill, for it lies only against him which did the Wrong.

Hutt. 121, 122.

2. If the Action ought to be brought against all, then the Defendant should have taken Advantage of it by Pleading, and to have shewed who were the Proprietors with himself; for 'tis impossible for the Plaintiff to know who they are; and for this Reason the Plea is not good.

Econtra. Econtra. The Plaintiff ought to have brought his Action either against the Master alone or all the Proprietors; 'tis true, if this had been only an Action of a simple Trespass, he might have brought it against all or one; but this sounds not only in a Wrong, but 'tis in Breach of a Covenant or Duty, and so ought to be commenced against all of them as common Carriers.

Now the great Reason why all are liable to an Action is, because they all have a Reward for the Hire of the Vessel; and it seems very unreasonable that one should bear the Burthen, and the rest run away with the Profit.

The Principal Case in Hutton is an Authority directly to this Purpose, tho' it was otherwise quoted by the Plaintiff's Counsel; it was Debt upon the Statute of Ed. 6. brought against one Lessee for not setting out of Tythes, and it appeared upon the Evidence that two were jointly possessed of the Term, and for that Reason it was held that the Action would not lie against one alone.

2. The Defendant ought not to have pleaded in Abatement that the rest of the Proprietors super se susceperunt simul cum the Defendant, &c. because such a Plea would not have been good here; for he shall never be compelled to plead in Abatement

either in Debt or Contract, but in one single Case, and that is where two are bound jointly, and one is sued, he may plead in Abatement, but cannot say Non est factum, for the Bond is his Deed since each of them have sealed it. 5 Co. 119.

Afterwards in Hillary-Term the Defendant had Judgment, that the Action ought to be brought against all the Part-owners, because they have all an equal Benefit, and the Ground of the Action is upon a Trust reposed in all, and every Trust supposeth a Contract; and in all Cases grounded upon Contracts the Parties who are Privies must be joined in the Action. Judicium. 2 Cro. 202. Palm. 523.

The Master of the Ship is no more than a Servant to the Owners, he hath no Property either general or special, but the Power he hath is given by the Civil Law. Molloy 201, 209.

There are many Cases where the Act of the Servant shall charge the Master; as for Instance, viz.

King Ed. VI. sold a Quantity of Lead to Renagre, and appointed the Lord North, who was then Chancellor of his Court of Augmentations, to take Bond for Payment of the Money. Dyer 161.

The Lord North appointed one Benger, who was his Clerk, to take the Bond, which was done, who delivered it to the Lord, and he delivered it back again to his Clerk, in order to send it to the Clerk of the Court of Augmentations.

Benger suppressed this Bond; and it was the Opinion of all the Judges of England, that the Lord North was chargeable to the King, because the Possession of the Bond by his Servant, and by his Order, was his own Possession.

So where an Officer of the Customs made a Deputy, who concealed the Duties, and the Master being ignorant of the Concealment, certified the Customs of that Part of the Revenue into the Exchequer upon Oath, he was adjudged to be answerable for this Concealment of his Servant. Dyer 238. b.

So where the Lessor was bound that the Lessee should quietly enjoy, and it was found that his Servant by his Command, and he being present, entred, this was held to be a Breach of the Condition, for the Master was the principal Trespasser. 4 Leon. 123.

Therefore tho' the Neglect in this Case was in the Servant, the Action may be brought against all the Owners, for it is grounded quasi ex contractu, tho' there was no actual Agreement between the Plaintiff and them. Molloy 203, 204, 209, 210, 234.

And as to this Purpose, 'tis like the Case where a Sheriff levies Goods upon an Execution which are rescued out of the Hands of his Bailiffs; this appearing upon the Return, an Action 2 Sand. 345. Hob. 206. Hutt. 121. 1 Mod. 198.

of Debt will lie against him, tho' there was no actual Contract between the Plaintiff and him; for he having taken the Goods in Execution, there is quasi a Contract in Law to answer them to the Plaintiff.

2. As to the second Point, it was ruled, that Not-guilty was a good Plea to any Misfeazance whatsoever, and that a Plea in Abatement, viz. that the rest of the Owners super se susceperunt simul cum Defendente absque hoc quod Defendens super se suscepit tantum, had been no more than the general Issue, but he hath not pleaded thus.

3 Cro. 554. Vering *versus* More.

Justice Dolben agreed, That the Action ought to be brought against all the Proprietors, it being upon a Promise created by Law; but he was of Opinion that this Matter might have been pleaded in Abatement.

Gold *versus* Strode.

AN Action was brought in Somersetshire, and the Plaintiff recovered, and had Judgment, and died intestate.

Gold, the now Plaintiff, took out Letters of Administration to the said Intestate in the Court of the Bishop of Bath and Wells, and afterwards brought a Scire Facias upon that Judgment against the Defendant, to shew Cause quare Executionem habere non debeat.

He had Judgment upon this Scire Facias, and the Defendant was taken in Execution and escaped.

An Action of Debt was brought by the said Gold against this Defendant Strode, who was then Sheriff, for the Escape, and the Plaintiff had a Verdict.

It was moved in Arrest of Judgment, and for Cause shewn, That if the Administration was void, then all the Dependancies upon it are void also, and so the Plaintiff can have no Title to this Action.

Now the Administration is void, because the entring upon Record of the first Judgment recovered by the Intestate in the County of Middlesex, where the Records are kept, made him have Bona notabilia in several Counties, and then by the Law Administration ought not to be committed to the Plaintiff in an inferior Diocese, but in the Prerogative Court.

Curia.

Curia. The Sheriff shall not take Advantage of this, since the Judgment was given upon the Scire Fac. and the Capias ad satisfaciendum issuing out against the then Defendant, directed to the Sheriff, made him an Officer of this Court, and the Judgment shall not be questioned by him; for admitting it to be a Recovery without a Title, yet he shall take no Advantage of it, 'till the Judgment is reversed.

'Tis not a void but an erroneous Judgment, and then a Person is in Execution upon such a Judgment, and escapes, and then an Action is brought against the Gaoler or Sheriff, and Judgment and Execution thereon, tho' the first Judgment upon which the Party was in Execution should be afterwards reversed, yet the Judgment against the Gaoler being but a collateral Thing executed, shall still remain in Force. 8 Co. 141.

The Ca. Sa. was a sufficient Authority to the Sheriff to take the Body, tho' grounded upon an erroneous Judgment, and that Execution shall be good 'till avoided by Error, and no false Imprisonment will lie against the Gaoler or Sheriff upon such an Arrest. 21 E. 4. 23. b. Cro. El. 164. Moor 274. 2 Cro. 3. 1 Rol. Abr. 809. Godb. 403. 2 Leon. 841.

Coghil *versus* Freelove.

In the Common-Pleas.

Debt for Rent incurred after an Assignment by an Administrator, for the Privity of Contract is not determined by the Death of the Intestate. 2 Vent. 209. 1 Lev. 127, 128.

DEBT for Rent was brought against the Defendant as Administratrix of Thomas Freelove her late Husband, deceased, in which Action the Plaintiff declared, That on the 1st of May, 21 Car. 2. he did by Indenture demise to the said Thomas Freelove, one Messuage and certain Lands in Bushey in Hertfordshire, Habendum from Lady-day then last past, for and during the Term of 21 Years, under a yearly Rent; that by Vertue thereof he entred and was possessed: That on the 7th of March 1685. the said Thomas Freelove died intestate, and that the next Day Administration of his Goods and Chattels was granted to the Defendant, and that 78 l. was in Arrear for Rent due at such a Time, for which this Action was now brought in the Detinet.

The Defendant confessed the Lease prout, &c. and the Death of the Intestate, and that the Administration was granted to her, but saith, That before the Rent was due, she by Articles made between her of the one Part, and Samuel Freelove of the other Part, did assign the said Indenture and all her Right, Title and Interest thereunto, and which she had in the Premisses, un-

to the said Samuel Freelove, who entred and was possessed; that the Plaintiff had Notice of this Assignment before he brought this Action, but nothing was said of his Acceptance.

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

And Judgment was given, by the Opinion of the whole Court, for the Plaintiff, against the Authorities following:

Cro.El. 555. Viz. 'Tis true, in Overton and Sydal's Case, it was resolved, that if an Executor of Lessee for Years assign his Interest, Debt for Rent will not lie against him after such Assignment; the Reason there given was, because the personal Privity of the Contract is determined by the Death of the Lessee, as to the Debt it self; and for the same Reason the Executor shall not be liable to the Rent, after the Death of the Lessee, if such Lessee doth make an Assignment of his Term in his Life-time.

3 Co. 24. a. My Lord Coke mentioning this Case, in his third Report affirms, that it was resolved by Popham Chief Justice, and the whole Court, that if an Executor of a Lessee for Years assign his Interest, Debt will not lie against him for Rent due after such an Assignment; but my Lord Popham himself, in reporting that very Case, tells us he was of another Opinion, which was, That so long as the Covenant in the Lease hath the Nature and Essence of a Contract, it shall bind the Executor of the Lessee, who as well to that, as to many other Purposes, represents the Person of the Testator, and is privy to his Contracts.

Pop. 120.

'Tis true, my Lord Popham held in that Case, that the Action did not lie, but because it was brought by the Successor of a Prebendary, upon a Lease made by him in his Life-time, who being a single Corporation, the personal Contract was determined by his Death.

But the same Case reported by others, is said not to be adjudged, for the Court was divided in Opinion.

Moor 251. Latch 262.

The Case of Marwood and Turpin is the same, but there the Defendant pleaded the Acceptance of the Rent after the Assignment, which was not done here.

Moor 600. Cro. El. 715.

Now if both these Cases should be admitted to be Law, and parrallel with this, yet the later Resolutions have been quite contrary; for 'tis now held, and with great Reason, that the Privity of Contract of the Testator is not determined by his Death, but that his Executor shall be charged with all his Contracts, so long as he hath Assets, and therefore such Executor shall not discharge himself by making of an Assignment, but shall still be liable for what

Sid. 240, 266. Allen 34, 42. Palm. 118. Latch 260. Noy 97. 2 Cro. 334. Moor 392.

Rent shall incur after he hath assigned his Interest; nay if the Testator himself had assigned the Term in his Life-time, yet his Executor shall be charged in the Detinet, so long as he hath Assets.

Newton *versus* Trigg.

Mich. 1 *Jac. Rot.* 226.

TRespass for breaking and entring of his Close, treading down of his Grass, &c. and taking away of his Goods. Upon Not-guilty pleaded, a special Verdict was found, That the Plaintiff was an Inn-keeper, and a Freeman of the City of London; that he bought Oates, Hay, &c. which he sold in his Inn, by which he got his Living; that he with others built a Ship, and he had a Share therein, and a Stock of 50 l. to trade withal; that he was indebted to several Persons, and departed from his House, and absconded from his Creditors; that thereupon a Commission of Bankruptcy was taken out against him at the Petition of the Creditors, that the Plaintiff was indebted to Trigg, and that the Commissioners found him to be a Bankrupt; and by Indenture bearing Date the 25th Day of June, made a Bargain and Sale of the Goods of Trigg, who did take and carry them away, &c.

Statute of Bankrupts do not extend to an Inn-keeper. 3 Lev. 309. Shower 96, 268.

The Question was, Whether upon the whole Matter the Plaintiff was a Bankrupt or not?

Serjeant Thompson argued, That he was not within any of the Statutes of Bankruptcy, for an Inn-keeper is under many Obligations and Circumstances different from all other Tradesmen; for he is to take Care of the Goods of Travellers, and if he set any unreasonable Price upon his Goods, 'tis an Offence which the Justices of Peace and Stewards in their Leets have Power to hear and determine.

2. He doth not buy and sell by Way of Contract, for most of his Gains arise by the Entertaining and Lodging of his Guests, by the Attendance of his Servants, and by the Furniture of his Rooms, and buy uttering of Commodities as in other Trades. And therefore by the Opinion of three Judges in the Case of Crisp and Prat, it was held that an Inn-holder doth not get his Living by Buying and Selling; for tho' he buyeth Provision, he doth not sell it by Way of Contract, but utters it at what Gain he thinks reasonable, which his Guests may refuse to give.

Cro. Car. 548.

Justice

Justice Berkley in the arguing of that Case agreed, that he who getteth his Living by Buying or Selling, and not by both is not within the Statutes; but the Jury having found that he got a Livelihood by both, and using the Trade of an Inn-holder, therefore he was a Bankrupt: But the other three Judges were of a contrary Opinion, because an Inn-keeper cannot properly be said to sell his Goods.

As to his having a Share in a Ship, 'tis no more than a Stock to trade, which may go to an Infant, or to an Executor after his Decease, and if either of these Persons should trade with it, they cannot be made Bankrupts, because 'tis in auter droit.

Econtra. Econtra. It was argued, that he who keepeth an Inn is a Trades-man, and may be properly said to get his Living by Buying and Selling.

The Goods of a Traveller are not distrainable for the Rent of an Inn-keeper, the Reason is because he is more immediately concern'd as a Trades-man, for the Benefit of Commerce.

2 Rol. Abr. 84. It was the Opinion of my Lord Rolls, that an Inn-keeper was a Trades-man, therefore any Man might build a new Inn, for it was no Franchise, but a particular Trade to keep an Inn.

And as a Trades-man he selleth his Goods to his Guests by Way of Contract, for he is not bound to provide Hay and Oats for the Horses of his Guests without being paid in Hand as soon as the Horses come into the Stable, for the Law doth not oblige him to trust for the Payment. 39 H. 6. 18, 19.

The Case of Crisp and Prat, as reported by Justice Croke, seems to be against this Opinion, but 'tis misreported; for Jones, who mentions the same Case, says, that it being found that the Inn-keeper got his Living by Buying and Selling, it was the Opinion of two Judges that he was within the Statute; but the other two Judges, as to this Point, were of a contrary Opinion, for they held that an Inn-keeper could be no more a Bankrupt than a Farmer, who often buys and sells Cattle and other Goods. Jones 436, March 34.

Tho' a Man is of a particular Trade, yet if it doth not appear that he got his Livelihood by Buying and Selling, 'tis not actionable to call such a Person a Bankrupt.

Stile 420. Sid. 299. T. Jones 156. Now certainly if the Plaintiff had declared that he was an Inn-keeper, and got his Living after that Manner, and that the Defendant, to scandalize him, said, He was a Bankrupt; the Action would lie as well as for a Dyer, Farmer, Carpenter, or such like Trades of Manual Occupation.

Most of the Inn-keepers are Farmers, and if it had been so found in this Case, it would not have been denied but that he had been within the Statute of Bankrupts.

Afterwards, in Trinity-Term, 3 Willielmi, Judgment was given for the Plaintiff: For taking the whole Matter as found by this Verdict, 'tis not sufficient to make him a Bankrupt. Judgment.

1. That he had a Ship which he let to Freight; this was not much insisted on at the Bar to make him a Bankrupt, for 'tis no more than for a Man to have a Share in a Barge, Hackney-Coach, or Wagon, all which are let for Hire.

Besides, in this Case 'tis found that the Plaintiff was but a Partner with another. And as to the 50 l. which he had in this Trade, that is not sufficient to make him a Bankrupt, for he must be actually a Trader at the Time that the Debt was contracted, which is not found; so it must be to make the Word Bankrupt actionable, for it must be found that he was a Trader at the Time of the Words spoken. Cro. Car. 282. Sid. 411.

All the Question of Difficulty is, That the Plaintiff was an Inn-keeper, and that he bought Necessaries, and uttered them in his House; but this will not make him a Bankrupt.

Because Inns are of Necessity, and under the Inspection of the Publick, and he cannot refuse to lodge travelling Persons; and 'tis chiefly upon this Account that he hath several Privileges which other Traders have not, as to detain a Horse 'till he is paid for keeping of it, &c. 2 Roll. Rep. 345. Hutt. 100. 2 Roll. Abr. 64.

They are under the Power of the Justices of the Peace, in the Places where they are situated; for if an Inn be erected in an inconvenient Place 'tis a Nuisance, and may be suppressed by Indictment; 'tis the same with an Ale-house, and therefore several Statutes which are made to prevent Tipling, and which appoint at what Price Ale shall be sold, have been adjudged to extend to Inn-keepers. Dalton. 28. 1 Jac. c. 9. 21 Jac. c. 7. 1 Car. c. 14.

Where a Man buys and sells under a Restraint, and particular Limitation, tho' 'tis for his Livelihood, yet he is not within the Statutes.

Inn-keepers do not deal upon Contracts as other Traders do, for a Judge of Assize may set a Price upon his Goods, and if they should set a Price themselves, if 'tis unreasonable they may be indicted for Extortion; what they buy is to a particular Intent, for 'tis to spend in their Houses, and tho' they get their Living by it, 'tis not ad plurimum, for the greatest Part of their Gains ariseth by Lodgings, Attendance, Dressing of Meats, and other Necessaries for their Guests.

Ever since the Statute of the 13th of Eliz. all the subsequent Acts relating to Bankrupts have been penned alike, except the 21st of Jac. I. which is a little larger, and takes in a Scrivener, and it may still be worth the Care of a Parliament to enlarge it to an Inn-keeper, but no Law now in Being extends to him.

He is not taken Notice of as a Trader within any of the Statutes of Bankruptcy, he is only communis Hospitator, a Person or Trader who buys and sells for Hospitality; by receiving Travellers he becomes chargeable to the Publick, to protect them and their Goods.

8 Co. Caly's Case.

A Shoemaker, Tanner, and Baker, are Trades within the Statutes, but the Difference between those Trades and an Inn-keeper is plain, because they use the Manufacture, and thereby encrease the Value, as Leather is made more useful and of more Value, by making of it into Shoes.

1 Cro. 31. Hutt. 46, 47.

A Farmer is not within the Statute, and yet they all buy and sell, for 'tis necessary to their Occupation.

This Point was settled in Crisp and Prat's Case; but the Occasion of the Doubt afterwards, was by the publishing of Justice Jones's Reports, who doubted upon the particular finding of the Jury, and so the Court came to be divided.

There is no material Difference between an Inn-keeper and the Master of a Boarding-School, who buys and dresses Provisions for young Scholars, and obtains Credit by his Way of Living, but it was never yet thought that he was within any of those Statutes.

Rowsby *versus* Manning.

Mich. 4 *Jac. Rot.* 15.

Conditional Submission to an Award Shower 98, 242.

DEBT upon a Bond for Performance of an Award, so as it be made by such a Day, and ready to be delivered to the Parties, or to such of them as desire it.

The Defendant pleaded nullum fecerunt Arbitrium, &c.

The Plaintiff replied, That after the Submission, and before the Day appointed in the Condition, the Arbitrators did make their Award, by which they ordered the Defendant to pay so much Money to the Plaintiff, and so assigned the Breach for Non-payment, &c.

And upon a Demurrer to this Replication, Serjeant Tremaine said it was a conditional Submission, viz. to perform an Award, so as it be made by such a Day, and ready to be delivered to the Parties

Parties, and the Plaintiff hath not shewed that it was ready to be delivered to the Defendant, which he ought to have averred.

If the Condition be to perform an Award between the Parties, Ita quod Arbitrium præd. fiat & deliberetur utrique Patrium præd. before such a Day, it must be delivered to all the Parties, and not to one, for each of them are in the Danger and Penalty of the Bond. 5 Co. 103. More 642.

Econtra. Serjeant Thompson agreed it to be a conditional Submission, but not such as goeth to the Substance of the Award it self; for the conditional Words are not to the Award, but to the Form of the delivering of it, and therefore it should come on the Defendant's Side to shew that it was not ready to be delivered. Econtra.

Curia. If an Award is actually made, 'tis then ready to be delivered; but in this Case it must be ready to be delivered to the Parties, or to such of them who desire it; so it must be desired, and if then denied, the Party may plead the Matter specially.

The Submission was, viz. So that the Award be made ad vel antea 5 Decemb. ready to be delivered at a certain Shop in *London*. 2 Cro. 577. 2 Roll. Rep. 193.

The Plaintiff shewed an Award made at York ready to be delivered at the Shop in London; this was adjudged to be a void Publication and Delivery, because a Place was appointed where it should be delivered and published, viz. at the Shop in London, where the Parties were to expect it, and not elsewhere.

So it would have been, if a Day had been appointed on which it ought to be delivered, and the Day had been mistaken. 2 Sand. 73.

But here is neither Day or Place appointed for the Delivery, so that the Defendant ought to have desired the Award; and if it had not been ready to be delivered, he ought to have pleaded the Matter specially.

DE
Term. Sancti Hill.

Anno 2 Gulielmi & Mariæ Regis & Reginæ in Banco Regis, 1690.

Mr. Leigh's *Case.*

Mandamus will not lie for the Office of a Proctor of *Doctors Commons.* 3 Lev. 309. Shower 217, 251, 261.

HE brought a Mandamus to be restored to the Office of a Proctor of Doctors Commons.

The Return was, That the Court was the supreme Court of the Archbishop of Canterbury, who had the Government thereof; that he appointed a Judge of the said Court, who had Power to alter and displace Officers; that the Defendant was admitted and sworn a Proctor of the Court, and took an Oath to obey the Orders thereof; that Part of the said Oath was, That no Proctor should do any Thing in that Court *without the Advice of an Advocate*; that he had done Business without such Advice in a certain Cause there depending; and that he refused to pay a Tax of 10 s. imposed upon him by Order of the Court towards the Charges of the House.

The Questions upon this Return were, viz.

1. Whether a Mandamus will lie to restore a Person to the Office of a Proctor?

2. Whether a sufficient Cause was returned to displace Mr. Leigh?

As to the first, It was held that a Mandamus doth lie, because 'tis a publick Office, and concerns the Administration of Justice; and the Proctors being limited to a certain Number, viz. 28, if many of them should be displaced, it would be a Means to hinder Justice.

This Court doth judicially take Notice of the Ecclesiastical Courts, by prohibiting them, by taking Notice of their Excommunications, or of any Proceedings, when they are against the Law of the Land.

A Proctor doth the Business in that Court as an Attorney in B. R. and Notice is taken of his Place as judicially as of any other Officer; and as to this Purpose, those Officers cannot be distinguished: If therefore a Mandamus hath been granted to restore an Attorney, why not a Proctor? Sid. 94, 152.

The Plaintiff hath no Remedy but by a Mandamus, because an Assize will not lie of this Office; 'tis admitted that an Action on the Case may be brought, but then Damages only are to be recovered, and not the Office; and it would be very inconvenient to leave it to a Jury to give such Damages as the Party may sustain for the Loss of his Livelihood.

'Tis no Objection to say, that there is a proper Visitor in this Case to whom to appeal, viz. to the Archbishop; for they have not set out any such visitatorial Power in the Return, or if any, that he had Power to restore him.

But if such Power had appeared upon the Return, yet a Proctor ought not to appeal to the Archbishop, or to the Guardian of the Spiritualties Sede vacante, because 'tis in Effect to appeal to themselves; for the Dean of the Arches, before whom the Appeal must be brought, is an Officer appointed by the Archbishop himself, and hath the same Jurisdiction with him.

Besides, the Proctors there are not properly under any Visitatorial Power, they have a particular Jurisdiction within themselves, and their Courts have been held in several Places, as at Bow, Christ-church, &c.

Then as to the Causes of this Removal; 'tis returned,

1. For receiving and prosecuting of a Cause without the Advice of an Advocate, contrary to a Statute made by the Archbishop Abbot.

2. For refusing to pay 10 s. set upon him as a Tax towards the Charges of the House.

Now neither of these are sufficient Causes to displace him.

As to the first Cause, if that Statute gives them any such Power, 'tis void, because it deprives a Man of his Freehold, which cannot be done but by the Law of the Land.

'Tis not said when this Offence was committed, for it may be before a general Pardon, and then 'tis discharged.

But if it is an Offence, that will not make a Forfeiture without Warning, and no such Thing appears upon the Return; for if he had Notice publickly, he might have offered something in Excuse of himself, as Sickness, &c. which might have been allowed by the Court. 11 Co. 99. a.

'Tis

'Tis as unreasonable a Law to put the Clients to unnecessary Charges to advise with an Advocate upon an ordinary Libel, as it would be for an Attorney of the King's Bench to advise with Counsel to draw a Declaration on a Bond.

2. They do not shew by what Authority they may levy a Tax, neither do they set forth what Tax was made in the whole; so that it might appear that 10 s. was a proportionable Part for him to pay; neither doth it appear when this Tax was made, or that Mr. Leigh was a Proctor when it was made.

Econtra. Econtra. This is not an Offence in Matter of Judgment, but 'tis a Misdemeanor and punishable.

'Tis very like the Case of Fellows of Colleges, who have proper Visitors, and therefore the King's Bench will not grant a Mandamus in such Cases.

A Proctor is an Officer of a Court different from the Courts of Law, and therefore the King's Bench cannot take Notice of his Office judicially; they have no other Way of punishing a Proctor but by displacing of him; and if this should be remedied by a Mandamus, then those Persons may offend without Punishment.

'Tis not like the Case of an Attorney, for he being an Officer of the King's Bench, the Court doth judicially take Notice of him, but not of a Proctor. 'Tis more like the Case of a Steward of a Court Baron, which is of private Jurisdiction, and for which a Mandamus hath been denied.

'Tis like Midleton's Case, who was Treasurer of the New River Water; 'tis true, a Mandamus was granted to restore him to that Office, but it was only de bene esse, to bring the Matter before the Court, tho' that was a Corporation settled by Act of Parliament.

'Tis also like the Cases of Abbots, Priors and Monks, for whom a Mandamus was never granted, because they are Ecclesiastical Corporations, and have proper Visitors, which is now by Law devolved upon the Archbishop.

So also Lay Corporations have Visitors, which are their Founders and their Heirs.

'Tis an Objection of no Force to say that this Appeal must be to the Dean of the Arches, which is to appeal to the same Person, because tho' 'tis true that the Dean is constituted by the Archbishop, yet when once he is invested with that Office, he is in for his Life, and the Archbishop cannot afterwards come into that Court and execute the Office of Dean himself, so he is not the same Person, neither hath he the same Jurisdiction.

I Curia.

Curia. A Proctor is not an Officer properly speaking, 'tis only an Employment in that Court, which Acts by different Laws and Rules from the King's Bench; they have an original Jurisdiction over this Matter, and a Mandamus is in the Nature of an Appeal, which will not be granted, where they have such a Jurisdiction, but when they exceed it and encroach upon the Common Law, then Prohibitions are granted.

'Tis for this Reason that in Cases of Divorce, which are of a higher Nature than this Case is, no Appeal can be to the King's Bench, for it would be an endless Business for Persons to appeal ab uno ad aliud Examen, and therefore Credit must be given to the Determinations of those Courts, who have such Original Jurisdiction.

Officers are incident to all Courts, and must partake of the Nature of those several and respective Courts in which they attend, and the Judges, or those who have the supreme Authority in such Courts, are the proper Persons to censure the Behaviour of their own Officers, and if they should be mistaken, the King's Bench cannot relieve; for in all Cases where such Judges keep within their Bounds, no other Court can correct their Errors in Proceedings. 1 Rol. Abr. 526.

Now for a Church-Warden of a Parish, Clerk, an Attorney, or the like, all these are Temporal Officers, and are to be ordered by the Temporal Laws.

But if any Wrong be done in this Case, the Party must appeal; so no Writ of Restitution was granted.

Rex *versus* Guardianum de le Fleet.

AN Inquisition being found to seize the Office of Warden of the Fleet into the King's Hands: The Court of Chancery, assisted with three Judges, was moved that it might be quashed. The Exceptions taken were, viz. Inquisition quashed. 3 Levinz 288.

1. 'Tis found that the Defendant was Warden of the Fleet, but doth not say what Estate he had therein, whether for Life, or Years, or in Fee, &c.

2. The Offences which are the Causes of the Forfeiture, are laid to be committed at the Fleet, by suffering Escapes, and by Extortion, and 'tis not found where the Fleet is situate, so there being no Visne, those Offences cannot be traversed.

3. They do not find the Escape to be sine Licentia & contra Voluntatem of the Warden, the Debts being unpaid. 39 H. 6. 32.

4. Admitting it to be a Forfeiture, the Office cannot go to the King, but it shall go to the next who hath the Inheritance.

The

The Opinion of the Court was, That there are two Things which entitle the King to this Office, neither of which were found by this Inquisition.

1. An Estate in the Party offending.

2. A Cause of Forfeiture of that Estate.

Now here was no Estate found in the Warden, but only that the Office was forfeited by suffering Escapes, &c.

9 Co. 95. If this had been an Office of Inheritance, then it ought to be found that such a Person was seised in Fee, &c. and so what Estate soever he had in it, ought to be expressly found.

But as this is found, 'tis void, because it doth not answer the End for which the Finding of Offices was provided, which is to entitle the King to the Offender's Estate.

An Indiament is but another Sort of Office; and here being no Estate found, 'tis much like and Indiament which finds no Offence, therefore it must be quashed,

It might have been objected, That no Man can tell what Estate the Warden had in this Place, and that not being known, no Office could be found for the King.

But this Objection runs to the finding of all Manner of Offices in general, whose very Nature is to find an Estate, and to devest the Subject thereof, and vest it in the King.

Besides, in this Case one of the Indentures by which the Office was granted to the Warden must be enrolled in the Court of Common-Pleas.

3 Cro. 895. 9 Co. 95. Keilw. 194. This cannot be helped by a Melius Inquirendum, which never will support a defective Inquisition, and this is such, because it doth not appear that the Defendant had any Seisin or Estate in the Wardenship of the Fleet.

Barker *Mil' versus* Damer.

Hill. 1. *Rot.* 635.

1 Salk. 80. AN Action of Covenant was brought by Sir William Barker, (who was Defendant in a former Action) against Mr. Damer, wherein he declared that William Barker his Father was seised in Fee of the Land in Question, (being in Ireland) and made a Lease thereof to one Page for 31 Years, under the yearly Rent of 200 l. in which Lease Page did covenant for himself, his Executors, Administrators and Assigns, to pay the Rent to Mr. Barker, his Heirs and Assigns.

That

That William Barker the Father, by Lease and Release, conveyd the Reversion to Sir William Barker, the now Plaintiff; that the Term was vested in the Defendant, and assigns the Breach for Non-payment of the Rent.

The Defendant pleaded to the Jurisdiction of this Court, That the Lands in the Declaration mentioned lay in Ireland, where they have Courts of Record, &c. and so properly triable there.

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

The single Question was, Whether an Assignee of the Reversion can bring an Action of Covenant against the Assignee of a Lessee in any other Place than where the Land is?

Those who argued that he may, said, that this Action being brought upon an Express Covenant, is not local but transitory, for Debitum & Contractus sunt nullius Loci, and if it is a Duty 'tis so every where; therefore it hath been adjudged, that upon a Covenant brought in one County, the Breach may be assigned in another.

2 Inst. 231. Noy 142. 2 Cro. 142. Ibidem. Sid. 157. 2 Roll. Abr. 571. 1 And 82.

Tremain Serjeant contra.

Econtra.

He admitted that Debt upon a Lease for Years upon the Contract it self, and Covenant between the same Parties, are transitory Actions, and may be brought any where, but when once that Privity of Contract is gone as by Assignment of the Lessee or the Death of the Lessor, and there remains only a Privity in Law, there the Action must be brought in the County where the Land lieth; the Reason is because the Party is then chargeable in respect of the Possession only.

Latch. 197. Hob. 37.

Therefore it was held, that where an Assignee of a Reversion of Lands in Somersetshire brought an Action of Debt in London, upon a Lease for Years made there, reserving a Rent payable at London, which was in Arrear after the Assignment, that the Action was not well brought, for it ought to have been laid in Somersetshire, where the Lands were, because the Privity of Contract was lost by the Assignment of the Reversion, and therefore the Party to whom that Assignment was made, ought to maintain the Action upon the Privity in Law, by reason of the Interest which he had in the Land it self, and that must be in the County where it lieth.

Cro. Car. 184. Jones 83. Dyer 40. b.

Curia. There is a Difference between an Action of Debt for Rent brought by an Assignee, and an Action of Covenant, for the first is an Action at the Common Law, which hath fixed the Rent to the Reversion, and therefore such an Action must be maintained upon the Privity of Estate, which is always local.

1 Sid. 402. 3 Cro. 580. 1 Sand. 240. 32 H. 8. cap. 34.

But an Assignee of a Reversion could not bring an Action of Covenant at the Common Law, for 'tis given to him by a particular Statute (viz. of 32 H. 8. but the Statute did not transfer any Privity of Contract to the Assignee, but the Intent of it was to annex to the Reversion such Covenants only which concerned the Land it self, as to repair the House or amend the Fences, and not to annex or transfer any collatteral Covenants, as to pay a Sum of Money, for that is fixed by the Common Law to the Reversion.

'Tis true, at the Common Law an Assignee of a Reversion might have maintained an Action of Covenant for any Thing agreed to be done upon the Land it self: Privity of Contract is not thereby transferred so as to make the Action transitory, but it must be brought upon the Privity of Estate; for if a Man doth covenant to do any collateral, Thing not in the Demise, and the Word Assigns is in the Deed, yet they are not bound if they have no Estate, so that 'tis not the naming of them, but by reason of the Estate in the Land, they are made chargeable.

No Judgment is entred upon the Roll.

F I N I S.

A TABLE *to the Third Part of* Modern Reports.

A.

Abatement. See **Joint Action** 8.

1. DEBT was brought by Four Plaintiffs, one of them died before Judgment, the Action is abated as to the rest, 249
2. Waste is brought against Tenant *pur autre vie*, and pending the Writ, *Custui qui vie* dieth, the Writ shall not abate, because no other Person can be sued for the Damages, *ibid.*
3. Two Jointenants are Defendants, the Death of one shall not abate the Writ, for the Action is joint and several, *ibid.*
4. Where two or more are to recover in a personal Thing, the Death of one shall abate the Action as to the rest, *ibid.*
5. But in *Audita Querela*, the Death of one shall not abate the Writ, because it is in Discharge, *ibid.*

Abeiance. See **Acceptance.**

1. Resignation of a Benefice passes nothing to the Ordinary, but putteth the Freehold in Obeiance till his Acceptance, 297

See { **Acceptance.** **Resignation.** **Surrender.**

Acts of Parliament. See { **Justice of Peace,** 2. **Pardon** 2.

Ought to be construed according to the Intention of the Law-makers, and ought to be expounded according to the Rules of the Common Law, 63
2. Where a particular Punishment is directed by a Statute-Law, it must be pursued, and no other can be inflicted upon the Offender, 78, 118
3. When an Act is penal, it ought to be construed according to Equity, 90, 157, 312
4. Preamble is the best Expositor of the Law, 129, 169

Action upon the Case.

Assumpsit.

A Feoffment was made upon Trust, that the Feoffee should convey the Estate to another, the *Cestuy que Trust* may have an Action if the Feoffee refuseth to convey, 149
2. In Consideration that the Plaintiff would let the Defendant have Meat, Drink, *&c.* he promised to pay as much as it was reasonably worth; the Word *valerent* was in the Declaration, it would have been *quantum valebant* at the Time of the Promise, but held good after Verdict, 190

3. Where

3. Where a personal Promise is grounded upon a real Contract, the Action will lie, 73
4. It will not lie for Rent reserved upon a Demise, but where a Promise is made to pay Rent in Consideration of occupying a House, it will lie, 240

Action on the Case. See { Bankrupts, 2. Indictment, 2.

Slander, where it lieth.

1. *He is a Papist*, spoken of a Deputy-Lieutenant, 26
2. Where the Words injure a Person in his Profession, or bring him in Danger of Punishment, 27
3. *He stole the Colonel's Cupboard-Cloth*, there being no precedent Discourse either of the Colonel or his Cloth, 280
4. *He is broken and run away, and never will return again*, spoken of a Carpenter, 155
5. *He is a Rogue, a Papist Dog, and a pitiful Fellow, and never a Rogue in Town has a Bonfire before his Door but he*, spoken of a Merchant, who made a Bonfire at the Coronation of King *James*, 103
6. *He owes more Money than he is worth, he is run away and is broke*, spoken of an Husbandman, 112
7. The Wife was called Whore, and that she was the Defendant's Whore; the Husband and she brought the Action, and concluded *ad dampnum ipsorum*, it lies without alledging special Damages, 120
8. *Sir* J. K. *is a buffle-headed Fellow, and doth not understand Law; he is not fit to talk Law with me; I have baffled him, and he hath not done my Client Justice*; spoken of a Justice of Peace, 139
9. J. P. *is a Knave, and a busie Knave, for searching after me and other honest Men of my Sort, and I will make him give Satisfaction for plundering me*; spoken of a Justice of Peace, no *Colloquium* was laid; the Court was divided, 163

Where it doth not lie.

Words where laid to be spoken *ad tenorem & effectum sequen'*, which is not an express Allegation that they were spoken, 71, 72

Action on the Case against a Common Carrier.

Where it was brought against him upon an *Assumpsit* in Law, and likewise upon a Tort, the Declaration is not good, 322

Action on the Case for a Wrong. See **Pleading.**

For diverting of a Water-course, the Antiquity of the Mill must be set forth, 49
2. It lies against a Wrong-doer upon the bare Possession only, and the Plaintiff need not set forth whether he hath a Title by Grant or Prescription, for that goes to the Right, 51, 52, 132
3. If the Declaration is for the Diverting of the Water *ab antiquo & solito cursu*, this amounts to a Prescription, which must be proved at the Trial, or the Plaintiff will be nonsuited, 52
4. Whether it lieth for the making of a scandalous *Affidavit* in *Chancery*, 108

5. For

5. For selling of Oxen, affirming them to be his own, *ubi revera* they were not, but doth not say, *sciens* the same to be the Goods of another, or that he sold them *fraudulenter* or *deceptive*, 'tis naught upon a Demurrer, but good after Verdict, 261
6. Where several are guilty of a Wrong, the Action may be brought against either, 321
7. Debt upon the Statute of *Ed.* 6. for not setting out Tythes, brought against Two Tenants in Common, one of them did set out the Tithes, and the other carried them away, it ought to be brought only against the Wrong-doer, 322
8. For disturbing of a Man in a common Passage or common Highway, no Action on the Case lieth, without a particular Damage done to himself, for the proper Remedy is a Presentment in the Leet, 294

Administrator. See { Infant, 18. Ordinary, Interest, 2. Pleading. 2.

Administrator *durante minore Ætate* hath no Power over the Estate, 24
2. Administration could not be granted by the Spiritual Court before the Statute of *Ed.* 3. *ibid.*
3. Where 'tis once granted, whether it ought to be repealed, 25
4. Administrator had the whole Estate in him before the Statute of Distributions, 60
5. He then gave Bond to distribute as the Ordinary should direct, *ibid.*
6. The Father died Intestate, leaving one Son, an Infant; Administration was granted *durante minore Ætate*; he died before 17. whether Administration *de bonis non* of the Father shall be granted to the next of Kin of him or his Son? 61, 62
7. Whether an Interest is vested in an Infant where Administration is granted *durante minore Ætate*, so that if he died before 17, it goes to his Executor? 61
8. Before the Statute of Distribution, if there was but one Child, he had a Right of Admistration, but it was only personal; and if he died before it was granted to him by the Court, it would not go to his Executor, 62
9. Husband hath a Right of Admistration to the Goods of the Wife, because the Marriage is *quasi* a Gift in Law, 64
10. If Administration had been granted to a Stranger before the Statute of Distributions, and no Appeal within fourteen Days, he who had Right, though beyond Sea, was barr'd, 64
11. Husband and Wife Administratrix to her first Husband, recover in Debt; the Wife died, and the Husband brought a *Scire Facias* to have Execution; it will not lie by him alone, because it was a Demand by the Wife as Admistratrix *in auter droit*, *ibid.*
12. Judgment was had in *Somersetshire*, the Plaintiff died Intestate, Administration is committed by an inferior Diocese, 'tis void, because the Entry of the Judgment in *Middlesex*, where the Records are kept, made him have *bona notabilia* in several Dioceses, and so Administration ought to be granted in the Prerogative

gative, 324
13. If the Inteſtate had two Sons and no Wife, each have a Moiety of the perſonal Eſtate, if but one, an Intereſt is veſted in him, 59
14. At Common Law none had a Right to an Inteſtate's Eſtate, but the Ordinary was to diſtribute it to pious Uſes, *ibid.*

Admiral and Admiralty.

There was a Sentence in the *Admiralty*, for taking of a Ship, and afterwards Trover was brought for taking of the ſame Ship, whether it lies or not? 194
2. Pawning of a Ship for Neceſſaries at Land, and a Libel was exhibited in the *Admiralty*, whether good or not?
3. Where Things ariſing upon Lands may be ſued for in the *Admiralty*, 245

Addition. See **Indictment.**

Where it makes a Thing certain, as an Ejectment *de Tenemento* is incertain, but with the Addition *vocat* the *Black-Swan*, 'tis made certain, 238

Admittance. See **Baron and Feme** 9.

A Cuſtom cannot warrant an incertain Fine, upon an Admittance to a Copyhold, 133
2. The Lord may refuſe to admit without a Tender of the Fine where 'tis certain, *ibid.*
3. Where 'tis incertain, the Lord is to admit firſt, and then to ſet the Fine, *ibid.*
4. Cuſtom that upon every Admiſſion the Tenant ſhould pay a Year's Value of the Land, as it was worth *Tempore Admiſſionis*, 'tis good, 132
5. For a Fine upon an Admiſſion an Action of Debt will lie, for though it ſavours of the Realty, yet 'tis a certain Duty, 230
6. Before Admittance, the Eſtate is in the Surrenderor, and he ſhall have an Action of Treſpaſs againſt any Perſon who enters before another is omitted, 226
7. Before an Admittance, the Surrendree cannot enter but by ſpecial Cuſtom to warrant it, 225

Affidavit. See **Action on the Caſe for a Wrong,** 4.

See { **Baron and Feme,** 11. **Infant,** 21.

Agreement and Diſagreement.

Whether Aſſent is neceſſary to a Surrender, it being a Conveyance at the Common Law; 'tis not neceſſary in Deviſes, or in any Conveyances directed by particular Statutes, or by Cuſtom, 298
2. Whether the Eſtate ſhall be in the Surrendree immediately upon the Execution of the Deed, if he doth not ſhew ſome Diſaſſent to it, 300
3. Agreement is not ſo much neceſſary to perfect a Conveyance, as a Diſagreement is to make it void, *ibid.*
4. A Feoffment to Three, and Livery is made to One, the Eſtate is in all till Diſagreement, 301

Alien.

Leases made to Alien Artificers are void by the Statute of 32 *H.* 8. This Statute was pleaded by an Alien, who was a *Vintner*, and held to be no Artificer, 94

Amendment. See Mis-trial, Costs, 2.

1. Of the *Distringas* by the Roll after a Verdict, the Day and Place of Assizes being left out, 78
2. In Matters of Form, the Court have sent for a Coroner to amend his Inquisition, 101
3. Of a Mis entry of a Writ of Enquiry, without paying of Costs, 113
4. Return to an *Homine Replegiando*, amended by Rule of Court, 120
5. A Riot was laid to be committed after the Indictment, it was amended, being only a Misprision of the Clerk,
6. Where Matter of Form is cured by a Verdict, but 'tis not amendable upon a Demurrer, 235
7. *Scire Facias* upon a Recognizance to have Execution for 1000 *l. juxta Formam Recuperationis*, it should have been *Recognitionis*, amended after a Demurrer, 251

Amerciament. See Court, 3.

1. Differs from a Fine, for that is the Act of the Court, but an Amerciament is the Act of the Jury, 138
2. It need not be to a Sum certain, for that may be affered, 138
3. A Bailiff of a Liberty cannot distrein for an Amerciament *Virtute Officii*, but he ought to set forth the taking *Virtute Warranti*, *Ibid.*

Appeal.

Against three for a Murder, the Count was, that *O.* gave the Wound of which the Person died; the Jury found that *L.* gave the Wound, and that *O.* and *M.* were assisting: This varies from the Count, and yet held good, 121
2. The Wound was given in one County, and the Death ensued in another, and the Party was tried where the Wound was given, and held good, *ibid.*
3. At Common Law it was at the Election of the Appellant to bring the Appeal in either County, and the Trial to be by a Jury of both; but now it may be brought in the County where the Party died, 122
4. Whether *Auterfoits* Convict of Man-slaughter is a good Plea to an Appeal of Murder, 156, 157
5. If a Woman be slain, her next of Kin shall maintain an Appeal, 157
6. How many Things are required by the Statute of *Gloucester* to be alledged in an Appeal of Murder, 158
7. The Appellee pleaded in Abatement but did not plead over to the Felony, whether good or not, 267
8. Where the Appellee must plead *in propria Persona*, and where *per Attornatum*, 268

Apportionment.

Where a Contract under Hand and Seal for a Sum certain shall not be ap-

apportioned in an Action *pro Rata*, as if it be for a Year's Service, the Plaintiff must serve a Year, and aver it, tho' the Contract is executory, 153

2. But if a Promise is for a Year's Board, an Action may be brought for three Quarters of a Year; for if there is a Variance between the Agreement and the Declaration, 'tis for the Benefit of the Defendant, 254

Apprentice.

Whether Justices of Peace have any Power to compel Men to take poor Children Apprentices, since the Statute gives Power to Churchwardens to raise Money for putting them out, which must be to such who are willing to take them for Money, 270

Arbitrament.

To pay 5 *l.* presently, and give Bond to pay 10 *l.* more on a Day following, and now to sign general Releases, it shall only discharge such Matters which were then depending at the Time of the Submission, and not the Bond, 264

2. A Person who was a Stranger to the Submission was awarded to be a Surety, 'tis void, 272

3. Submission was so as the Award be made, *&c.* ready to be delivered to the Parties, or to such of them who shall desire it; the Defendant must desire the Award, and plead the Matter specially, and the Plaintiff need not aver that it was ready to be delivered, 330

Assent. See **Agreement.**

Assets.

Reversion in Fee Expectant upon an Estate Tail, is not Assets, but when it comes into Possession, then and not before 'tis Assets, 257

Assignment. See **Privity of Contract,** 2.

Executor of a Lessee for Years shall be liable to an Action of Debt for Rent incurr'd after an Assignment of the Term, for the Privity of Contract of the Testator is not determined by the Death, but his Executor shall be charged with his Contracts, so long as he hath Assets, 326

Assizes.

The Method of arraigning an Assize, the Title must be set forth in it, 273

Attornment. See **Bargain and Sale.**

Ejectment of a Manor, Parcel in Rents and Parcel in Services, the Attornment of the Tenants must be proved, 36

Averment. See **Devise,** 4.

The Consideration of a Duty ought to be precisely alledged, as in an Action on the Case for a Duty to be paid for weighing Goods, it must be averred that the Goods were such which are usually sold

by Weight, 162
2. The Nature of an Averment is to reduce a Thing to a Certainty which was incertain before, 216
3. Where it may be made against the expreſs Words of a Condition, 217
4. Not allowed to be made againſt a Record, 305

B.

Bail.

IT was demiſed in a *Scandalum Magnatum*, 4
2. Writ of Error pending in the *Exchequer-Chamber*, the Principal in the Action rendred himſelf, the Bail are diſcharged, 87
3. *Scire Facias* againſt Bail upon a Writ of Error, who plead, that the Principal rendred himſelf before Judgment, 'tis not good for the Bail are liable not only to render the Body, but to pay the Debt, *ibid.*
4. Proceedings were ſtayed by Injunction above two Years after the Bail was put in, and before the Declaration Delivered, which was pleaded to a *Scire Facias* brought againſt them, but held not good, 174

Bankrupts.

An Inn-keeper is not within the Statutes of Bankruptcy, 327
2. 'Tis not actionable to call a Man Bankrupt, unleſs it be laid, that he was a Trader at the Time of the Words ſpoken, 329
3. Inn-keeper buys and ſells under a Reſtraint of Juſtices and Stewards of Leets, which tho' for a Livelihood, yet cannot be a Bankrupt, 329
4. Whether a Farmer or Maſter of a Boarding-School be within the Statutes, 330

Barretry.

Difference between Barretry and Maintenance, 97
2. 'Tis not Barretry to arreſt a Man without a Cauſe, *ibid.*
4. If one deſign to oppreſs, and to recover his own Right, 'tis Barretry, 98
5. Money may be laid out to recover the juſt Right of a poor Man, and no Barretry, *ibid.*
9. But Money may not be expended to promote and ſtir up Suits, *ibid.*

Barbadoes.

It was gotten by Conqueſt, and therefore to be governed by what Law the King willeth, 161

Bargain and Sale.

What Words by Conſtruction of Law ſhall amount to a Bargain and Sale to make the Reverſion paſs with the Rent without Attornment, 273

Baron and Feme. See Slander, 7; Adminiſtrator, 9, 11; Sci. Fa. 7

1. Whether *Sci. Fa.* will lie againſt the Husband alone after the Death of the Wife, upon a Judgment had

 againſt

against her *Dum sola*, 186
2. If a Judgment is recovered against her while sole, then she marries and dies, the Husband is not chargeable, unless had likewise against him during the Coverture, *ibid.*
3. A Debt is due to her whilst sole, she marries, and dies before 'tis recovered, it shall not go to the Husband by Vertue of the Marriage, but he may have it as Administrator to his Wife, *ibid.*
4. Judgment is obtained against her whilst sole, she marries, and a *Sci. Fa.* is brought against Husband and Wife, and Judgment *quod habeat Executionem*, the Wife dies, a *Sci. Fa.* may be brought against the Huband alone, 189
5. The Recovery upon a *Sci. Fa.* is against both, and is therefore joint against both, 188
6. Husband may have Execution of a Judgment recovered by him and his Wife, after the Death of his Wife, without a *Sci. Fa.* 189
7. *Devastavit* against both, the Wife being an Executrix, and Judgment that the Plaintiff have Execution *de bonis propriis*, the Wife dies, the Goods of the Husband are liable, *ibid.*
8. A Woman who had a Term for Years married, the Rent is Arrrear, she died, the Husband shall be liable, because by the Marriage he is entitled to the Profits of the Land, *ibid.*
9. Feme Covert Copyholder, her Husband made a Lease for Years, without Licence of the Lord, 'tis a Forfeiture during the Coverture, 222
10. Feme Covert Heir to a Copyhold Estate, her Husband after three Proclamations will not be admitted, 'tis a Forfeiture during Coverture, 226
11. The Husband hath a Lease in Right of his Wife, who was an Executrix, and he grants all his Right and Title therein, the Right which he had by his Wife passeth, 278
12. A Feme Sole had a Lease, and married, then Husband and Wife surrender in Consideration of a new Lease to be granted to the Wife, and to her Sons, the Estate vests immediately in her, without the Assent of her Husband, for the Law intends it her Estate 'till he dissent, 300
13. Feme Covert, and another Jointenant for Life, she and the Husband lease their Moiety, reserving a Rent during Life and the Life of her Partner, the Wife died, 'tis a good Lease against the surviving Jointenant, 'till Disagreement, 300
14. The Husband made a Feoffment in Fee to the Use of himself and Wife, and to the Heirs of the Survivor; he afterwards made another Feoffment of the same Lands, and died; the Wife entred, but the Fee was not vested in her by the first Conveyance, because the contingent Right was destroyed by the last, 310

Bar.

Recovery in a personal Action is a Bar to an Action of the like Nature, where the same Evidence supporteth both Actions, 2

Judgment

Judgment in Trespass is no Bar to an Action of *Detinue*, 2

Bill of Exchange.

The Drawer and Endorsers are all liable to Payment; but if Recovery be against one, 'tis good Bar to an Action which may be brought against the rest, 86

By-Law. See { Corporation, 12. Trade, 8.

Where 'tis too general, and where not, 193

C.

Carrier. See **Pleading** 11.

Certainty. See { Custom. Grants.

Tertiorari.

IT lies to remove Causes and Orders from an inferior Jurisdiction, where 'tis not prohibited in express Words by any Statute, 95

2. Will not lie to the Grand Sessions, nor to a County-Palatine, to remove Civil Causes. *Quære*, whether it lies to the Royal Franchise of *Ely*, 230

Charter.

Usage shall expound ancient Charters, 9

2. The Common Law doth operate with it, *ibid.*

3. One Clause of a Charter may expound another, 10

4. A Charter which establishes a Corporation must provide for a new Election in order to a Succession, otherwise the Common Law will not help, 13

Church. See **Prohibition.**

Commitment.

By the Lord Chancellor and several others *Dominos Concilii*, (for a Misdemeanour) whether it should not be *Dominos in Concilio*, 213

2. Of a Peer for a Misdemeanour, which amounts to a Breach of the Peace, for which Sureties are to be given, 214

3. When a Person is brought in by a *Capias* for any Offence, he ought to plead *instanter*. 215

Common and Commoner. See { Jointenancy 4. Joint-Action 7. Prescription 7.

A Common cannot pass without Deed; and if the Plaintiff sheweth a *Que Estate*, he must produce the Deed, 52

2. If a Prescription is made for a Common, and doth not say for Cattle *Levant* and *Couchant*, 'tis not good, 162, 246

3. But this Fault is cured by a Verdict, 162

Confederacy. See **Indictment.**

Condition. See { Infant 2. Notice 2, 4.

A bare Denial without doing any more

more is no Breach of the Condition, 31
2. How it differs from a Limitation, 32
3. To restrain Marriage to the Consent of particular Persons is void, *ibid.*
4. Where 'tis of two Parts in the Disjunctive and both possible at the Time of the Bond given, and one becomes impossible afterwards by the Act of God, the Obligor is not bound to perform the other Part; for the Condition being made for his Benefit, shall be taken very beneficially for him, who had Election to perform either Part, 233
5. When the Condition is but of one Part 'tis otherwise, as if *A.* promise *B.* that if *C.* do not appear such a Day at *Westminster*, he will pay 20 *s.* *C.* died before the Day the Money must be paid, 234
6. Condition was to pay Rent at *Michaelmas* or *Lady-day* during the Life of a Woman, or within thirty Days after, she died after the Feast, but within the thirty Days, the Payment which was due at the Feast was discharged thereby, *ibid.*
7. To save harmless *Non damnificatus* generally is a good Plea; but if it be to save harmless, acquit and discharge, then 'tis not good without shewing how acquitted and discharged, 252

Confederacy. See **Agreement.**

Consideration. See **Action on the Case.**

Construction.

Where it shall be made of an Act of Parliament according to the Intent of the Law-makers, 33
2. Where it shall be made of an entire Sentence, so as the Intent of the Law may appear, 220
3. Where particular Words are in the first Part of a Sentence, and general Words follow, both shall stand, 278, 279

Contract.

Where an Agreement is entire to do or perform a Thing for a certain Sum, it shall not be apportioned *pro rata* for the Performance of Part, 153
2. There must be a Recompence of each Side to make the Contract good, 237

Copyhold and Copyholders. See **Baron and Feme,** 8, 9.

Lord may seize the Land of a Copyholder till a Fine is paid, 222
2. A Man by Custom may assign a Person to take the Profits of a Copyhold Estate during the Minority of an Infant, without rendring an Accompt when he comes of Age, *ibid.*

Corporation. See **Charter.**

In all Proceedings which concern a Corporation, it must be alledged that there is one, and how erected, whether by Grant or Prescription, 6

2. Mayor

2. Mayor hath no more Power than an Alderman in the Corporation where he is Mayor, 9
3. Is not of the *Quorum* for electing of an Alderman, 10
4. The Mayor is named in the Grant as Part of the Name of the Corporation, and is not of the *Quorum* without naming him to be so, 9, 10
5. He is a Mayor in respect of Reverence, but not of Power, 11
6. At the Common Law neither his Name or Office require his Presence at the choosing of an Alderman, 11, 14
7. He cannot act *eo Nomine*, but by the express Power given in the Charter, 12
8. Elections of Officers of a Corporation must be free, 21
9. Mayor of Corporation is no Officer at the Common Law, 12
10. Original of a Corporation was Preservation of Trade, *ibid.*
11. Corporation by Charter, without setting forth their Duty or Office, hath no Power, *ibid.*
12. A Company in *London* made a By-Law, that none of them should buy such a Commodity within 24 Miles of *London*, but two Men, 'tis too large to bind at such a Distance out of their Jurisdiction, 159

Costs. See **Amendment** 3.

Trespass for breaking of a Close, and impounding of Cattle, and Damages given under 40*s*. the Plaintiff shall have his Costs. 39
2. Amendment after a Writ of Error brought, Costs must be paid, 113

Covenant. See **Local Action.**

Where a Thing is lawful at the Time of the Covenant made, and afterwards prohibited by Law, yet the Covenant is binding, 39
2. To find Meat, Drink, and other Necessaries, the Breach was assigned in not finding Meat, Drink, *& alia necessaria*, and entire Damages; though this Breach was too general, yet 'tis good; for it may be as general as the Covenant, 69
3. There must be such Certainty in it, that if the Defendant should be sued again, he may plead the former Recovery in Bar, *ibid.*
4. Need not so much Certainty in assigning a Breach upon a Covenant, as upon a Bond for Performance of Covenants, *ibid.*
5. For quiet Enjoyment the Breach was that a Stranger *habens jus & titulum*, and doth not say what Title; for it may be under the Plaintiff himself, therefore not well assigned, 135
6. To make an Assignment according to an Agreement between the Parties, as Counsel should direct, whether the Counsel of the Plaintiff or Defendant should advise, 192
7. *Give*, *grant*, and *confirm*, are Words at the Common Law, where they shall be taken to amount to a Covenant to stand seised, 237

Court.

Cause not to be removed out of an inferior Court, unless the *Habeas Corpus* is delivered to the Steward before Issue or Demurrer joined, so

ſo as 'tis joined within ſix Weeks after Arreſt or Appearance, 85
2. If the Cauſe is tried in an inrior Court, the Steward not being an utter Barriſter, an Attachment ſhall go, *ibid.*
3. Amerciament in a Court-Leet is a Duty veſted in the Lord, for which he may diſtrain, 138
4. Preſentment in a Court-Leet, is the proper Remedy when a Man is diſturbed in a common Paſſage or Way, 294

Custom. See { Admittance. Infant 10. Preſcription 8. Pleading 12.

Muſt have nothing to ſupport it but Uſage, 133
2. 'Tis made of repeated Acts, *ibid.*
3. Muſt be very certain, or 'tis not good, 134
4. Muſt be taken ſtrictly when it goes to the Deſtruction of an Eſtate, 224
5. A Cuſtom, that every-Copyholder who leaſes his Land ſhall forfeit, it doth not bind an Infant, 229
6. Amongſt Merchants where it muſt be particularly ſet forth, 226
7. It muſt be certain, and therefore where it was laid for an Infant to ſell his Land when he can meaſure an Ell of Cloth, 'tis void for the Incertainty, 290
8. To have *ſolam & ſeparalem Paſturam*, hath been held good, 291
9. Preſcription muſt have a lawful Commencement; but 'tis ſufficient for a Cuſtom to be certain and reaſonable, 292
10. Whether a Cuſtom likewiſe ought to have a lawful Commencement, 293

D.

Damages. See { Ejectment 3. Joint-Aion 2. Treſpaſs 2.

Baron and Feme brought an Action for Words ſpoken of the Wife, and concluded *ad damnum ipſorum*, 'tis good, for if ſhe ſurvive, the Damages will go to her, 120

Debt. See { Admittance 5. Aſſignment 1. Judgment 1. Quantum meruit.

Where 'tis brought upon a Specialty for leſs than the whole Sum, it muſt be ſhewed how the other was diſcharged, 41
2. Whether it lies for a Fine upon an Admiſſion to a Copyhold Eſtate, for it doth not ariſe upon any Contract, 240
3. There muſt be a perſonal Contract, or a Contract implied by Law, to maintain an Action of Debt, *ibid.*

Deceit. See Action on the Caſe.

Deputy. See Office 6, 7, 9.

Deviſe. See Tail.

Where it ſhall not be extended by Implication, 82

2. Where

2. Where the Word *Estate* passeth a Fee, where not, 45, 105
3. *I give all to my Mother*, passeth only an Estate for Life, for the Particle *All* is a Relative without a Substantive, 32
4. Tho' *A.* and the Testator's Name is omitted in the Will, yet 'tis good by averring his Name, and proving his Intention to devise it, 217
5. The Testator, after several Specifick Legacies and devises of Lands, gave all the rest and remaining Part of his Estate, *&c.* by those Words the Reversion in Fee passeth, 228
6. By the Devise of an Hereditament the Reversion in Fee passeth, 229

Deisseisin. See { Election, 1 / Interest, 2 }

The Son purchased in Fee, and was disseised by his Father, who made a Feoffment with Warrantry, the Son is bound for ever, 91
2. Lessor made a Lease for Life, and died, his Son suffered a common Recovery, this is a Disseisin, *ibid.*
3. Where an Estate for Life or Years cannot be gained by a Disseisin, *ibid.*
4. A wrongful Entry is never satisfied with any particular Estate, nor can gain any Thing by a Fee-Simple, 92

Distribution.

Before the Statute, if there was but one Child, he had a Right of Administration, but it was only personal; so that if he died before Administration, his Executor could not have it, 62

E.

Ejectment.

THE Demise was laid to be the 12th *Junii, habendum a præd. duodecimo die Junii*, which must be the 13th Day, by Vertue whereof he entred, and that the Defendant *postea, eod.* 12 *die Junii* did eject him, which must be before the Plaintiff had any Title, for his Lease commenced on the 13th Day, not good, 199
2. *De uno Messuagio sive Tenemento*, not good, because the Word *Tenementum* is of an incertain Signification, but with this Addition, *vocat'* the *Black Swan*, 'tis good, 238
3. If the Term should expire, pending the Suit, the Plaintiff may proceed for his Damages; for though the Action is expired *quoad* the Possession, yet it continues for the Damages, 249

Election.

Where the Cause of Action ariseth in Two Places, the Plaintiff may choose to try it where he pleases, 165
2. Tenant at Will made a Lease for Years, the Lessee entreth, this is no Disseisin, but at the Election of him who had the Interest in it, 197

Entry.

In Feoffments, Partitions, and Exchanges, which are Conveyances at the Common Law, no Estate is changed

ed until actual Entry, 297
2. Lease for Years not good without Entry, 297
3. Tenant for Life, Remainder in Tail Male levied a Fine, and made a Feoffment, having but one Son then born, and afterwards had another Son, the eldest died without Issue, the contingent Remainder to the second was not destroy'd by this Feoffment, for it was preserved by the Right of Entry which his elder Brother had at the Time of the Feoffment made, 305

Escape.

Debt upon an Escape would not lie at the Common Law against the Gaoler, it was given by the Statute of *W.* 2. 145
2. The superior Officer is liable to the voluntary Escapes suffered by his Deputy, unless the Deputation is for Life, 146
3. If an Escape is by Negligence, it must be particularly found, 151
4. A Person was in Execution upon an erroneous Judgment, and escaped, and Judgment and Execution was had against the Gaoler, and then the first Judgment was reversed, yet that against the Gaoler shall stand, 325

Evidence. See Witness.

An *Affidavit* made in *Chancery* shall not be read as Evidence, but only as a Letter, unless Oath is made by a Witness that he was present when it was taken before the Master, 36
2. What shall be Evidence of a fraudulent Settlement, *ibid.*
3. An Answer of a Guardian in *Chancery* shall not be read as evidence to conclude an Infant, 259
4. Whether the Return of the Commissioners in a *Chancery* Cause, that the Person made Oath before them is sufficient Evidence to convict of Perjury, 116
5. Whether a true Copy of an *Affidavit* made before the Chief Justice is sufficient to convict the Person for the like Offence, 117
6. A Verdict may be given in Evidence between the same Parties, but not where there are different Persons, unless they are all united in the same Interest, 142
7. Conviction for having two Wives shall not be given in Evidence to prove the Unlawfulness of a Marriage, but the Writ must go to the Bishop, because at Law one Jury may find it no Marriage, and another otherwise, 164

Exchange.

Ought to be executed by each Party in their Life-time, otherwise 'tis void, 135

Excommunication. Stat. 5 Eliz.

For not coming to the Parish-Church, the Penalties shall not incur if the Person hears Divine Service in any other Church, 42
2. The Causes are enumerated in the Statute, which must be contained in the *Significavit*, otherwise the Penalties are not to incur, 89

Executor.

Executor. See { Grants. Notice, 5.

Whether an Executor *de son tort* can have any Interest in a Term for Years, 92, 93
2. An Executor may sell the Goods before Probate, 92
3. May pay Debt upon a simple Contract before a Bond, of which he had no Notice, 115
4. Whether an Action of Debt will lie against an Executor upon a *Mutuatus*,
5. By what Words he hath an Authority only, without an Interest in the Thing devised, 209, 210
6. He had both Goods of his Testator, and of his own, and granted *omnia Bona sua*; that which he hath as Executor will not pass, for they are not properly *sua*, 278

Exposition of Words and Sentences. See { Number.

Subsequent Words may explain a former Sentence in a Deed, but in Wills the first Words guide all which follow, 82
2. Action was brought by Original, for that the Dendant *prosecut' fuit & adhuc prosequitur* in the Admiralty; those Words *adhuc prosequitur* shall not be construed to make it subsequent to the Original, but must refer to the Time of suing it forth, 103, 157
3. Doubtful Words must be expounded always against the Lessor, 230
4. To make an Assurance to the Obligee and his Heirs, the Conjunction *and* shall be taken in the Disjunctive, 235

F.

Fair. See Trade

IF the Place where it should be kept is not limited by the Grant, it may be kept where the Grantee will, 108

False Imprisonment.

It will not lie against a Sheriff for taking the Body by Vertue of a *Ca. Sa.* upon an Erroneous Judgment, for the Execution is good 'till avoided by Writ of Error, 325

Fees.

Of the Clerks of the Crown-Office, the Court will not regulate upon a Motion, but if oppresive they must be indicted for Extortion, 297

Fines levied. See Tenant at Will, 6.

One of the Cognisors died before the Return of the Writ of Covenant, 'tis Error; but not in the Case of a Purchaser for a valuable Consideration, for the Court will interpose, 99
2. If the Cognisor do die after the Entry of the King's Silver, the Fine is good, 140
3. Writ of Covenant, *Teste* 15th of *January*, returnable *in Crastino Purificationis* taken by *Dedimus* 18th of *January*: The Cognisor died in *Easter*-Week following, but four Days before her Death, the King's Silver was entred as of *Hillary* Term precedent. This was held a good Fine, 141

4. Where

4. Where a Person is in Possession by Vertue of a particular Estate for Life, and accepteth a greater Estate, it shall not devest the Estate of those in Remainder for Life, so as the same may be barred by Fine and Non-claim, 195
5. Lease for one hundred Years in Trust to attend the Inheritance, *cestui que Trust* being in Possession, demises to another for fifty Years, and levied a Fine, and the five Years passed, the Term for a Hundred Years is devested by this Fine, and turned to a Right, and so barred, 196
6. In what Cases a Fine is a Bar, and what not, 198

Fines upon Admittance. } See { Admittance. Copyhold. Debt, 2. Infant, 9.

The Judges are to determine whether it be reasonable or not, 134
2. Lord cannot enter for Non-payment of an unreasonable Fine, 134

Forfeiture.

If Tenant for Years make a Feoffment, 'tis a Forfeiture; but if he make a Lease and Release, 'tho' 'tis of the same Operation, yet 'tis no Forfeiture, 151

Fraud. See Evidence.

G.

Grants, Grantor and Grantee.

WHere an Interest is coupled with a Trust in a Grant, it shall go to the Executor of the Grantee, 43
2. Grants must be certain, otherwise they are void, 134

Grants of the King.

Not good for the sole Printing of Blank Bonds, exclusive of all other Printers, 75
2. A Grant to restrain Trading to particular Places, is good, 77
3. But of sole making Cards not good, because it restrains a whole Trade, *ibid.*
4. A Grant cannot devest the Subject of a Right enjoyed long before it was made, *ibid.*
5. Cannot discharge a Person of a Duty to which he is made liable by a subsequent Act of Parliament, 96
6. Difference between his Grants and Prohibitions,
7. Where his Grants ought to be taken very strictly, 168
8. In a *Quo Warranto*, the Defendant pleaded that the King was seised in Fee of a Franchise, who granted it to another *Habendum* the Hundred, whether good or not, 199

Gun. See Justice of Peace, 3.

Conviction before a Justice of Peace, upon the Statute of *H.* 8. for keeping a Gun, not having 100 *l. per Ann.* quashed, because it was said

non

non habuisset, instead of *nunquam Habuit*, 100 *l. per Annum*, 280

H.

Habendum.

Where it shall be said to explain the general Words preceding, 81
2. Nothing passes in the *Habendum*, but what was mentioned in the Premisses, 199

Heir.

Error by the Plaintiff, *ut Consanguineus & Hæres, viz. Filius, &c.* 'tis sufficient without shewing the Descent from more Ancestors, 152
2. Where he shall take by Descent, and where by Purchase, 205
3. In a Bond where the Word *Heir* is a Word of Limitation, and not a Designation of the Person, 233
4. Reversion in Fee descended to an Heir after the Estate Tail spent, and an Action was brought against him upon a Bond of his Ancestor, 'tis not necessary that the Plaintiff name all the intermediate Remainders, but him who was last actually seized of the Fee, 255

Heriot.

Lease for 99 Years if *A. B. C.* so long live, paying an Heriot upon the Death of either, *A.* assigns the Term, no Heriot shall be taken of the Assignee, 231
2. May seize or distrain for Heriot Service; if Distrain, it may be the Beast of any Man upon the Land; but if he seise, it must be the very Beast of the Tenant, *ibid.*
3. Where an Heriot is reserved upon a Demise, it differs from those which are due by Tenure, 231
4. Lease for 99 Years if *M.* and *D.* so long live, reserving an Heriot after Death of either, provided if *D.* survive no Heriot to be paid, but *M.* survived, the Court was divided where a Heriot should be paid, 230

Highways.

A Man cannot be exempted from repairing by the Grant of the King, if made before the Statute of *Ph. & Mar.* which charges him to repair, 96

Homine Replegiando.

Brought for a Monster, and upon the Return of the Sheriff that he had replevied the Body, he was bailed, 121
2. Brought for a young Woman taken out of her Parents Custody, and married against her Consent, 169

Hue and Cry. See Robbery.

Hundred Court.

This Court was first derived from the County Court, 200
2. Hundreds were usually granted to Abbots, and their Possessions coming to the Crown by Dissolution of their Abbies are merged, and cannot be regranted, 200.

I.

Ideot.

HOW it differs from a Lunatick, 43
2. The King hath Power to grant his Estate to any Person without Account to be given. *ibid.*
3. Grant of an Ideot, by the King, the Grantee dieth, his Executor hath an Interest in him, *ibid.*

Jeofails. See { Indictment, 8. Traverse, 4. Variance, 2.

None of the Statutes help an insufficient Indictment, 79
2. Variance between Original and Declaration not aided by the Statute of Jeofails, 136
3. Want of concluding without a Traverse is but Matter of Form, and aided, 319

Indictment.

For using of *Alias Preces* than enjoin'd by the Book of Common-Prayer, it may be upon an extraordinary Occasion, and so no Offence, 79
2. For scandalous Words, whether it lieth as it doth for Libels, the one being a private, the other a publick Offence, 139
3. For Barretry in solliciting of a Suit against another, who was not indebted to the Person, 97
4. It will lie for such Words for which an Action will not, 139
5. For a Riot in unduly electing of an Alderman of *Bristol*, not being summoned by the Mayor, 5
6. Exception to it, *viz.* doth not say 'that 'tis *Antiqua Villa*, or whether it was a Corporation by Charter or Prescription, of which the Court cannot judicially take notice if not shewn, 5
7. Doth not say that any Charter was granted to the City of *Bristol*, where the Riot was supposed to be committed, 7
8. Must be very exact and certain, for 'tis not aided by any Statute of Jeofails, *ibid.*
9. For treasonable Words preached in a Sermon, *viz. We have had two wicked Kings together, &c.* whether good without some preceding Discourse of the King, 53, 54, 69
10. For Subornation of Perjury in perswading another to swear, and doth not set forth that the Oath was made, that it might appear that the Thing sworn was false, 122
11. Quashed, because the Words, *per Sacramentum duodecim proborum & legalium Hominum*, were left out, *ib.*
12. For using a Trade not being an Apprentice, upon 5 *Eliz.* and doth not aver that it was a Trade used before the making of the Act, 152
13. For not serving upon a Wardmote Inquest, quashed for Incertainty, 168
14. For Perjury by the Name of *A. B. de Parochia de Aldgate*, and did not shew in what County it was, for which Reason it was held not good, 139
15. In Indictments there must be an Addition to the Person and Place, *viz.* To the Person, of what Estate and

and Degree he is. To the Place, *viz.* in what Hamlet, Town, Place and County he liveth, 139

16. Caption was *coram Justiciariis ad Pacem dicti Domini Regis conservand'*, and did not say *nunc*, whether good, *ibid.*

17. For Burglary, the very Day need not be set down; for if it be either before or after the Offence, the Jury ought to find according to the Truth, 141

18. 'Tis sufficient to lay the Fact to be committed *in Parochia, &c.* without laying a Vill, tho' Parish is an Ecclesiastical Division, 158

19. *Per Sacramentum* 12 *præsentat' existit Modo & Forma sequen' Midd.* viz. *Juratores pro Domino Rege præsentant*, it should have been *præsentat' existit quod, &c.* and not *Modo & Forma*, quashed, 201

20. The Certainty of the Fact ought to be particularly alledged; if for Murder, it must be alledged that a Stroke was given, 202

21. Pardon was pleaded, and Judgment *quod Defendens eat sine Die*, but being convicted of Manslaughter, his Goods were forfeited; and tho' he was out of the Court by this Pardon and Judgment, yet the Indictment was quashed upon a Motion for a Fault in it, and this was to prevent the Seisure, 202

22. Two were indicted for a Confederacy, one of them was acquitted, and the other found guilty, the Acquittal of one is the Discharge of the other, 220

Inducement.

In Trover the Contract is but Inducement, the Cause of Action is upon the Conversion, 322

Inferior Court. See Court.

Infant. See { Copyhold, 2. Custom 5, 7. Evidence 3.

After three Proclamations in a Court Baron of a Manor, he did not come to be admitted to a Copyhold Estate, and held no Forfeiture, 223

2. Had an Estate upon Condition to be performed by him, and 'tis broken during his Minority, the Estate is gone for ever, 222, 224, 226

3. The Law will not allow the Privilege of Infancy to work a Wrong to any Body, 222, 226

4. Shall not be prejudiced by the Laches of another, but shall be answerable for himself, 222, 223

5. Custom to be admitted after three Proclamations will not bar him if beyond Sea, 222

6. He is not obliged to be admitted during his Infancy, 223

7. His Feoffment is no Forfeiture at the Common-Law, *ibid.*

8. If he doth not present to a Church within six Months it shall lapse, *ibid.*

9. He may be admitted to a Copyhold, but not obliged to pay the Fine during his Nonage, 224

12. May be bound by Acts of Necessity, and by some Customs, *ibid.*

11. Where

11. Where he hath a Right, it shall be preserved after a Fine and Non-claim, but he hath no Right before Admittance to a Copyhold, 226
12. Cases of Coverture and Infancy are guided by the same Reason of Law, so are Cases of Infants and Lunaticks, *ibid.*
13. Where he brought an *Audita Querela* to avoid a Statute entred into by him in his Minority, 229
14. A Surrender made by an Infant is void, 303
15. Where Acts done by him are void in themselves, where voidable, 307
16. When he is made Defendant he must appear by Guardian, and not by Attorney, for he hath not Capacity to choose one; the Appearance by Guardian is the Act of the Court, when he is Plaintiff he may sue *per Prochein Amy*, 236
17. Whether in *Replevin* one of them who made Cognizance, being an Infant, may do it *per Attornatum?* It may be pleaded in Abatement, 248
18. If he is Administrator he may bring an Action of Debt *per Attornatum*, because he sueth in the Right of another, 248
19. Where he recovers as Plaintiff, the Defendant shall not assign Infancy for Error, *ibid.*
20. Answer of his Guardian in *Chancery*, shall not be read as Evidence at Law to conclude him, 259
21. He is not capable to take a Surrender, because he cannot give his Assent, which is an Essential requisite to a Surrender, 298
22. Release by an Infant Executor is no Bar, for it worketh the Destruction of his Estate, 303
23. Cannot surrender a future Interest by his Acceptance of a new Lease, or make an absolute Surrender of a Term by Deed, 304

Information.

For a Forgery brought against a Coroner, who inserted the Names of two Persons in an Indictment upon his Request for a Murder whom the Jury had not found guilty, 66
2. For a Riot in breaking a Bank and diverting a Watercourse, the Jury found *quoad Fractionem Ripæ* guilty, and *quoad Riotam* not guilty, for which Reason the Judgment was arrested, 73
3. For going armed to terrify the People, 'tis an Offence at Common Law, 118
4. For forging *quoddam Scriptum per quod A.* was bound, which cannot be if the Bond was forged, 104
5. For Perjury in a Deposition taken before Commissioners in *Chancery*, whether they ought to be present to testify that the Defendant is the same Person, 116
6. An Information of Perjury will not lie against a Person for Swearing to the Value of Lands, if not true, 134
7. Upon the 5th of *Eliz.* against a *Turkey*-Merchant for employing Men in his House to dress Cloth, it was held to be Exercising the Trade of a *Cloth-worker*, 315

Inn-keeper. See **Pleading**, 11.

Inquisition. See *Melius Inquirendum.*

Found to be an Ideot, *per Spatium octo Annorum*, those Words are Surplusage, for he must be so *a Nativitate.* 44
2. Quashed, because the Year of the King was omitted, 80
3. Taken before a Coroner, the Person having drowned himself, it was *suffocat' & emergit' fuit*, if it had stood singly upon the Word *emergit'*, it had been insensible, but the Word *suffocat'* expressing the Sense, it was held good, 100
4. Where nothing is vested in the King before Office found, *ibid.*
5. It must always be found that there is an Estate in the Person offending, and a Cause of Forfeiture of that Estate to vest it in the King, 336

Interest in a Thing. See **Pardon**, 4.

Where a Man may have an Interest in a Chattel without a Property. 61
2. Devise to a Wife and Children after Debts and Legacies paid, an Interest vests in the Devisees; but 'tis otherwise in Case of Administration, for there no Interest vests 'till actual Distribution, 65
3. A Man may have a Property, tho' not in himself, as in the Case of Jointenancy, 97

Intestate. See **Administration.**

Innuendo.

The proper Office of it is to make the subject Matter certain, 53
2. It will not help insensible Words, 54

Jointenancy, and Tenancy in Common. See **Abatement**, 3; **Baron and Feme**, 12; **Interest**, 3

If one Jointenant bring an Action against the other, unless he pleads the Jointenancy in Abatement, the Plaintiff will recover, 97
2. If two Coparceners lease a House and the Rent is Arrear, and one brings an Action and recovers, Judgment shall be arrested, because both ought to join, 109
3. Tenants in Common must join in the Personalty, but 'tis otherwise in real Actions; for though their Estates are several, yet the Damages to be recovered survive to all, 109, 251
4. Where one Commoner may bring an Action against his Fellow, 251

Joint Action. See **Action for a Wrong**, 6; **Jointenancy**, 2, 3

Where an Action may be joint or several at the Election of the Plaintiff, 86
2. Where 'tis brought against three Defendants, who plead jointly, the Jury may severe the Damages, and the Plaintiff may take Execution *de melioribus Dampnis*, as well as where their Pleas are several, and Trials

Trials at ſeveral Times, 101, 102
3. Judgment againſt two, and one brought a Writ of Error, and aſſigned the Infancy of the other for Error, the Writ was abated becauſe both did not join, 134
4. The Defendants in the Original Action muſt join in a Writ of Error; but it ſeems otherwiſe where the Plaintiffs bring Error, 135
5. Two covenant to ſell Lands, and the Purchaſer agreed to pay the Money to one of them, he alone ought to bring the Action, 263
6. Where there are ſeveral Proprietors of a Veſſel for Carriage of Goods, which are damaged by carrying, the Action muſt be brought againſt all, or againſt the Maſter alone, 321, 322
7. Where two Tenants in Common were ſued for not ſetting out of Tythes, the Action ought to be brought not againſt him who ſet them out, but againſt the other who carried them away, 322
8. Two are bound jointly, one is ſued, he may plead in Abatement, that he was bound with another, but cannot plead *Non eſt factum*, 323
9. In all Caſes which are grounded upon Contracts, the Parties who are Privies muſt be joined in the Action, *ibid.*
10. Action muſt be brought againſt all where a Promiſe is created by Law, 324

Iſſue.

Muſt be joined upon an Affirmative and a Negative, by concluding to the Country, 80

Judges.

The making, altering and diſplacing of ſeveral Judges, Serjeants at Law and King's Counſel, 71, 99, 100, 104, 125, 143, 191, 239

Juſtices of Peace.

Offences againſt the Statute of 23 *Eliz. c.* 1. for not coming to Church, may be enquired of by them in their Seſſions, 79
2. Where a Statute appoints a Thing finally to be done by them, yet the Court of *King's Bench* may take Cognizance of it, 95
3. Conviction for keeping of a Gun before a Juſtice of Peace; the Time when he had not 100 *l. per Annum* muſt be preciſely alledged, 280

Juſtification. See Pleading, 4, 5.

Where 'tis pleaded by Way of Excuſe to an Action of Treſpaſs, for the taking of any Thing, the Defendant muſt aver the Fact to be done, and ſet forth the Warrant to him directed, and the taking *Virtute Warranti*, and not generally, that he took it by a Mandate, *&c.* 138
2. In *Replevin*, where the Defendant made Conuſance in Right of the Lord, he may juſtify the taking generally, *ibid.*

Judgment.

1. At the Common Law, no Execution could be of a Judgment after a Year and a Day, but the Remedy was to bring an Action of Debt

Debt upon Judgment, 187, 189
2. Now a *Scire Fac.* is given upon a Judgment after the Year by the Statute of *W.* 2. 189
3. When a Judgment is once executed, the Goods are *in Custodia Legis*, and shall not be taken away by an *Exchequer* Process, or by the Commissioners of Bankrupts, 236

L.

Lapse. See Notice.

Lease.

A Covenant in a Lease for Years, that the Lessee should pay the Rent without obliging his Executors or Administrators, 'tis determined by his Death, 231
2. For 99 Years, if three Persons or any of them so long live, reserving a Rent, and an Heriot upon the Death of either, the Beast of the Assignee shall not be taken for a Heriot, for the Lessee is to pay his best Beast, and that shall not be carried further than to the Person named, 231

Libel.

Where a Fine and Corporal Punishment was imposed upon the Offender after Conviction, 68

Limitation.

An Estate was settled upon Trustees, to the Use of *A.* and her Heirs, provided she marry with the Consent of Trustees, Remainder over to *B.* This is a Limitation, and not a Condition, 32

Limitation of Action. See 21 Jac. 16.

Where a Trespass is laid with a *continuando*, for more than six Years, and the Statute pleaded, and entire Damages, it must be intended only for that which falls within the six Years, and that the Jury rejected the Beginning of the Trespass, 111
2. This Statute relates to a distinct, and not to a continued Account, 112
3. It provides a Remedy when the Plaintiff is beyond Sea at the Time when his Right accrues, and saves it 'till he returns; whether it may be extended in a Case where the Defendant is beyond Sea longer than six Years, from the Time the Plaintiff was entitled to the Action, 311, 312

Local Actions.

Whether Covenant will lie by an Assignee of a Reversion, against an Assignee of a Lessee in any other Place than where the Land lieth, 337
2. *Debitum & Contractus sunt nullius Loci*, *ibid.*
3. Debt for Rent upon a Lease for Years brought upon the Contract and Covenant between the same Parties, are transitory, *ibid.*
4. If Privity of Contract is gone by making an Assignment, and only a Privity in Law remains, the Action must be brought in the County where the Land lieth, *ibid.*

M.

Mayor. See **Corporation.**

Marriage. See { **Condition,** 3. **Evidence,** 7. **Limitation.** **Notice.**

A Maid above 12 and under 16 taken from Parents, or Guardian, and married, forfeits her Estate to the next in Remainder, during her Life, 84
2. There must be Proof of the Stealing an Heiress, either by Slight or Force, to bring the Person within the Statute of *Phil. & Mar.* 169
3. There must be a continued Disassent of the Parent or Guardian, for if she once agree, 'tis an Assent within the Statute, though she or they disagree afterwards, 169
4. Marriage *de Facto* is triable in the Temporal Courts, but *de Jure* in the Spiritual Court only, 165

Mandamus.

Denied to restore a Person to a Fellowship of a College, 265
2. Denied to restore a Proctor to his Office in *Doctors Commons*, 332
3. It hath been granted to restore an Attorney, 333
4. It will not lie to restore a Steward of a Court-Baron, 334

Master and Servant. See **Robbery,** 2.

Where the Act of the Servant shall charge the Master, 323
2. Where the Master may have an Action for a Robbery done upon the Servant, 287

Melius Inquirendum.

Not granted but for a Misdemeanor in the Jury, 80
2. It never helps a defective Inquisition, 336
3. Whether it may be granted to a Coroner in the Case of a *Felo de se*, who makes his Enquiry *super Visum Corporis*, 238

Merchants. See { **Custom, Pleas, and Pleading,**

Misfeazance.

Not guilty, is a good Plea to any Misfeazance whatsoever, 324

Misprision of Clerk. See **Amendment.**

Mis-trial.

'Tis not a Mis-trial where the Day And Place of the Assizes is left out of the *Distringas*, for the *Jurata* is the Warrant to try the Cause, 78

Mortuary.

'Tis not due, but by particular Custom of the Place, 268

Monopoly.

The Definition of it, 131

N.

Ne exeat Regnum.

IS a Writ grounded upon the Common Law, and not given by any particular Statute, 127
2. It was brought to prevent a Person who had married an Heiress without her Parents Consent to go beyond Sea, 169

Nolle prosequi.

Whether it may be entred after the Jury is sworn, 117

Non Compos Mentis.

If he releaseth his Right, that shall not bar the King, but he shall seize his Lands during Life, 303
2. Surrender made by him is void, 305
3. He may purchase Lands, and may grant a Rent-Charge out of his Estate, and shall not plead Insanity to avoid his own Acts, 309

Notice. See Executor, 115.

A Settlement was made in Trust for *A.* provided she married with the Consent of Trustees, Remainder to *B.* she married without Consent. Whether the Trustees ought not to give Notice of this Settlement before the Marriage? Or whether the Estate is forfeited without Notice? 29, 30
2. Where Conditions are annex'd to Estates to pay Money, Notice is necessary; but where Estates are limited upon Performance of collateral Acts, 'tis not necessary, 30
3. Lapse shall not incur upon a Deprivation, but after Notice given to the Patron by the Ordinary himself. 31
4. The Heir himself ought to have Notice of such Conditions, which his Ancestor hath put upon his Estate, because he hath a good Title by Descent, 34
5. Where it ought to be given of Debts to an Executor, 115

Number.

Where the Singular Number shall be intended by the Plural; as by Children is meant Child, 63

O.

Obligation, Obligor and Obligee.

DEbt upon Bond will not lie before the Day of Payment is past, but it may be released before, 61
2. Where the Debt is confessed under Hand and Seal, whether that will amount to an Obligation, 154

Office and Officer.

Whether the Office of Marshal of *B. R.* can be granted in Trust, 145
2. It cannot be granted for Years, *ibid.*
3. Non-Attendance, whether a Forfeiture or not? 146
4. Non-Feazance is a Forfeiture, *ibid.*
5. It lies in Grant, and cannot be transferred without Deed, 147

6. Neither a Judicial or a Ministerial Officer may make a Deputy, unless there is an express Clause in the Grant that it may be executed *per se vel Deputatum*, 147, 150
7. Marshal of *B. R.* may grant that Office for Life, but cannot give the Grantee Power to make a Deputy, 147
8. That Office may be made without Will, 149
9. Deputy may be made without Deed, 150

Ordinary.

Probate of Wills did not originally belong to him, 24
2. He had no Power at Common Law over the Intestate's Estate, 25
3. An Action lay against him at Common Law, if he got the Goods and refused to pay the Intestate's Debts, 25
4. Was alone entrusted by the Common Law, as to the Distribution of the Intestate's Estate, 59
5. Afterwards by the Statute of *W.* 2. was bound to pay Debts so far as he had Assets, 60
6. Then, and not before, an Action of Debt might be brought against him, if he did dispose the Goods without paying Debts, *ibid.*
7. By the Statute of the 31st of *Ed.* 1. he was bound to grant Administration to the next of Kin, *ibid.*
8. Afterwards by the Statute of 21 *H.* 8. was compelled to grant it to the Widow or next of Kin, or both, *ibid.*
9. Before the Statute of Distributions, he always took Bond of the Administrator to distribute as the Ordinary should direct, *ibid.*

Outlawry. See 5 Ed. 6.

For Treason cannot be reversed without the Consent of the Attorney-General, 42
2. For Treason the Party was taken within the Year, but because he was apprehended, and did not render himself, he had not the Benefit of the Statute, 47
3. For Treason, and a Rule of Court for the Execution of the Person, 72
4. For Murder against three Persons, it was reversed, because it did not appear that the Court was held *pro Comitatu*; 2dly, 'Tis said *Non comperuit*, but doth not say *nec eorum aliquis comperuit*, 90

P.

Pardon.

THE King hath Power to pardon by general Words, as *felonica Interfectio* for Murder, 37
2. Where his Power is restrain'd by Act of Parliament, yet a *Non obstante* is a Dispensation to it, 38
3. A Suit was commenced for Dilapidations, which is to have Satisfaction for Damages sustained, 'tis not pardoned by these general Words, *viz. Offences, Contempts* and *Penalties*. 56
4. If an Interest is vested in the King, a Pardon of all Forfeitures will not divest it without particular

lar Words of Restitution, 101, 241, 242
5. An Exception in a Pardon ought to be taken as largely as the Pardon it self, 242
6. A Pardon of all Offences, except Offences in collecting of the King's Revenue, that must be of the stated Revenue, and not what arises by any Forfeiture, *ibid.*

Parish. See **Indictment.**

Parliament.

Writ of Error upon a Judgment in *B. R.* returnable in Parliament, Prorogued from the 28th of *April* to the 29th of *November*, whether this was a *Supersedeas* to the Execution, because a whole Term intervened between the *Teste* and Return of the Writ of Error, 125

Pedegree.

Where Persons are named by Way of Title, and where by Way of Pedigree, 255

Perjury. See **Information.**

Pleading.

In pleading of the Statute of Usury, you must set forth, what Agreement was made, and what Sum was taken more than six Pounds in the Hundred, 35
2. An Administrator pleaded a Judgment in Bar to an Action of Debt for 100 *l.* brought against him, and that he had not Assets *præterquam Bona non attingen'* to 5 *l.* but did not shew the certain Value of the Goods, and yet held good, *ibid.*
3. A Judgment upon a simple Contract may be pleaded in Bar to an Action of Debt upon a Bond, 115
4. A Possession where 'tis only an Inducement to a Plea and not Substance, the Defendant may justify upon such a Possession against a Wrong-doer, 132
5. Where a special Justification is to an Action of Assault and false Imprisonment, the Cause of Commitment must be set forth in the Plea, 160
6. Where the Defence consists in Matter of Law, the Defendant may plead specially, but when 'tis Fact he must plead the general Issue, 166
7. Where special Matter, which might be given in Evidence at the Trial, and which amounts to no more than the general Issue, may be pleaded, *ibid.*
8. When a Man is brought into Court by *Capias*, he ought to plead *instanter*, because he hath given Delay to the Court, 215
9. So where he appears upon Recognizance, or *in propria Persona*, or is in Custody for any Misdemeanour, he ought to plead *instanter*, *ibid.*
10. In Covenant to pay so much Money to the Plaintiff or his Assigns as should be drawn upon the Defendant by Bill of Exchange, he pleaded that the Plaintiff, *secundum Legem mercatoriam*, did assign the Money to be paid, *&c.* it ought to have been *secundum Consuetudinem mercatoriam*, 226, 227
11. If

11. If an Action is brought against an Inn-keeper or Common Carrier, the Declaration must be, *Secundum Legem & Consuetudinem Angliæ*, 227
12. In Trespass the Plaintiff prescribed as to the Freehold, and alledged a Custom in the Copyholders to have *solam & separalem Pasturam, &c.* whether he could make a joint Title in the same Declaration, by Vertue of a Prescription and Custom, 250
13. If the Plea is double, the Plaintiff ought to demur, 251
14. The Condition of a Bond was to acquit, discharge and save harmless, *Non damnificatus* generally is not a good Plea without shewing how acquitted and discharged, 252
15. *Mutuatus* for 400 *l.* the Defendant pleaded an Attainder of Treason in Abatement; the Plaintiff replied, that after the Attainder, and before the Action, he was pardoned, *&c.* and concludes, *unde petit Judicium & Dampna sua*; for this Cause Replication was ill, 281

Pledges. See Replevin.

Replevin in an inferior Court by Pleint removed in *B. R.* the Plaintiff was nonsuited, and a *Sci. Fac.* brought against his Pledges, and held good, 58
2. There are no Pledges of *Returno Habend'* at the Common Law, the Sheriff was not obliged to take Pledges in a Replevin by Plaint, 75

Poor.

A Man had 5 *l.* to remove out of one Parish into another, who gave Bond to repay it, if he returned within forty Days, he stayed there so long, and it was held a good Settlement, 67
2. A Note in Writing must now be left pursuant to the Statute to make a Settlement, 247

Possession.

'Tis sufficient to maintain an Action against a Wrong-doer, 48

Prerogative.

Whether a Lease was made pursuant to a Power in a Proviso to make Leases for three Lives or 21 Years, or for any Term upon three Lives, the Lease made was for 99 Years determinable upon three Lives, 268, 269

Power.

In granting of Letters Patents of the sole Printing exclusive of all others, 76, 129
2. Where no individual Person can claim a Right or Property, it must be vested in the King by Law, 76
3. Whether the King hath a Prerogative to restrain Trade to a particular Number of Men in particular Places, 127
4. He may command his Subjects to return out of a Foreign Nation, *ibid.*

5. He

5. He may regulate Trade by Letters Patents,

Prescription. See { Common, 2. Pleading, 12.

For a Way he may set forth his Estate without shewing how he came by it, 52

2. Where it cannot be by a *Que Estate* to have *Retorna Brevium*, 200

3. Where it may be to hold Pleas, Leets and Hundreds without Matter of Record, 201

4. For all the Tenants of a Manor to Fowl in a Free Warren, this Prescription is not too large, it might not be good upon a Demurrer, but 'tis otherwise after a Verdict, 246

5. For a *Profit apprender in alieno solo*, the Tenants of a Manor may prescribe by a *Que Estate* exclusive of the Lord, *ibid.*

6. There must be a certain and permanent Interest abiding in some Person to maintain a Prescription, and therefore it will not lie *Ratione Commorantiæ*, 290

7. To have Common *sans Numbre* is good, but *ad Libitum suum*, which is almost the same Thing, is void, *ibid.*

8. It may be joined with a Custom in the same Declaration, 251

9. Where 'tis laid in a Discharge, as to be exempted from Toll, or for an Easement, as for a Way to a Church, not only a particular Person, but the Inhabitants of a whole Vill may prescribe; but where it relates to the Profit or Interest in the Land it self, 'tis not so, 292

Presentment.

In a Court Leet which concerns the Person and not the Freehold, whether traversable, 137, 138

Privity of Contract. See **Local Action**, 4.

Action against an Administratrix of a Term for Rent incurred after the Assignment of the Lease, the Privity of Contract of the Intestate was not determined by his Death, but Administratrix shall be charged with his Contracts as long as she hath Assets, 326

'Tis not gone either by an Assignment of the Term or Death of the Lessor, neither is it transferred to the Assignee by the Statute of *H. 8.* for that Statute only annexeth such Covenants which concern the Land with the Reversion, 337, 338

Proof. See **Prohibition.**

Prohibition.

Not to be granted because a Temporal Loss may ensue, 67

2. Where some Words are actionable at Law, and some punishable in the Spiritual Courts, a Prohibition shall be granted, for otherwise it would be a double Vexation, 74

3. Libel *Causa Jactationis Maritagii*, the Suggestion for a Prohibition was, that he was indicted at the *Old Baily* for marrying two Wives, that he was convicted in a Court of that Offence which had a proper

per Jurisdiction, &c. and a Prohibition was granted, 164
4. A Person lived in one Diocese, and occupied Lands in another, where he was taxed towards the finding of Bells for that Church, for which a Suit was commenced in the Bishop's Court where the Lands were, and he suggested the Statute of *H.* 8. that no Man shall be cited out of his Diocese, except for some Spiritual Cause neglected to be done there, and a Prohibition was granted, for this was not a Spiritual Cause neglected to be done, because Church Ornaments are a personal Charge upon the Inhabitants, and not upon the Land Owners who dwell elsewhere, but the Repairing of the Church is a real Charge upon the Land, 211
5. Not granted for Mariners Wages, 244
6. Libel for a Tax upon the Parishioners for not repairing of their Church, who suggest that they had a Chapel of Ease in the same Parish; the Prohibition was denied, for of common Right they ought to repair the Mother Church, 264
7. Proof of Matter of Fact by one Witness denied to be allowed in the Spiritual Court is a good Cause for a Prohibition, 284
8. Where the Release of a Legacy offered to be proved by one Witness was denied in the Spiritual Court, *ibid.*
9. Proof of Payment or Subtraction of Tythes denied, and a Prohibition granted, *ibid.*
10. Whether a Prohibition ought to be allowed after Sentence, an Appeal being then the more proper Remedy, 284

Property. See **Interest.**

Q.

Quorum.

MUst be one Justice of the Peace of the *Quorum*, otherwise cannot be a Sessions, 14, 152

Quantum meruit.

Will lie for Rent reserved upon a real Contract where the Sum is not certain, but if a Sum in gross is reserved, then Debt must be brought, 73

R.

Record.

ERror shall not be assigned against the Essence of a Record, 141

Recovery Common.

Reversed without a *Scire Facias* to the Tertenants, but it seems not to be good, 119
2. For there must be a *Scire Facias* against the Heir and Tertenants when a Writ of Error is brought to reverse it, 274

Relation.

Relation.

Where an Eſtate ſhall paſs by Relation, where not, 299, 300

Releaſe.

Of a Legacy by one Executor, and alſo of all Actions, Suits and Demands whatſoever, thoſe general Words which follow are tied up to the Legacy, and releaſe nothing elſe, 277

2. Of a Demand will not diſcharge a growing Rent, 278

3. A Receipt was given for 10 *l.* in which there was a Releaſe of all Actions, Debts, Duties and Demands, nothing is releaſed but the 10 *l.* 277

4. Judgment againſt four Defendants who all joined in a Writ of Error, and the Plaintiff pleaded a Releaſe of Errors by one, it ſhall not diſcharge the reſt of a perſonal Thing, but if there had been four Plaintiffs to recover, the Releaſe or Death of one is a Bar to all, 109, 135, 249

5. A Releaſe of all Actions will diſcharge an Award of Execution upon a *Scire Facias*, 185, 187

6. Of all Actions and Demands doth not diſcharge a Legacy, it muſt be by particular Words, 279

7. One of the Defendants, who made Conuſance, releaſed the Plaintiff after the taking of the Cattle, this was held void upon a Demurrer, for he had no Demand or Suit againſt the Plaintiff, having diſtrained in the Right of another, *ibid.*

Remainder. See { Entry, 3. / Fines levied, 4.

Muſt take Place *eo inſtanti* the particular Eſtate is determined, or elſe it can never ariſe, 309

2. By the Conveyance of the Reverſion in Fee to him who had the Eſtate for Life before the Birth of a Son, the particular Eſtate is merged, and all contingent Remainders are thereby deſtroyed, 311

Replevin.

Where 'tis brought by Writ, the Sheriff cannot make Deliverance without the taking of Pledges *de proſequendo & retorn' Habend'*, 35

Replication.

Where the Plaintiff confeſſeth and avoideth, he ought not to traverſe, for that would make his Replication double, 318

Requeſt.

When a Thing is to be done upon Requeſt, the Time when the Perſon requires it to be done is the Time of Performance, 295

Reſervation.

Of a Rent upon a Leaſe for three Years payable at *Michaelmas* and *Lady-Day*, Debt was brought for 2 Years without ſhewing at which of the Feaſts it was due, 'tis good after Verdict, but ill upon a Demurrer, 70

Resignation. See **Abeiance.**

To the ordinary, and Patron presented, 'tis void if the Ordinary did not accept the Resignation, 297

Reversion. See { **Bargain and Sale. Surrender,** 2.

Tenant in Tail, who had likewise the Reversion in Fee, if he acknowledge a Judgment, the Reversion may be extended, 256
2. But a Reversion in Fee, expectant upon an Estate Tail, is not Assets until it comes into Possession, 257
3. By what Words a Reversion in Fee passeth in a Will, 228

Revocation.

A Will shall not be revoked by doubtful Words, 206
2. It might be revoked by Word, without Writing, before the Statute of Frauds, 207
3. Before that Statute a Will might be revoked by a subsequent Will, which was void in it self, yet good to revoke the former, 207, 218
4. A subsequent Will which doth not appear shall not be any Revocation of a written Will which doth appear, 204, 205, 206
5. Whether a subsequent Will which is void in it self may revoke another since the Statute of Frauds, 218
6. Such a Will must be good in all Circumstances to revoke a former, 260, 261

Riot. See **Information.**

Robbery.

The Hundred was sued, and it did not appear that the Parish where the Fact was laid to be done was in the Hundred, or that it was done upon the High-way, or in the Day-time, this was helped after Verdict, 258
2. A Servant delivered Money to a Quaker to carry home for his Master; they were both robb'd, *viz.* the Servant of 26 *s.* and the Quaker of 106 *l.* the Servant made Oath of the Robbery, and the Quaker refused, the Master brought the Action, it doth not lie for him, 287, 288

S.

Scire Facias. See { **Bail,** 3, 4. **Baron and Feme,** 1, 4, 5. **Judgment,** 2. **Pledges,** 1. **Recovery.**

Must be to the Tertenants before the Common Recovery shall be reversed by Writ of Error, 119
2. *Scire Facias quare Executionem non habet* recites the first Judgment, but prays no new Thing, only to have Execution upon that Judgment, 187
3. 'Tis not an original but a judicial Writ, and depends upon the first Judgment, 187

4. 'Tis suspended by Writ of Error; and if the Original Judgment is reversed, that is so also, 187
5. Debt will lie upon a Judgment had on a *Scire Facias*, 188, 189
6. A Judgment upon a *Scire Facias* is a distinct Action from the original Cause, 189
7. Judgment in Dower, and a Writ of Enquiry of Damages, the Woman marries, and dies before the Writ of Enquiry executed, the Husband administred, and brought a *Scire Facias* upon the Judgment, whether it lieth or not, 281

Serjeants at Law. See **Judges.**

Surplusage. See **Inquisition.**

Steward. See **Court.**

Supersedeas. See **Parliament.**

Surrender. See **Assent**, 1, 2

Where it may be pleaded without an Acceptance, 297
2. No Man can take it but he who hath the immediate Reversion, 299
3. If pleaded without an Acceptance, 'tis aided after Verdict, which shews 'tis no Substance, 301
4. By one *Non compos Mentis* 'tis void *ab initio*, 303

T.

Tail.

DEvise to *D.* for Life, the Remainder to her first Son, and the Heirs of the Body of such first Son, (endorsed thus) *viz.* Memorandum, *That* D. *shall not alien from the Heirs Male of her Body:* She had a Son, who had Issue a Daughter; 'tis not an Estate Tail Male, for the *Memorandum* shall not alter the Limitation in the Will it self, 81, 83
2. The Testator had two Sons and four Daughters: He devised a House to his eldest Son; and if he die, then he devised his Estate to his four Daughters; and if all his Sons and Daughters died without Issue, then to *A.* and her Heirs; this is not an Estate Tail in the Daughters by Implication, 105
3. Where a Devise is to several Persons by express Limitation, and a Proviso, if all die without Issue of their Bodies, the Remainder over, this is no cross Remainder, or an Estate by Implication, because 'tis a Devise to them severally by express Limitations, 106
4. Devise to his eldest Son, and if he die without Heirs Males, (but doth not say of his Body) then to his other Son, *&c.* 'tis an Estate Tail in the eldest, 123

Tenant in Common.

A Devise to hold by equal Parts makes a Tenancy in Common; so

that there can be no Survivorship in such Case, 210

Tenant at Will.

Cestuy que Trust by Deed is Tenant at Will to the Trustees, 149
2. Where a Grant by Tenant at Will, though void, amounts to a Determination of his Will, 150
3. Whether Tenant at Will can grant over his Estate, *ibid.*
4. What Act shall amount to the Determination of his Will, *ibid.*
5. Any Thing is sufficient to make an Estate at Will, 196
6. Tenant in Fee made a Lease for 100 Years in Trust to attend the Inheritance, and continued still in Possession he is Tenant at Will to the Lessee for 100 Years; and if he make any Lease, and levy a Fine *sur Cognizance, &c.* the first Lease is displaced, and turned to a Right, and the Fine bars it, *ibid.*

Trade. See { Grants, 2. / Prerogative, 3, 5. / Indictment, 12. / Information, 7.

Confinement of Staple to certain Places was the first Regulation of Trade, and from thence came Markets, 127
2. The King is sole Judge where Fairs or Markets ought to be kept *ibid.*
3. Custom to restrain a Man from using of a Trade in a particular Place is good, 128
4. A Man may restrain himself by Promise or Obligation not to use a Trade in a particular Place, *ibid.*
5. Regulation of Trade is the chief End of Incorporations, *ibid.*
6. Such incorporate Bodies have an inherent Power to judge what Persons are fit to use Trades within their Jurisdictions, *ibid.*
7. Whether Grants of the King prohibiting Trade are void, 131
8. Cannot be restrained by any By-Law, 159
9. At the Common Law any Man might exercise any Trade he pleased, 312
10. Petty-Chapmen are not within the Statute of 5 *Eliz.* 315
11. Journeymen who work for Hire are not within the Statue; but the Master who sets them to work and pays their Wages, is punishable, 316, 317
12. Subject hath not Power absolutely to trade without the King's License, 127

Traverse. See { Jeofails, 3. / Presentment. / Replication.

Cannot be to a Return of a Writ of Restitution, 6
2. He who traverseth the King's Title must shew a Title in himself, 146
3. After a Traverse, 'tis not good Pleading to conclude to the Country, 203
4. Not concluding with a Traverse is but Matter of Form: 'Tis aided by the Statute of Jeofails upon a Demurrer, 319
5. Want of a Traverse seldom makes a Plea ill in Substance; but an ill Traverse often makes it so, 320

6. It

6. It must be taken where the Thing traversed is issuable, 320

Treason. See **Outlawry.**

Attainder of Treason reversed because on Arraignment or demanding Judgment, and because there was Process of *Ve' Fa'* instead of a *Capias*, and likewise for that it did not appear that the Party was asked what he had to say why Sentence, *&c.* 265

Trespass.

For breaking and entering a Free Fishery, and taking the Fish *ipsius Querentis*, not good, for he had not such a Property as to call the Fish his own, 97

2. In Trespass, *quare vi & armis clausum fregit*, to his Damage of 20 *s.* an Action lieth, let the Damage be never so little, 275

Trial. See { **Appeal,** 2, 3. **Election,** 1.

Where the Trial and Conviction of a Criminal is had, he must be executed in that County, and not elsewhere, unless in *Middlesex* by Prerogative of *B. R.* which sits in that County, 124

2. Where the Court refused to grant a new Trial in a Case where excessive Damages are given, 101

Trover and Conversion.

Judgment in Trespass is no Bar to an Action of Trover for the same Goods, 1

2. They are different Actions in their very Nature, 2

3. It lies upon a Demand and Denial, but Trespass doth not, *ibid.*

4. Trover *pro diversis aliis bonis* hath been held good, 70

5. 'Tis a good Plea in Trover to say that Damages were recovered against another Person for the same Goods, and the Defendant in Execution, though the Money is not paid, 86

6. Whether it lies for taking a Ship after a Sentence in the Admiralty for taking the said Ship, 194

7. Brought by two, and after Verdict one died, whether Judgment shall be arrested, 249

V.

Variance. See { **Appeal,** 1. **Apportionment,** 2.

BEtween the Original in Trespass and the Declaration, that being certified three Terms past, and no Continuances, for that Reason not good, 136

2. Between Original and the Declaration, not aided by the Statutes of Jeofails, *ibid.*

3. *Sci' Fa'* to have Execution of a Judgment obtained in the Court of *Oliver* late Protector of *England*, and the Dominions and Territories thereunto belonging, and in reciting the Judgment, it was said to be obtained before *Oliver* late Protector of *England*, and the Dominions, *&c.* but left out Territories, this

this was held to be good in Substance, for the Judicature is still the same, 227

Venire Facias.

The Court would not order the Plaintiff to file a *Ve. Fa.* 246

Verdict. See { Assumpsit, 2. / Action for a Tort, 5. / Amendment, 1, 6. / Common, 3. / Evidence, 6. / Prescription, 4. / Reservation, 1. / Robbery, 1. / Surrender, 3.

The true Reason why it helps a defective Declaration, 162

2. A Promise to pay *quantum rationabiliter valerent*, instead of *valebant*, at the Time of the Promise, good after Verdict, 190

3. It cannot be diminished, neither can any Thing be added to it, 205

4 An Hundred was sued for a Robbery; and tho' it did not appear that the Fact in the Declaration mentioned was done in the Hundred, or that the Robbery was in the High-way, or done in the Day-time, yet good after a Verdict, 258

5. The Defendant sold Cattle, affirming them to be his own, *ubi revera* they were not; but 'tis not said that he affirmed them to be his own, *sciens* the same to be the Goods of another, or that he sold them *fraudulenter vel deceptive*, yet good after Verdict, 261

Vicaridge.

'Tis not sufficient to alledge Seisin in Fee of a Rectory, and that he ought to present to the Vicaridge, but he must say that he is Impropriator, or that he was seised in Fee of a Rectory impropriate, 295

Visitor.

No Appeal lies from his Sentence, for he is *Fidei Commissarius*, especially in the Case of a Fellow of a College, which is a Thing of private Design, and doth not concern the Publick, 265

Use.

If a Letter of Attorney is in a Deed, or a Covenant to make Livery, nothing passes by way of Use, 237

W.

Ways. See { Action for Wrong, 9. / Prescription, 1.

IN Actions for not repairing them, it must be alledged, that the Defendant *reparare debet*, 291

2. Action on the Case doth not lie by any particular Person for not repairing, unless he hath particular Damage, but an Indictment is the proper Remedy, *ibid.*

3. Custom for all Occupiers of a Close in such a Parish to have a Foot-way, not good, for the Plaintiff ought to prescribe in him who hath the Inheritance, 294

Waste. See **Baron and Feme**, 7.

It lay at Common Law only against Tenant by the Curtesy or in Dower, 90
2. It was given by the Statute of *Gloucester* against Tenant for Life or Years, and treble Damages, *ibid.*
3. It lies against an Executor *de son Tort* of a Term for Years, 93
4. It lies against an Administrator of a rightful Executor, tho' the Statute doth charge only Executors *de son Tort*, and Administrators, that they shall be liable as the Executor or Intestate, 113

Wills. See { **Exposition.** **Devise,**

A subsequent Will may be made so as to consist and stand with a former, 204
2. It may also revoke Part and confirm Part of a former Will, *ibid.*
3. If two Wills are made without Dates, they are both void; otherwise of Codicils, 208
4. Two Witnesses to a Will, and two to a Codicil annexed to the same Will, one of the Witnesses to the Codicil was a Witness to the Will, the third Person is not a good Witness to the Will, for he never did see it, 262

Witnesses.

A Witness at a Trial had made a Bargain with the Plaintiff, who promised her 1000 *l.* if she recovered; she was not allowed to be sworn, 85
2. Informer shall be a good Witness to convict a Man for Deer-stealing, tho' he has a Moiety of the Forfeiture, 114, 115
3. The Party to an usurious Contract shall not be a Witness to prove the Usury, for he is *Testis in propria Causa*, 114

FINIS.

Law Books printed for, and sold by Tho. Ward, *in the* Inner-Temple-Lane.

THE first Part of the Institutes of the Laws of *England*; Or, a Commentary upon *Littleton*, not the Name of the Author only, but of the Law it self. By Sir *Edward Coke* Knt. The Eleventh Edition, carefully corrected, with an Alphabetical Table. To which is added the Treatise of the old Tenures of the Laws of *England*; and also three Tracts, The First his Reading upon the Statute of levying Fines; the Second of Bail and Main-prize; the Third his compleat Copy-holder, and many Thousands of new References to the Modern Law Cases. In *Folio.*

2. The Arguments and Reports of Sir *Henry Pollexfen* Knt. late Lord Chief Justice of the *Common Pleas*, in some special Cases by him argued, during the Time of his Practice at the Bar, together with divers Decrees in the *High Court of Chancery*, upon Limitations of Trust for Terms of Years, published with the Allowance and Approbation of all the Judges. In *Folio.*

3. A new Book of Declarations, Pleadings, Verdicts, Judgments, and judicial Writs, with the Entries thereupon; many of the same being upon new Cases and Statutes in the late Reign, with various other useful and necessary Entries, compiled by Mr. *Henry Clift*, and published by Sir *Charles Ingleby* Knt. Serjeant at Law. In *Folio.*

4. Mr. *John Lilly*'s Practical Register, or general Abridgment of the Law, as it is now practised in the several Courts of *Chancery*, *King's Bench*, *Common Pleas*, and *Exchequer*, digested by Way of Common Places, under Alphabetical Heads, with great Variety of Cases extracted from the Reports, together with all the Modern Rules of Court, brought down to this Time. In two Volumes in *Folio.*

5. Mr. Serjeant *Tremain*'s *Placita Coronæ*, or Pleas of the Crown, in Matters Criminal and Civil, containing a large Collection of Modern Precedents, *viz.* Appeals, Convictions, Indictments, Informations, Traverses, Pleadings, *&c.* Writs of *Mandamus*, *Quo Warranto*, Restitution, *Habeas Corpus*, &c. and Returns thereof, with great Variety of Precedents under many other Heads, relating to the Crown-Law: the Whole digested and revised by Mr. *John Rice* of *Furnivals* Inn. In *Folio.*

6. Mr. *John Lilly*'s Practical Conveyancer, containing Rules and Instructions for Drawing all Sorts of Conveyances of Estates and Interests; also particular Rules for the Exposition of Deeds, Wills, *&c.* and of Words used in Conveyances, together with the Resolutions of the several Courts at *Westminster*, in Cases wherein Difficulties have arisen, touching the Words and Clauses in Deeds, Devises, *&c.* In *Folio.*