MODERN
CASES
Argued and Adjudged in the
Court of King's Bench
AT
WESTMINSTER,
In the Reign of Her late Majesty
Q. ANNE,
IN THE
Time when Sir *JOHN HOLT* sat Chief Justice there.

Taken by

THOMAS FARRESLEY,
late of the *Middle Temple*, Esq;

None of these Cases were ever before printed.

With two Tables, the first of the Names of the *Cases*, the other of the principal *Matters*.

The Second Edition.
With References to all the Modern Reports.

In the *SAVOY*:
Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edward Sayer* Esq;) for John Walthoe in the *Middle Temple Cloysters*. MDCCXXV.

A TABLE OF THE NAMES OF THE CASES.

The Names of the CASES.

Paſch. 1° Annæ Reg.

In Banco Reginæ.

Coram Holt, *Chief Juſtice.*
Powys, & Gould, } *Juſtices:* An. Dom. 1702.

NOTE, A Retorn, viz. the firſt Retorn of this Term was by Proclamation cut off, and the Term adjourned to the ſecond Retorn. 942, 943. 2 Keb. 76,

Term adjourned. 1 Sid. 276. 1 Lev. 176, 178. 1 Keb. 152. poſt. 152.

Per Cur', If Jury in an inferior Court will not agree of their Verdict, the way is as in other Courts, to keep them without Meat, Drink, Fire or Candle, till they agree; and the Steward may adjourn the Court from Time to Time till they agree.

Jury in Inferior Court not agreed. *Vide* 1 Salk. 201.

Generally a Levari fac' is not the Proceſs of an Hundred-Court, but it may be it by Cuſtom, and generally all the Hundred-Courts in England have ſuch a Cuſtom: The true Common Law Proceſs is a Diſtringas. Lutw. 588, 589. Cumberb. 124.

Levari in Hundred-Court. 1 Salk. 201. 2 Lev. 81. *Vide poſt* 44.

All Miſdemeanors in a Judicial Officer, is a Contempt of this Court, and every Day an Attachment is granted againſt a Bailiff of an inferior Court, for granting an Attachment againſt all the Parties Goods. And Holt remembred a Caſe of the Mayor of Hertford, where a Court was held before him only, and he pretending Right to a Houſe made himſelf Leſſor of the Plaintiff, and gave Judgment for his own Leſſee; and for this he was brought up by Attachment and lay'd by

Attachment on Contempt of Judicial Officers. 1 Salk. 201. *Poſt.* 38, 84, 85.

the Heels, though he got of the eaſier for that he had been an Old Cavalier: This he ſaid was in my Lord Hyde's Time:
1 Salk. 201. But on the other Hand an Officer is not to be puniſhed for an Error in his Judgment.

Verdict on a Juror's Knowledge. 1 Salk. 405.

If a Jury give a Verdict upon there own Knowledge, they ought to tell the Court ſo; but the fair way had been for ſuch of the Jury as had Knowledge of the Matter, before they are ſworn, to tell the Thing to the Court, and be ſworn as a Witneſs.

Jury diſcharged *ſans* Verdict. 1 Salk. 201.

Note, All this was ſaid by the Court upon a Motion for an Attachment againſt a Steward of an Inferior Court, who had diſcharged a Jury without giving a Verdict, but the Court would hear further before they granted an Attachment.

Doctor Woodward's *Caſe.*

Judgment on a Warrant of Attorney. 6 Mod. 14. 16. 282. 1 Salk. 402. *Poſt.* 115. 139.

The Queſtion was upon the regular Entry of a Judgment upon a Warrant of Attorney. Per Cur', If a Year paſs after a Warrant of Attorney given, Judgment can't be entered upon it without Leave of the Court, but if one give a Warrant in Vacation to give Judgment as of laſt Term, his Death does not determine that Warrant, becauſe the Party was alive at the Time of the Judgment enter'd; and the Time of entering the Judgment is not expreſſed on the Roll, but in the Margin, and the Uſe of it is for Security of Purchaſers only, but without it it is good againſt the Party. Alſo if Defendant make Default ſo as Plaintiff might have enter'd Judgment againſt him, and before actual Entry Defendant dies, yet Plaintiff may enter his Judgment as of the Term in which Default was made: And Holt quoted Shelley's Caſe, who died at four a-Clock in the Morning of the Day on which the Recovery was, ſo that if you reckon Hours and Minutes, he was Dead at the Time of the Recovery had, yet it was held good: So if the Caption of a Fine be taken in the Vacation, if the Writ be returnable the next Term, the Death of the Party determines it; but if it be returnable the Term before, it ſhall be well notwithſtanding the Parties Death.

On Defendant's Default, *&c.* *Poſt.* 13. 93. 94, *&c.*

Erroneous Judgment.

If a Judgment be below for the Plaintiff, and Error is brought and the Judgment reverſed, yet if the Record will warrant it,

the Court ought to give a new Judgment for the Plaintiff; but if the Judgment be erroneous and againſt the Plaintiff in the Merits, that ought to be reverſed, and a new Judgment given for the Defendant: Pur Cur', If erroneous Judgment be for Defendant, and it is reverſed, and the Merits appear for Plaintiff, he ſhall have Judgment; but if the Merits be againſt Plaintiff, Defendant ſhall have new Judgment: So in the Exchequer-Chamber; for they are to reform as well as to affirm or reverſe.

New Judgment. Cumberb. 314. 1 Sand. 180. 2 Sand. 256. 1 Salk. 262, 401, 403.

S. C. on a new Writ 1 Salk. 89, 402. 2 Salk. 603.

Atwood & Burr.

ERror of a Judgment on a Sci. Fac. againſt Bail in the Mayor's Court of Maidſton; the Writ did recite, that a Plaint was levied in Debt upon a Bond againſt J. S. by the Plaintiff the 17th Day of July, the 6th Year of the King, in Cur' Domini Regis villæ Regis de Maidſton; and thereupon a Summons iſſued returnable the 31ſt of July, and after a Nihil thereunto return'd, a Capias returnable the 14th of Auguſt following, by which the Defendant being taken, and appearing on the Return of the Cepi corpus the Defendant became his Bail, and enter'd into a Recognizance to pay the Condemnation with coſts and charges of Suit; the Sci. Fac. did further recite a former Sci. fac. and commands the Officer Sicut prius, *&c.* A Sci. Feci. was return'd and Judgment againſt the Bail, and now upon the Writ of Error many Exceptions were taken.

Error on a Judgment in Inferior Court *ver.* Bail on a *Sci. Fac.* Q. 5 Mod. 397. 6 Mod. 304. Cumberb. 149, 161.

1. That in this Caſe the Inferior Court can only award Execution of Goods, Lands and Tenements within their Juriſdiction, and therefore the Sci. Fac. ought to run ſo, and not generally as here.

Exceptions to the *Sci. Fac.* Q. N. Lutw. 185. 1 Salk. 404.

2. After Iſſue joined and a Ven. Fac. to try it, the Defendant in the original relicta verificatione cognovit Actionem, and Judgment againſt him in 100 l. Debt, and 50 l. Damages without any Mention of coſts, and the Prayer of the Sci. Fac. againſt the Bail is to have Execution de debito & dampnis; ſo not according to his Recognizance.

3. The Sci. Fac. is in the Mayor's Name, whereas it ought to be in the King's Name and Teſted by the Mayor, it being a Proceſs of the King's Court.

4. The

4. The Sci. Fac. recites a Plaint levied the 17th of July, and on the Record it appears to have been on the 14th.

2 Salk. 599. 5. In a Sci. Fac. againſt a Recognizance it ſhould be in ea parte, and here it is in hac parte.

6. The Command of the Writ ought to be to ſummon the Party, if found within the Juriſdiction, but here it is general.

7. Here went an al. Sci. Fac. upon which this Judgment is; and the firſt Sci. Fac. not return'd, and ſo they ſhew on the Record.

To which it was Anſwered.

Opinion. 1. By Holt C. J. The Recognizance is well taken, that in Caſe Judgment be againſt the Defendant, to levy the Condemnation of his Goods and Chattels, Lands and Tenements; and the common Courſe in the King's Bench is ſo, tho' in the Common Pleas they bind in a Sum certain, and the Summons need not be crampt up by Words to the Juriſdiction of the Court; or that ſhall be underſtood.

Cumberb. 299. 2. Where the Demand is of a Debt certain, one need ſay no more than dampna to include Coſts, except it be on taking a Verdict on a Trial where Coſts are to be mentioned, but upon Confeſ. Nihil dic', &c. It is never, or at leaſt never need to be done.

3. It is the conſtant Practice in all Inferior Courts to make the Proceſs in the Name of the Mayor.

Variance. Inſt. Leg. 497, 498, &c. 4. Upon a Writ of Error there can be no Advantage taken of a Variance between the Writ of Sci. Fac. and the Original Record.

2 Salk. 599. 5. It is true, the Right way is not to ſay in hac parte in Proceſs upon a Recognizance, but it has obtained now to make it either way, and we muſt not hinder it.

6. Anſwered, as in the firſt, ſupra.

7. Which is the chief, he asked the Counſel on the other ſide, how they could proceed upon a Sci. Fac. which was not retorned as here the firſt was not; for there ought to be ſome Anſwer to the Writ, as that the Party had nothing, &c. That he Sci. fecit, or non eſt Invent. for if there be no Retorn I doubt it will be a Diſcontinuance, and that can't be cured by Appearance; but after Verdict a Miſcontinuance is cured, and there being no Retorn to the firſt, or ſo much as a Recital of it on the ſecond, but only ſicut prius præcept. eſt; it will be hard to maintain it, and if you don't appear at the Retorn you can't appear at all if the Proceſs be not continued down. If there be an Original retornable in Trinity Term and the Defendant does not appear but comes in Hillary Term, all is wrong if there be not a continuance to Hillary Term down duely entred: If Sci. Fac. be retornable die Jovis prox' poſt tres Septim. S. Michael. if the Party appear Craſt' S. Martini, it will be an incurable Gap, for none can appear when he has no Day by the Writ or on the Roll, and here is neither: And ſuppoſe the firſt Sci. Fac. had been well retorned and an Alias iſſues out retornable in June, and the Defendant appears in Auguſt, all would be had without a continuance entered till Auguſt; becauſe without it the Defendant has no Day in Court; but he ſaid perhaps the want of a Retorn of the Sci. Fac. might be cured by the Day on the Roll where the Teſte and iſſuing out of the Writ is, which perhaps may be a ground for an Alias and alſo a Day for Appearance; and he ſaid, that upon pleading the Statute of Limitation, he always uſed to plead the Retorn and not the Purchaſe of a Writ; for it was the Retorn that gave the Poſſeſſion of the Cauſe to the Court. And if one were to continue a Latitat for ſeveral Years he muſt get the firſt retorned; upon which Retorn you make your continuances down tho' you never take out another; but there muſt be a Retorn of the firſt Writ; ſo if a Cap. ad Satisfac. be taken without a Year, you muſt continue it down as long as you pleaſe upon a Vicecomes non miſit breve, and not be put to a Sci. Fac. ſo there is a vaſt Difference between the Writ to which the Defendant has an Anſwer, and one to which he has none; for if it be a Writ to which the Party has a Plea, there muſt be ſome ſort of a Retorn, or that it came tarde, but ſtill there muſt be ſome Retorn; and for this he quoted the Caſe of Sir John Vidian and Welling; and can any Court hold Plea of a Writ before it comes back to them? And if you come to ſet it forth by Sicut alias, you

Diſcontinuance.

Miſcontinuance, &c. *Vide* 1 Sal. 177, 178, &c. 1 Sand. 338, 9. *Poſt.* 124. 3 Sal. 131.

Star. of Limitations how pleaded. *Vide. Poſt.* 12, 99. Juſt. Leg. 538, &c. Cumberb. 70.

Poſt. 7, 50. 68, 69.

ought to ſet it out at large; and he ſaid he would ſuppoꝛt it, if he could, foꝛ the Sake of the Suitoꝛs, who have been at the Charge of purchaſing the Franchiſe, and not foꝛ the Sake of the Steward; foꝛ they generally oppꝛeſs the People. [This was Mich. 13. W. 3.]

Objection to the Declaration, &c.

And the Caſe was Argued again this Term, and Broderick took Exceptions: Firſt, That the Oꝛiginal Declaration was that the Defendant per Scriptum ſuum Obligatorium, &c. The Defendant pleads non eſt Factum, and a Venire to try the Cauſe was ad recognoſcendum ſi Scriptum Obligatorium pred' was the Deed of the Defendant, which he ſaid was a Contradiction, and then there being no Day on the Roll to the Party but the Day on the Venire, which is none, the Venire being contradiꝛy, the Confeſſion of Relicta Verificatione is void, and the Judgment grounded thereupon erroneous. But anſwered by Holt, take it to be ſo, and that it is a plain Diſcontinuance, which is the utmoſt you can pꝛetend, you can't take Advantage of that in an Erroꝛ upon the Judgment on the Sci. Fac. againſt the Bail. If Bail be to an Action in this Court, and a Sci. Fac. againſt the Bail and Judgment againſt them by Nihil Dicit, in a Writ of Erroꝛ of that Judgment, they can't ſay that there was no Judgment in the Oꝛiginal Action, becauſe that ought to have been pleaded on the Sci. Fac. foꝛ tho' it be eſſentially neceſſary to charge the Bail, there ſhould be Judgment againſt the Pꝛincipal, yet that muſt be taken Advantage of in pleading upon the Sci. Fac. and never upon a Writ of Erroꝛ.

Opinion.

Vide 1 *Vent.* 78.

Objection to the Retorn.

Then was objected, The want of a Retoꝛn of the Firſt Sci. Fac. foꝛ an Entry was made that the Officer had not retoꝛned it; To which it was anſwered by Counſel, that True it is, upon a Writ iſſuing out of Chancery retoꝛnable in the Common Pleas oꝛ in this Court, no Pꝛoceedings can be till it be retoꝛn'd, foꝛ till then it is not depending; otherwiſe where the Writ iſſues out of the ſame Court and is retoꝛnable there. Vid. 2 Ed. 4 11. 5 Co. 47. And the ancient Pꝛactice was, that when a Writ iſſued out of this Court, an Entry was made of it on the Roll, and where a Man is to loſe his Inheritance oꝛ incur a Penalty, he may appear on the Day on the Roll, tho' the Officer has not retoꝛned the Writ.

Reſponſ.

Holt,

Holt, The ancient way was to make a Record of the Original, and in the Common-Pleas they went by way of Recital, Dominus Rex miſit Breve ſuum clauſum in hæc verba: Now a Sci. Fac. is ſued out here, and an Entry made of Vicecom' non miſit Breve, and ſued out and returned, and the Party appears: Why ſhall they not proceed upon this ſecond Writ? And tho' the firſt be not returned, yet there is an Entry of it on the Plea-Roll, and upon that the other Proceedings are founded; and the ſecond refers to it ſicut alias. Opinion. *Poſt.* 50, 68, 69. *Antea*, 5.

And the Caſe being argued again in Mich. primo Annæ, Holt declared, He had ſpoke to Coke Prothonotary of the Common-Pleas, who aſſured him he never knew a Proceeding upon a ſecond Sci. Fac. the firſt not returned, and he ſaid, that tho' the Defendant had a Day in Court upon the Sci. Fac. being entered on the Roll at its Iſſuing, yet there can be no proceeding upon it till it be returned, and you ſhould get a Return made; no matter whether executed or not.

Another Exception taken was, that this was a Judgment on Demurrer, and they gave a Final Judgment without giving an Interlocutory one, Quia videt. Cur. *&c.* And it was ſaid; That the Forms of Judgments ought to be ſtrictly kept to; and therefore Conceſſum or Adjudicatum has been held bad in an Inferior Court. And this is like the Caſe of a ſpecial Verdict, where the ſpecial Fact is left to the Judgment of the Court. 1 Rol. Rep. 305, 309. 2 Cro. 372. 3 Cro. 227. 'Tis not enough that Judgment be given for him that ought to have it, but it muſt alſo be upon a right Ground. Vide Owen 19. Exception to the Judgment.

But Holt ſaid, Such a Fault would be amended now; and he ſaid, that always upon Demurrer before you proceed to final Judgment you ſay, quia videt. Cur. quod Placitum, *&c.* Ideo conſideratum eſt, and here they give final Judgment, when for ought appears they have not determined the Matter ſubmitted to them; and tho' it be not eſſential to give a Reaſon for their Judgment, yet it is material to decide the Matter put in Judgment, and the Court ſeemed inclined to reverſe the Judgment for theſe two Errors; which Raymond for the Defendant perceiving, he took Exception to the Writ of Opinion. *Note*,

of Error, that it was Quod in adjudicatione Executionis Judicii pred' Error intervenit, where it ſhould be in adjudicatione Executionis Recognitionis pred'. And tho' Powel ſaid that a Recognizance was a Judgment, and wanted nothing but Execution to make it a compleat Judgment: Holt ſaid, yet it was another Species of a Judgment which ought to be ſhewed, and the Court were of Opinion to quaſh the Writ of Error for this. Exception But ſee 1 Salk. 402, That the Judgment below was Reverſed. Mich. 10 Annæ.

Writ of Error quaſh'd

What an Arreſt. 6 Mod. 173, 211. 1 Salk. 79.

Per Holt, If a Window be open, and a Bailiff put in his Hand and touches one for whom he has a Warrant, he is thereby his priſoner, and may break open the Door to come at him.

Jacob *verſus* Dallow.

S. C. 1 Salk. 551. 5 Mod. 436. 6 Mod. 230.

Prohibition Seat in a Church.

LIbel was in the Spiritual Court for diſturbing in a Seat in a Church; the Defendant below comes for a Prohibition and ſuggeſts a preſcriptive Right in himſelf, and Prohibition granted and declared on and for a Conſultation; the Defendant ſet up a preſcriptive Title to himſelf, and traverſes that of the Plaintiff, and upon Demurrer a Conſultation was awarded, for Per. Cur', The Ordinary has of common Right the Diſpoſal of Seats, if there be no temporal Right ſet up againſt it, as the now Plaintiff has done here, viz. his Preſcription, and that is now traverſed.

Prohibition. *Vide poſt.* 137, 148.

After Sentence in a Spiritual Court, they will not grant Prohibition; except it appear upon the Face of the Proceedings, to be Matter out of their Juriſdiction. Quære, poſt.

Davila *verſus* Dalmanſer.

S. C. 1 Salk. 73.

Attachment for hindring an Award.

A Submiſſion to an Arbitration was by Rule of Court, and after the Arbitrators had made ſome Progreſs in the Matter, the Party came and ſnatch'd away the Papers, and ſo hinder'd farther Proceeding: And per Holt, There ought to be an Attachment, if the Party did not enlarge the Rule and pay Coſts.

4

Lum-

Lumly *verſus* Quarry, *Judge of the Admiralty of Penſilvania.*

S. C. 1 Sal. 101.

IT was Trover and Converſion for a Ship, which the Defendant condemned for want of being regiſtred in England; the Action was laid in London, and being removed by Habeas Corpus to the King's Bench; the Queſtion was, whether there ſhould be Bail as this Caſe ſtood. and Holt ſaid, That tho' it was upon a Habeas Corpus, they might enquire into the Cauſe of Action, and if they ſaw Occaſion, order ſpecial Bail: for otherwiſe the Inferior Courts might be made Uſe of to oppreſs People, by laying great Actions upon them there; and here, if the Defendant has acted as Judge, and the Matter was within his Cognizance, his Sentence, whether Right or Wrong, binds till it be reverſed; and if it were in the Admiralty of France, it would be ſo, and the only Remedy in ſuch Caſe is to Appeal.

Trover and Converſion for a Ship.

Cumberb. 366.

Bail on a *Hab. Corp.* See 1 Salk. 98, 101, 102.

Per Holt, The Writ of Ne Exeat Regnum ought not to be granted, but upon great Reaſon and Examination; otherwiſe a Homine replegiando may lie.

Ne Exeat Regn. Hom. repleg. Vide 2 Salk. 581, 702

Queen & Ewer.

S. C. 2 Salk. 564.

SCire Facias upon a Recognizance entered into before Holt, C. J. conditioned That one J. S. ſhould appear to an Indictment againſt him, and carry it down to Trial according to the late Act of Parliament; and the Defendant demurs to it:

Recognizance.

1. There is a Variance between it and the Recognizance: The Recognizance recited is, That upon Iſſue joined, the Defendant would give Notice of Trial to the Proſecutor and his Clerk; and the true Recognizance entered into, is to give Notice to the Proſecutor or his Clerk; So there is a Variance, and it is not purſuant to the Statute; for it is in a greater Sum than the Statute requires, which is only 20 l. each. It was urged on the other ſide, that if one would except againſt a Writ, he ought to have Oyer of it; and that notwithſtanding it be ſet out in hæc Verba. But it was anſwered, that it were Vain to demand Oyer of a Writ which is already ſet out in hæc Verba on the Roll. Indeed 'tis True, none can except againſt an Original Writ that is not ſet out in hæc Verba

Variance.

Oyer of the Writ. See 6 Mod. 28. 2 Lutw. 1642. 1 Mod. 62. 1 Sand. 9. 5 Co. 74.

Opinion. ba, without having Oyer of it. And Holt, C. J. ſaid, That the Recognizance varies from the Statute, and therefore can't be good by the Statute; yet it may be good by the Common Law: It is True, the Recognizance, if not according to the Statute, can't make the Certiorari a Superſedeas, for by Statute no Certiorari ſhall be a Superſedeas without a Recognizance of 20 l. &c. But before that Statute the Judges of this Court had Power to take Recognizance, which is not taken away by the Statute; but only that they ſhall not be ſuch as will make a Certiorari a Superſedeas: And the Writ was quaſh'd for the 1ſt Exception.

Writ quaſhed.

Domina Regina & Paroch. de Milverton

Order of Juſtices quaſh'd in Part. Blackerby's Caſes *Vide* 2 Salk. 472. 5 Mod. 208, 209.

UPon an Appeal to the Seſſions, they made an Order that the firſt Order ſhould be quaſh'd; and the Party ſent to the Pariſh from whence he was thereby removed. It was agreed, the Juſtices of the Seſſions had only Power to affirm or quaſh the former Orders, but not to make a new One; but becauſe an Order may be good in Part and void for other Part; that Part which ordered the Poor Perſon to be ſent back was quaſh'd, and the Reſt confirmed.

Bail for a Feme Covert. 6 Mod. 17, 105. 1 Salk. 115. 1 Mod. 8. 1 Lev. 1.

Per Holt, A married Woman is to be diſcharged upon common Bail of Courſe; but if it be doubtful whether ſhe be married or not, ſhe ſhall be held to ſpecial Bail, if the Cauſe require ſpecial Bail.

Coroner. *Poſt.* 16. 2 Hawk. 41. *&c. ibid.*

It is Matter indictable to bury a Man that dies of a violent Death, before the Coroner's Inqueſt have ſate upon him. Per Holt,

Order of Juſtices. 6 Mod. 40, 43. 1 Salk. 145, 147.

It is a Rule of Court: That no Order of Juſtices, whereof an Appeal lies, be brought hither by Certiorari, till after Appeal; and if any be, that it be ſent back by Procedendo: For the Original Order does not come up, but the Tenor of it, as appears by the very Words of the Return.

Feltham & Cudworth.

Statute of Compoſition of two Thirds pleaded. *Poſt.* 16, 96.

SCire Facias by an Adminiſtrator to revive a Judgment had by the Inteſtate againſt the Defendant, who pleads the Statute of Compoſition of two Thirds in Number and Va-

lue of the Creditors, and a Compoſition for Payment of 2 s. in the Pound; Ita quod he paid it within five Years after he ſhould be diſcharged out of Priſon; and on Demurrer the whole Queſtion, whether the Defendant ought to aver that he had been in Gaol: And it was urged by the Plaintiff that he ought and that the Plea was ill for Want of it; for the Intent of the Statute was, that there ſhould be an abſolute poſitive Compoſition, either to take leſs than the Debt, or to give a longer Day of Payment; but not to diſcharge the whole Debt of the Creditors, by the Compoſition of two Thirds, which would be the Caſe here, if the Defendant had never been in Gaol; for the 2 s. in the Pound was not payable till five Years after the Defendant came out of Gaol, and that might be never, if he had not been then in Gaol; and then the Compoſition might be, that Defendant ſhould never Pay.

To which it was anſwered, that it is in the Power of the two Thirds of the Creditors, &c. to make a Compoſition general; that a contingent Compoſition is a Compoſition within their Power; beſides it was ſaid, that the Matter ſubſequent to the Ita quod, did not depend upon it as upon a Condition precedent, but that the Ita quod was only a Limitation; as a Grant of a Rent provided it does not touch his Perſon, or a Grant without Impeachment of Waſte, Ita quod he don't commit voluntary Waſte. *Ita quod.*

Another Day the Court held it no good Compoſition, becauſe it is ſuch as perhaps the Defendant will never be bound to perform, and the Ita quod makes it a Condition precedent, that the Defendant ſhould be diſcharged out of Gaol; and the Statute intended a final abſolute Agreement, whereby the Creditor is bound to receive ſo much or to give ſuch Time, and if the Defendant does not perform ſuch Compoſition, the former Debt is thereby revived. Suppoſe I covenant with J. S. to convey him ſuch Lands, Ita quod he pay me 500 l. by ſuch a Day; he does not pay the Money by the Day, I am not Bound to make over to him the Eſtate; for where an Ita quod is annexed to an Agreement for a Thing not executed, it qualifies the Matter before; and is the ſame Thing as if it were put firſt: And the Act means there ſhould be a compleat final Agreement, and not one depending on Uncertainties: now non Conſtat that the Defendant ever was in Priſon, and therefore for ought appears, the Condition precedent never happened nor is like to happen; and we can't intend he was impriſoned: And *Curia.*

Condition precedent. 1 Salk. 171, 231.

And per Omnes, All Compoſitions by Vertue of this Act, work by way of Defeazance, which if not performed the Original Debt ariſes. Judgment pro Quer'.

Toll incident to a Market. Cumberb. 297. 1 Show. 257. 2 Show. 34. 3 Lev. 400, 424. 1 Salk. 327. 4 Mod. 319, &c.

Per Holt, A Toll is not of common Right incident to a Market; per Eundem, It has been held that an Indebitat' Aſſumpſit would lie for a cuſtomary Fine of a Copyholder, but he ſaid, he never could be reconciled to that Opinion.

Mayor.

Per Eundum, without a particular Uſage, the Mayor of a Corporation has not a caſting Voice.

Green & Rivit.

S. C. 2 Salk. 421.

Statute of Limitation. *Vide* Inſt. Leg. 538. 1 Sand. 36, 37, 120, 127. Cumberb. 70. 1 Show. 354. 2 Show. 79, 126. 3 Salk. 227.

IN an Aſſumpſit, non Aſſumpſit infra ſex Annos was pleaded Plaintiff replies that pro Recuperatione of the ſaid Debt, he ſued out a Bill of Middleſex which he recites in his Replication, and it appears to bear Teſte, Die Lunæ poſt tres Septimanas Sancti Michaelis, Anno quinto, Ita quod parat. habeat the Defendant's Body Die Lunæ poſt tres Septimanas Sancti Michaelis, generally without telling when, and that the Defendant promiſed within ſix Years before the Iſſuing thereof; Defendant rejoined, that he did not promiſe in ſix Years before the Iſſuing thereof, and on Demurrer the Exception was to the Replication, that it did not appear when the Writ was returnable, for it could not be intended to be immediate without it had been ſo ſaid expreſly; and in Fact a Bill of Middleſex is never returnable immediate, and 'tis True, the Writ it ſelf does never mention the Year in which it is returnable; but when one pleads a Writ, he ought to do it: And Holt ſaid, the Statute of Limitations was one of the Beſt of Statutes, and the Pleading thereof no Diſparagement to any Body; and Defendant had Judgment Niſi.

Vide antea 5.

Judgment *Niſi.*

Sir George Tuke's *Caſe.*

Aſſumpſit for Non-payment of Money on Delivery of a Note.

IN Aſſumpſit the Plaintiff declared, that he was poſſeſſed of a Note of the Defendant's by which the Defendant promiſed to pay him ſo much Money; that the Defendant in Conſideration the Plaintiff would deliver him the ſaid Note, promiſed to pay him the Money, that he thereupon delivered him the Note; after Verdict it was moved in Arreſt of Judgment, that here was no Conſideration; for it did not appear what the

Consideration of the Note was; And if the Note were without Consideration, the Delivery of it up can't be one. Vide Pal. 171. 2 Saund. 136. But per Cur. 1. Delivery of the Note being said indefinitly, it shall be intended a Delivery for ever; and tho' a Note for the Payment of the Money does not carry a Consideration in it self, yet it is Evidence of a Debt, and by Consequence a Means whereby he may recover his Money; and the Parting therewith is a Consideration and the Defendant has admitted it to be upon Consideration by Demanding it to be delivered. And if the Case had been, that this had been the Note of J. S. for Payment of Money to J. N. and J. D. in Consideration that J. N. would deliver the Note to him had promised to pay him, it had been a good Consideration; for it is not necessary the Matter of the Consideration should be of Advantage to the Defendant, so it be any Trouble or Disadvantage to the Plaintiff. Judgment pro Quer'.

1 Salk. 23, 25. N. Lutw. 148. 2 Salk. 125, 126, 136. 1 Lev. 165. 1 Vent. 159. 1 Sid. 31, 248. 1 Roll. abr. 28.

Judgment.

A. takes a Judgment in the Name of B. who dies, and Administration is committed to another: A. enters Satisfaction on the Judgment; the Administrator of B. moves that the Entry of Satisfaction be vacated, and this appearing on a Report of the Master to whom it was referred, the Court said the Defendant had good Equity, but they could not help him, and the Rule was to vacate the Entry of the Judgment Nisi.

After Death Satisfaction acknowledged. *Antea* 2. *post.* 93, 94, &c.

Prideaux & Morrice.

S. C. 2 Salk. 502.

IT was an Action on the Case in the Common Pleas, against the Defendant Morrice, being on of the Aianders of the Town of in Cornwall, for not returning the Plaintiff, he being duly elected a Member of Parliament for that Borough; but instead thereof Falsly and Maliciously returning J. S. who was not duly chosen. Upon a special Verdict finding all the Declaration, and farther, that the Right had not been determined in the House of Commons, and that there was another Aiander still Living; the Court after several Arguments, delivered their Opinions by Trevor, C. J. Blencow, Powell and Nevill;

Parliament. False Return. *Vide* 1 Salk. 19, 20. 6 Mod. 45, 49. 1 Mod. 145. 5 Mod. 311. 2 Lev. 114. 2 Salk. 503. Polexf. 470.

We are all of Opinion, that the Defendant ought to have Judgment.

1. We don't give our Opinions how it would be, if the Matter had received a Determination in the Houſe of Commons in Favour of the Plaintiff.

2. We give no Opinion how the Action ought to be conceived: whether it ought to be againſt both the Slanders, or whether it might be againſt one of them, becauſe our Opinions are that it does not lie againſt them any way.

So that our firſt Reaſon is, for that the Judging of the Right of Election belongs to the Parliament, that is, to the Houſe of Commons; and that is the proper Juriſdiction for determining ſuch Matters, and therefore it would be very abſurd and inconvenient, if it ſhould be tried by a Jury or Court of Weſtminſter Hall, in an Action on the Caſe; for that would produce a different Determination of the ſame Matter, by two Independant Juriſdictions; one might have Judgment and Damages againſt him in Weſtminſter Hall, for a Matter in which he might have done his Duty by a Vote of the Houſe of Commons; and of which the Commons are the ſole Judges.

Obj. Obj. This Inconvenience of claſhing Juriſdictions would enſue in Caſes where the Act of Parliament gives the Action, and a particular Penalty; and yet none will ſay but the Action will lie notwithſtanding, even before any Determination of the Matter in Parliament.

Reſp. Anſw. Where the Parliament gives the Courts of Weſtminſter Hall a Juriſdiction, let the Inconvenience be what it will, we may exerciſe the Juriſdiction; but it can't be ſaid, becauſe the Parliament has given us a Juriſdiction in particular Inſtances, that by the ſame Reaſon it has given it to us in all Caſes: And the Argument is, to ſay becauſe the Parliament has given us a Remedy, therefore it lay at Common-Law, when the contrary Inference is much more natural; and if the Parliament had intended to give a Remedy, it would have given an Action of the Caſe; for that had been the moſt adequate Remedy, and would ſuit every Body's Caſe, and the Statute 23. of H. 6. that gives a Penalty in ſome Caſes, takes Notice, that before that Statute, there was not ſufficient Remedy.

Obj. Not inconvenient that there ſhould be concurrent Juriſdictions, for the Queen's Bench, Common Pleas, and the Court of Exchequer are ſo. Obj.

Anſw. It is True; but that works no Inconvenience to the Subject; for if the Suit be commenced in one Court, and after in another, that Court which has firſt Poſſeſſion of the Cauſe, ſhall determine it, and it is a good Plea in Abatement for a Defendant to ſay, that there is an Action depending in another Court for the ſame Cauſe; and a Judgment in one Court is pleadable in Bar to an Action for the ſame Cauſe in another: But that will not be ſo in the preſent Caſe. Reſp.

Obj. The Caſe of the Earl of Banbury, where the Court of Queen's Bench did determine the Right of Peerage. Obj. 2 Salk. 512.

Anſw. That Cauſe is not a Precedent to be followed, for the Conſequence of it is a Failure of Juſtice to this Day; ſo that that Caſe is a ſtrong Inſtance of the Miſchief that we would now avoid. Reſp.

Another Argument againſt it is, that of Littleton upon the Statute of Merton, a non uſitato. Anſw. The Miſchief has always been as appears by the Acts of Parliament giving Remedy therein. Vide Acts of H. 4. and H. 6.

Another Argument againſt it is, That the Right of a third Perſon would be tried here between Strangers: Anſw. So it would be determining his Right by a ſide Wind.

Carlile & Greenwood.

S. C. 6 Mod. 134.

SCire Facias brought on a Judgment in the Queen's Bench at Weſtminſter, and the Adminiſtrator produced Adminiſtration, by the Arch-Biſhop of York; and becauſe the Judgment was Aſſets at Weſtminſter in the Province of Canterbury, the Adminiſtration in the Province of York did not extend to it. Adminiſtrator.

Lilly's *Caſe*.

COvenant lies not againſt an Apprentice being an Infant. 1 Cro. 179. 1 Mod. 271. ſee 2 Danv. 460. pl. 12. 1 Lev. 290. 2 Sand. 169. ſee Covenant by an Apprentice. 6 Mod. 154. Be- Apprentice.

Beverly & Pim.

Traverſe. *Antea* 10, 11. *poſt.* 96.

CASE upon ſeveral Promiſes; the Statute of Compoſition of two Thirds pleaded in Bar; But the Plaintiff ſhewed the Contract to have been ſince the Time of the Statute, which the Defendant did not traverſe in his Plea, as he ought to have done; for if you vary from the Time in the Declaration, and make ſuch Variance material, you ought to traverſe the Time in the Declaration: And Judgment pro Quer' Niſi.

Domina Regina & Clerk.

S. C. 1 Salk. 377.

Coroner's Inqueſt traverſable. See 1 Salk. 190, 377. 2 Lev. 140, 141.

IT was an Inquiſition taken before the Coroner, Super viſum Corporis of one who had killed himſelf; and firſt was ſaid per totam Curiam, that ſuch Inquiſition is traverſable:

1. That it wanted the Word Murdravit, for it was that the Party Deum præ Oculis non habens, ſolus exiſtens in Domo ſua Manſionali voluntarie felonice & ut Felo de ſe cum cultro Pretii, *&c.* quem in manu ſua dextra tenuit, Jugulum ſuum ſecuit & ſeipſum occidit. And it was anſwered, that the Word Murdravit is not neceſſary in ſuch an Inquiſition as this, tho' it be otherwiſe in an Indictment of Murder of another Perſon, becauſe there are Degrees in the Offence of killing another, as Manſlaughter, Murder which ought to be expreſſed in Words, but in the Offence of killing one's ſelf there can be no ſuch Degrees. 1 Keb. 66. held by Twiſden that the Word Murdravit is not neceſſary in ſuch an Inquiſition, tho' there was an Opinion to the Contrary in the Caſe of Alderman in 3 Keb. 604. Dyer 304. 2 Lev. King & Parker. Holt ſaid, If it was not for the Authority of Alderman's Caſe in my Lord Hale's Time, he would think it not neceſſary in the Caſe of Felo de ſe; for he ſaid the Reaſon why Murdravit is neceſſary in an Indictment of Murder, is becauſe Clergy does not lie in Murder. But moſt ſurely a great Defect in this Inquiſition is, that it is not ſaid he died of the Wound ſet forth in the Inquiſition: For to what Purpoſe has the Queen a View of the dead Body, But to ſhew the Jury that the Wound is Mortal? And for this Fault the Inquiſition was quaſhed; for it is not enough to ſay that it was Felonice, but alſo it ought to be ſhewn how it was Felonice. Per totam Curiam Note,

Vide antea 10. 2 Hawk. 48. Coroner's Inqueſt to have a View, that the Jury may ſee the Wound mortal.

Note, Midſummer Day was on Wedneſday this Year, and if that had not been, that Wedneſday had been the laſt Day of Trinity Term, but now it was on Thursday: For per Holt, Trinity Term may begin on Midſummer Day, but can't end on it; there can be no Return this Year in tres Septiman' Trin' but it muſt be Die Jovis poſt tres Septiman' Trin', and this he ſaid had not happened in one Hundred Years before.

Trin. Term cannot end on Midſummer Day. *Vide* 6 Mod 81, 148, 196, 251, 252.

Adam's *Caſe*.

A Capias in Withernam was teſted the 1ſt of May, and returnable Die Jovis poſt tres Trin'; and the Court ordered the Attorney and Filazer to attend; for they look'd upon it to be a great Oppreſſion to make ſuch a long Return in Order to deprive one of his Liberty ſo long. And here he gave Bail, Body for Body to appear at the Return of the Writ; and the Withernam was ſuperſeded.

Withernam ſuperſeded. *Vide* 2 Show. 221, 226, 229, &c. Ray. 474. &c.

Information againſt the Play-Houſe for Acting profane and lewd Plays, and they being bound by Recognizance to try it made up the Record wrong, viz. Lincoln's Fields for Lincoln's Inn-Fields, thinking to be acquitted upon that Variance; but Holt ordered it to be found Specially, and Mr. Attorney moved to have their Recognizance eſtreated,

Play-Houſe proſecuted. 1 Mod. 76. 5 Mod. 142. Cumberb. 304.

Sir Richard Newdigate's *Caſe*.

Sir Richard Newdigate was bound by his Recognizance for a Twelvemonth to keep the Peace againſt his Daughter, and for his Appearance the firſt Day of next Term, and the Court ſaid, they could not diſpence with his Attendance, as they could if it was de Die in diem, but here he was bound by the Condition of his Recognizance.

Recognizance of the Peace againſt the Father.

Term. S. Trinitatis,

Anno 1 Annæ.

S. C. 2 Salk. 619.

Machil *verſus* Clerk.

Tenant in Tail, in Conſideration of his Son's Marriage, Covenants to ſtand ſeized to Uſes; but afterwards ſuffers a Recovery to other Uſes, and the Uſes on the Recovery adjudged good.

ERror in this Court, on a Judgment given in the Common Pleas, where the Queſtion upon a Special Verdict in Ejectment was this: A Tenant in Tail, in Conſideration of a Marriage of his Son, Covenants to ſtand ſeized to the Uſe of himſelf for Life, Remainder to the Uſe of his Son and Heir, and the Heirs Male of his Body by his intended Wife, with ſeveral Remainders over; and after he ſuffers a Recovery in which he himſelf is Tenant to the Præcipe, and vouches over the common Vouchee; which Recovery was to other Uſes than thoſe mentioned by the Covenant: So the Queſtion was, Whether the Tenant in Tail, notwithſtanding the Covenant to ſtand ſeized, continued ſeized in Tail, for then the Recovery was good, otherwiſe it could not be good in this Caſe, he coming in as Tenant to the Præcipe. And Williams here argued that the Covenant was void. Thus, Eſtates-Tail owe their being to the Statute De Donis, which is the only Law which reſtrains Conveyances of them at this Day, and the Care of that Statute regards only the Iſſue and thoſe in Reverſion or Remainder, and does in no way extend to the Party himſelf during his Life: And in favour of ſolemn Conveyances, the Iſſue himſelf and thoſe in Reverſion and Remainder, are put to their Action in Caſe of Feoffments and Fines by a Tenant in Tail, and in all Caſes the Tenant himſelf is bound by his Alienation or Conveyance, as well ſince as before the Statute.

Argument. *contra*, the Uſes.

Covenants to ſtand ſeized to Uſes *Vide* 3 Lev. 126, 306, 37, &c. 1 Mod. 98, 121, 159, 175. 2 Lev. 75, 213, 225. 2 Jon. 105. 1 Vent. 372. 2 Vent. 260, 266. 318. 2 Mod. 207, &c.

N. Lutw. 242, 378, &c. Cumberb. 128, 890, 195. 2 Salk. 679. 3 Salk. 307, 385.

Until the Statute 27 H. 8. cap. 10. no legal Eſtate paſs'd by the Conveyance of a Covenant to ſtand ſeized, which was but only a Uſe; but now by that Statute, the Uſe draws the Poſſeſſion to it; and then by this Conveyance the Tenant in Tail is ſeized to his own Uſe for Life the Remainder to J. M. his Son in Tail; which Conveyance the Tenant in Tail can't

can't avoid in his own Life, and then it follows that he only has an Eſtate for Life with Remainders over, ſo that the ſuffering a Recovery is a Forfeiture of his Eſtate, and the Covenant to ſtand ſeized by the Rule of Grants, ſhall be taken moſt ſtrongly againſt him; and moſt advantagiouſly for thoſe who are to take by it, and the rather for that here the Uſes are to him for whoſe Benefit the Statute De Donis was made, videlt. the Eldeſt Son, that is, the Heir apparent.

Obj. This being by way of Covenant to ſtand ſeized, nothing paſſes but what may lawfully paſs as in Caſe of a Grant, and then it will make no Alteration of the Eſtate-Tail. Obj.

Anſw. It is True a Covenant to ſtand ſeized, does not work a Diſcontinuance, yet all the Eſtate may be as much deveſted out of the Tenant in Tail himſelf, as if there were a Diſcontinuance, and the Covenant will not paſs away the Remainder limited over, but it will paſs a baſe Fee, or put the Eſtate-Tail in Abeyance. Suppoſe he had covenanted to ſtand ſeized to the Uſe of his Son immediately, or to the Uſe of a Third Perſon immediately, with Remainders over, would not that put the Eſtate-Tail in Abeyance; or paſs a baſe Fee? And how does this Caſe differ from that? A Covenant to ſtand ſeized operates like a Bargain and Sale, that is by way of Uſe; both enure by way of Grant, and receive their Virtue from the Statute of Uſes; and all the Difference is, that the Statute of H. 8. does ordain, that no Eſtate of Freehold ſhall paſs by the Statute of Uſes, in Caſe of Bargain and Sale till Enrollment, but that is only a Condition ſine qua non, and it is the Statute 27 H. 8. c. 10. that both raiſes the Uſe and creates the Eſtate; then if Tenant in Tail bargains and ſells his Eſtate to a Man and his Heirs, a baſe Fee will paſs. Vide Plo. 557. 3 Co. 84. Cro. Car. 489. And tho' Littelton ſays, That if Tenant in Tail grants totum Statum ſuum, the Grantee hath but an Eſtate for Life of the Tenant in Tail, yet that muſt be meant, that he has but an abſolute indefeazable Eſtate only during his Life, but ſtill during his Life he has a baſe Fee; and the Iſſue after the Death of the Tenant in Tail, may bring a Formedon againſt the Grantee, which ſhews the Eſtate was not abſolutely determined by his Death. 10 Co. 98. Reſp. Abeyance.

If Tenant in Tail bargain and ſell to another and his Heirs, and after levy a Fine to A. and his Heirs, to the Uſe of

of A. and his Heirs, the Bargainee now has an Eſtate to him and his Heirs, during the Continuance of the Eſtate-Tail, which the Fine to the Uſe of another could not give, if he had it not before. Some hold that by the Bargain and Sale of the Tenant in Tail to a Man and his Heirs, he only has a deſcendible Freehold, and the Eſtate-Tail is in Abeyance. 1 Inſt. 331. a. And after ſuch Bargain by Tenant in Tail to another and his Heirs, the Tenant in Tail has no Reverſion or Remainder in him; and he can't puniſh Waſte or enter for a Forfeiture; and therefore all the Right of the Eſtate will be out of him, and by conſequence in Abeyance; and here if the Right of Entail be in Abeyance, it will do as well for my Purpoſe, for if it be out of him at the Time of the ſingle Voucher, it will be a void Recovery.

Abeyance. If Tenant in Tail covenant to ſtand ſeized to the Uſe of one for Years, Remainder to the Uſe of his firſt Son in Tail; this puts the Eſtate-Tail in Abeyance; ſo if he covenants to ſtand ſeized to the Uſe of A. for the Life of B. and after to the Uſe of C. this puts the Eſtate-Tail in Abeyance: And it is no Anſwer to ſay, that where Tenant in Tail covenants to ſtand ſeized for Years, or for Life of another; ſtill there remains ſomething more in him which he may grant over, for the Eſtate for Years, or for the Life of the other may determine, during the Life of the Tenant in Tail; and then the Remainder over may poſſibly take; but where he covenants to ſtand ſeized for his own Life, he has done what he can lawfully do; and any Covenant over is what he can't lawfully do, and therefore it is of no Force: For where Tenant in Tail covenants to ſtand ſeized to the Uſe of another, during his own Life, ſtill there remains ſomething in him, in Reſpect whereof he can puniſh Waſte and enter for a Forfeiture: And why can't he grant this Intereſt out of himſelf by way of Remainder, as well as grant it out of himſelf in another Manner, where he grants totum Statum ſuum, in which Caſe the Eſtate-Tail is ſo entirely out of him, that he can't puniſh Waſte or enter for Forfeiture? Tenant in Tail grants his Eſtate to A. and his Heirs during the Life of the Tenant in Tail, Remainder to B. and his Heirs during his Life: Both A. and B. by Poſſibility may take, tho' the Eſtates have the ſame Limitation, viz. the Life of the Tenant in Tail; and this is like the Common Caſe in Settlements, where an Eſtate is limited to Huſband for Life, Remainder to Truſtees and their Heirs for the Life of the Huſband, for ſupporting and

preſerving contingent Remainders; and if this laſt Caſe be Law, it proves that Tenant in Tail has ſomething in him, after giving away an Eſtate for his own Life; and if he has any ſuch Thing in him, he may grant it out of him, 1 Inſt. 331. a. Where Tenant in Tail grants totum Statum ſuum, he has not only granted all his Eſtate for Life, but alſo all his Right to the Entail out of himſelf, and if he could do ſo, he has done it here; and then the Recovery after, with ſingle Voucher, can't be good, Hetly 110. Tenant in Tail covenants to ſtand ſeized to the Uſe of himſelf for Life, Remainder to Uſe of his eldeſt Son, no Uſe ariſes to the Son, if not during the Life of the Father only. He owned that the Caſe of Blythman in 1 And. 291. 3 Cro. 279, was in Part againſt him, vid. Yelv. 51. 1 Brown. 193, ſame Caſe; and that Marriage is a good Conſideration to raiſe a Uſe. Vid. 2 Cro. 168. 2 Rol. Abr. 784.

Cowper contra, And he agreed if the Eſtate-Tail was altered by the Covenant, the Recovery was void; ſecus not, and for Authority for him, he quoted 3 Cro. 895. 2 Co. 52. 3 Cro. 471. Mo. 32. Pl. 105. And. 160. Mo. 613. Pl. 540. Ro. 257. And as to Littleton's Caſe, That if Tenant in Tail grant totum Statum ſuum, that the Entail is in Abeyance, he quoted Pl. 561. the whole Court to the Contrary, and he ſaid no ancient Authority did agree therewith. Beſides tho' it be allowed to be Law, there is a great Difference between Covenant by Tenant in Tail to ſtand ſeized, and a Grant of totum Statum of him: Firſt, the Covenant is to ſtand ſeized of the Eſtate that he has to Uſe, and that is an Eſtate-Tail, and one can't be ſeized of an Eſtate-Tail to Uſe. Vid. 2 Rol. Abr. 780. Cro. Car. 401. 1 Inſt. 19. So that when Tenant in Tail covenants to ſtand ſeized of his Eſtate, it can't be his Eſtate-Tail; then it muſt be only of the Eſtate he lawfully can be ſeized of, and that is for his Life only; and it will be void as to the Eſtate-Tail. Argument for the Recovery.

Holt, C. J. How do you diſtinguiſh a Bargain and Sale by Tenant in Tail to a Man and his Heirs, from a Covenant to ſtand ſeized, to the Uſe of him and his Heirs? Both Conveyances raiſe an Uſe without Tranſmutation of Poſſeſſion, what Eſtate ſhall a Bargainee in Fee of Tenant in Tail have? You ſay an Eſtate for Life only: If ſo, upon the Death of the Iſſue in Tail, the Eſtate of Bargainee determines, and yet that is not ſo till Entry of the Iſſue in Tail, and Opinion of *Holt, C. J.*

this does in no wise contradict the Statute de Donis, for the Donee in Tail grants the whole Estate out of him; but the Issue after his Death may determine, and he replied on Seymor's Case: For in that Case, if it were determined by the Death of the Tenant in Tail, the Fine would be a Discontinuance; whereas it enur'd by way of Confirmation of the base Fee that past by the Fine, and the only Difference is, that it was a defeazable Fee, before the Fine, and by the Fine, becomes an indefeazable Fee. And if Tenant in Tail made a Feoffment, and after levied a Fine, that Fine binds the Right of the Entail, tho' the Feoffor had it not in him at that Time; it is True, a Tenant in Tail can't be indefeazably seized to Use, and none can give an Estate-Tail to Use, but the Use will be void: And where Littleton puts his Case of totum Statum suum, he is to be intended where it is granted by him to another and his Heirs, for otherwise it would not put the Estate-Tail in Abeyance; and such a Grant without Livery, would make a Discontinuance, and is a base Fee, whereby the Issue is put to his Entry. Vid. Walsingham's Case in Pl. 1 Cro. 427. Stone's Case: Tenant in Tail, Reversion to the King, commits Treason; the Question was how the King should have the Estate, by the Statute of 26 H. 8. or by Determination of the Estate-Tail; but the Case of a Covenant to stand seized may differ from that of Bargain and Sale, for the Right of the Estate-Tail is conveyed in the Case of Bargain and Sale, but in the Case of Covenant to stand seized to his own Use for Life, he is so already; and he can't bind his Heir, without making an Alteration of the Estate-Tail; if this had been a Remainder to some Body more remote than the Heir, it would be more questionable.

Opinion of the Court and the Reasons thereof.

At another Day, the whole Court delivered their Opinion, by the Chief Justice, that the Recovery notwithstanding the Covenant to stand seized was good, and the Chief Justice said, It would be reasonably expected from them to give the Reasons of this their Opinion, for tho' there were several Authorities express in the Point, yet the Reasons of these Judgments were not so obvious; for it has been a Question if a Tenant in Tail, by Bargain and Sale, Lease and Release, or Covenant to stand seized, conveyed the Lands whereof he is seized in Tail, to another and his Heirs; Whether that Estate so conveyed does actually determine (as Littleton seems to hold) upon the Death of the Tenant in

Tail, or does continue till Entry of the Iſſue in Tail? And we hold, that notwithſtanding the Covenant has not that Operation here; yet if Tenant in Tail bargain and ſell, leaſe and releaſe, or covenant to ſtand ſeized to the Uſe of one of his Blood in Fee, that ſuch Bargainee, &c. has a baſe Fee not determined by the Death of Tenant in Tail, but continuing in Bargainee or Releaſee, &c. till the Iſſue in Tail make an Actual Entry: This indeed ſeems to differ from the Opinion we now give, but we will by and by diſtinguiſh.

And it will be worth while to know and conſider the Reaſon hereof, becauſe it ſeems to contradict Littleton.

The 1ſt Reaſon then is, becauſe the Tenant in Tail himſelf, has an Eſtate of Inheritance in him, that is not denied, before the Statute de Donis he had it, and it was called a conditional Fee; and the Statute of Donis does not make any Alteration of the Eſtate, ſo as to make it not an Inheritance, but only fixes it, ſo that there ſhall not be an Alienation of it to the Diſinheritance of the Iſſue in Tail; yet ſo as a baſe Fee, may be made of it: And of baſe Fees, ſee 1 Inſt. 18. a. If Lands be given to a Villain in Tail; and the Lord enters, he has a baſe Fee, that is, to him and his Heirs, while the Villain has Heirs of the Entail; ſo that the Tenant in Tail has an Inheritance in him which may be turned into a baſe Fee, then, when he bargains and ſells, leaſes and releaſes, &c. this Inheritance to another and his Heirs, it's but reaſonable it ſhould paſs a baſe Fee, eſpecially if nothing in the Statute be againſt it.

2. The Tenant in Tail has the whole Eſtate-Tail in him, and why ſhould not he that has the whole Eſtate by Bargain and Sale, Leaſe and Releaſe, or Covenant to ſtand ſeized, deveſt himſelf of the whole, and put it in the Bargainee? For the Power of diſpoſing is an Incident inſeparable to his Eſtate.

3. Turning of the Eſtate-Tail into a baſe Fee, is not at all contradictory to the Statute de Donis, nor any Branch of it: That Statute has very ſtrong Words to hinder an Alienation to the Prejudice of the Iſſue in Tail, Non habeant illi quibus Tenementum ſic datum fuerit ſub conditione poteſtatem alienandi Tenementum ſic datum, quo minus ad Exitum illorum quibus Tenementum ſic fuerit datum remaneat poſt illorum obitum, vel ad Donatorem, &c. revertatur. Theſe Words are very ſtrong, yet

yet we know the Conſtruction that has been made upon them. If a Tenant in Tail make a Feoffment or levy a Fine, it is ſo far a Prejudice to the Iſſue, that he ſhall be put to his Action; and his Entry is taken away, and he has no Remedy but by a Formedon in Deſcender, and yet ſuch Fine or Feoffment was never taken as a Breach of the Statute of Donis; ſure then it ſhall be no Breach of the Statute to have him put to his Entry, to recover the Eſtate. Since then it is his Inheritance, and all in him, and that a Power of Alienation is incident to his Property that he has, and that an Alienation made by him to put the Iſſue to Entry is no Breach of the Statute of Donis; from hence I do infer, that ſuch Eſtate by Bargain and Sale, &c. made by him, to one and his Heirs, is not actually determined by his Death; now as for Authorities in the Caſe, Vide 10 Co. 95. Seymor's Caſe is in Point. Tenant in Tail bargains and ſells to B. and his Heirs; and the Court held, that the Bargainee had a deſcendible Eſtate, whereof his Wife was dowable, and that by the bare Bargain and Sale; and tho' there was a Fine after, which barred the Iſſue, that only excluded the Iſſue in Tail, but not enlarged the Eſtate of the Bargainee, for if he had not a Fee before, the Fine after could not have given it to him, for it did not work by way of Enlargement of an Eſtate.

He quoted the Caſe of Fines in 3 Co. where it is ſaid fo. 84. That Littleton's Words in Sect. 612. are not to be taken ſtrictly and literally: And he ſaid it was very True that a Bargain and Sale by a Tenant in Tail to one and his Heirs does not work a Diſcontinuance; but yet the Eſtate paſſing by it, does not determine till Entry of the Iſſue: And where Littleton ſays, That he can't diſpoſe of more than for his Life, that is, he can't rightfully do it, ſo as to bar his Iſſue, but he may convey the Eſtate that ſhall continue longer, if this Iſſue will not avoid it; and the Caſe of Fines ſays beſides, that if Tenant in Tail be of a Rent or Advowſon, and he grants all his Eſtate in the Rent or Advowſon to one and his Heirs, tho' he dies, the Rent or Eſtate in the Advowſon is not thereby determined, but at the Election of the Iſſue in Tail; for if the Alienation be with Warranty, and the Iſſue bring Formedon, and Alienee pleads Warranty with Aſſets in bar, he ſhall be barred by Reaſon thereof, ſo that till Act be done by the Iſſue in Tail to determine it, the Alienation continues; if it be of Rent, and he bring Formedon, collateral Warranty ſhall bar him. Winche's Rep. 5. Tenant in Tail bargains and ſells

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an Advowson to another and his Heirs; and the Question was, Whether he was remitted? It was not a Doubt but a Fee-simple passed by the Bargain and Sale; indeed Hobart held the Issue was remitted, but the other two held he was not, and if the Bargain and Sale had been determined by the Death of the Issue, there could not have been a Question of the Remitter, and that plainly shews that the Estate, which past by the Bargain and Sale, had Existence after the Death of the Tenant, though it were an Advowson. But this is no great Question, if you consider the common Case of Lease for Years made by Tenant in Tail, not warranted by the Statute of 32 H. 8. such Lease is not void by the Death of Tenant in Tail, the Issue must enter to avoid it; for if he does not do so, but accepts the Rent, he is bound by the Lease, which shews it was not determined by the Death of Tenant in Tail; for if it were, no subsequent Acceptance of the Rent would have helpt it.

Another Instance comes home to the Case in question, and that is the Case of an Exchange; the Estates must be equal, you can't give an Estate for Life in Change for an Estate in Fee; you may indeed give an Estate for Life, in Exchange for another Estate for Life; an Estate in Fee for an Estate in Fee, that is, each Party taking, must take an Estate of equal Extent; if one give an Estate-Tail, and takes a Fee, it is bad: If Tenant in Tail and Tenant in Fee make an Exchange, they both have Fee-simple, (1 Inst. 51. a) without more a-doe; for in Case of Exchange there needs no Livery, but only a reciprocal Execution by both Parties, and this is notwithstanding a good Exchange, and a Fee-simple passes from the Tenant in Tail, and shall continue till avoided by the Issue; and here he is not put to his Action to avoid it, because here being no Livery there was no Discontinuance. 1 Inst. 332. Then the Exchange must have this Effect, that it passes a base Fee till avoided by his Issue: And if the Issue will not agree to it, he may wave the Land in Fee conveyed to him, and enter into the other. But if he does not do so, but continue in the Land given, the Exchange stands good during his Life; and after his Death his Issue may avoid it by entring, and so on, toties quoties. It does therefore follow that a base Fee does pass, otherwise it could not be a good Exchange; if so, then there is the same Reason, that when Tenant in Tail bargains and sells, leases and releases, covenants to stand seized to Uses in Fee, such Conveyances should pass a base Fee; which

Exchange of Estates.

ſhould continue till determined by the Act of the Iſſue in Tail.

But to conſider the Caſe in Queſtion, Notwithſtanding this be ſo, that the Bargainee, Releaſee or Ceſtui que Uſe, of a Covenant to ſtand ſeized, &c. has a baſe Fee, how happens it here, that the Covenant to ſtand ſeized in the Caſe in Queſtion, does not alter the Eſtate-Tail, but that it ſtill continues? The Reaſon is, becauſe that tho' the Tenant in Tail may make Conveyance of the Eſtate in his Life, which ſhall be good and binding of the Eſtate-Tail, till avoided by the Iſſue; yet any Conveyance he makes to commence after his Death ſhall be void, if by Poſſibility it may not take Effect during his Life; and the Eſtate by this Covenant is to commence from and after the Death of the Tenant in Tail; and the Inſtance before put of the Leaſe for Years, is appoſite to this Purpoſe.

If Tenant in Tail make a Leaſe for Years, not warranted by the Statute, to commence immediately, or which may poſſibly commence during his Life, ſuch Leaſe is voidable only upon his Death, but if he make a Leaſe to commence from and after his Death, that Leaſe is ipſo facto void, by the very Creation of it. And that is the Book of Dyer 297. Pl. 25 though there was one Judge of another Opinion, 2 Cro. 457. Well then; this Remainder is limited to commence from and after the Death of Tenant in Tail; therefore it is void. But you'l ſay, here he covenants to ſtand ſeized to the Uſe of himſelf for Life, the Remainder over; ſo that the Eſtate to ariſe upon the Covenant to ſtand ſeiſed did ariſe in his own Lifetime: To this they anſwer, that the Covenant to ſtand ſeized to the Uſe of one's ſelf is void, except it be for the ſake of the Remainder over, and the Remainder being to commence after his Death is void, and the Covenant to ſtand ſeized to his own Uſe can't be good for the ſake of a void thing; if one covenants to ſtand ſeized to his own Uſe in Tail, it had been good; for which he quoted Carrington's Caſe.

Now what is the Reaſon, that ſuch Eſtate is void, when it is limited to commence after the Death of the Tenant in Tail? It is becauſe 'tis to commence at a Time, when the Right of the Eſtate out of which it would iſſue, is in another Perſon by a Title paramount the Conveyance, viz. per Form. doni. Tenant in Tail has an Eſtate out of which he may carve out other Eſtates, provided he does it out of the Eſtate

in himself, so as to make it rightful in its Creation, but otherwise not; for it would be injurious to make good a Lease or other Estate commencing upon the Right of another, whose Title is paramount the Lease or Estate so made; and in the principal Case, the Issue in Tail has a Title paramount the Title of the Remainder, by virtue of the Covenant, the very Minute the Remainder would take Effect: And that is the only true Reason; and therefore to make such an Estate to take Effect upon the Possession of the Issue, whose Title is paramount, would be to make an Estate take by wrong the very Minute it has its Creation. Now for Case and Judgment in the principal Point there are many, 2 Rep. 52. Yel. 51. Mo. 883. 3 Lev. 291. 3 Cro. 895. And the Words of the last Book are full of the Reason that I give.

I do, you see, disagree with Littleton, for if you take him according to the Letter, it contradicts the Case of Fines, 3 Co. And if I have contradicted Littleton, I have done it upon great Authority, Viz. the Case of Fines, and Hob. 319. where he says, the Law abhors Abeyance, and never suffers it but in Case of Necessity. Abeyance.

And he took Notice of the Case in 1 Saund. 260. in the Common Pleas, which Authority he said was against him upon the first Matter, viz.

1. If Tenant in Tail make a Bargain and Sale, the Bargainee has no more, says that Book, but for Life of Bargainor, tho' the Habendum were to Bargainee and his Heirs, and so then they held it. But I must take the Liberty to disagree with them, because I have the Authority of Seymour's and other Cases with me, for we may with as much Decency deny their Authority, as they have denyed that of Seymour's Case. For a Fine to a stranger shall extinguish the Right of an Intail, but can't enlarge any Estate before made out of the Estate-Tail, so that if the Estate which the Tenant in Tail makes, may possibly commence during his Life, such Estate shall after his Death continue till avoided by the Issue, but if it can't commence till after Death of Issue, it is absolutely void.

2. If Tenant in Tail covenant to stand seized to the Use of J. S. who is of his Blood, for his Life, with Remainder over to another, and dies before the Remainder happens, yet the

the Remainder is good till it be avoided by actual Entry of the Iſſue; otherwiſe it will exiſt after the Death of the Iſſue, becauſe the Eſtate for Life had taken Effect; and the Remainder might have taken Effect during the Life of the Tenant.

3. If Tenant in Tail make a Leaſe and Releaſe to the Uſe of himſelf for Life, with Remainder over to another, the Remainder over is good till avoided, tho' it be to commence after the Death of the Iſſue in Tail; and the Reaſon is, becauſe it iſſues out of the Eſtate by Leaſe and Releaſe, which is good, till avoided by Entry: He ſaid, the grounds he went upon were his own, but his Brothers concurred with him in the main, and the Judgment in the Common Pleas was affirmed.

Judgment affirmed.

S. C. 2. Sal. 425.

Domina Regina & Rogers.

Information in the Mayor's Court, *London*.

AN Information was againſt him in the Name of the Common Serjeant of the City of London in the Mayor's Court, grounded upon a Cuſtom in London to puniſh in that Manner, any that ſhould give opprobrious or affronting Language to any of their Aldermen. The Information did ſet forth another cuſtom, for holding a Leet on ſuch a day yearly in the ſeveral Wards, that Sir R. Jeffreys was Steward of ſuch a Leet in ſuch a Ward, and ſate in the ſaid Court, held at, &c. as Steward: That the Defendant made an Aſſault upon him, and contemptuouſly ſaid, He had as much to do there as he had, that he miſtook himſelf, for he was not now among his Bridewel-Birds, and that the next Year he ſhould not keep his Court there: This matter being brought up by Habeas Corpus, it was moved that the Defendant ſhould be diſcharged. For,

Poſt. 91. Vid. 1 Mod. 35. 3 Mod. 139. 6 Mod. 124. 1 Sid. 65.

1. There is nothing in the Words, for which an Indictment does lie, except the Aſſault; for at moſt they are but Words of Diſreſpect, for which there is no other Remedy then to bind the Party to Good Behaviour, or for Want of Sureties to commit him, and that may be lawfully done in Caſe of diſreſpectful Words to a Magiſtrate; or if one in a Court behaves himſelf inſolently, he may be committed immediately as for a Contempt. And beſides it was ſaid, there was nothing in the Words, but what was true.

Vide Sir Thom. Jon. 229. 3 Cro. 78. Mo. 347. 2 Lev. 200. 1 Vent. 16. 6 Mod. 124.

1. The Defendant was a Suitor, therefore he was bound to be there, and he had a Right to be there.

2. The Steward was not among Bridwell Birds, and that he should not hold Court there next Year; he had a Right to hinder it, for the Court was held in the Church, and he was Church-Warden.

Holt, C. J. It may be they have a Custom to punish by Information for reasonable Cause, but it will be a great Question, whether the Cause here be such: And whether there may be a Custom to make Words more criminal than the Common Law makes them: And this is not like the Case of calling a Woman a Whore, which is punishable there, tho' not at Common Law; for that is grounded upon another Custom of punishing Fornication there, which is not punishable any where else; and he said a contemptuous Carriage and Behaviour to a Magistrate, was a Breach of ths Good Behaviour, and he to whom such Affront is offered, may bind him to his Good Behaviour; or if he has no Sureties, commit him till he find some: So in this Court, if a Witness will be insolent, we may commit him for the immediate Contempt, or bind him to his good Behaviour; but we can't indict him for it, and that is the Course according to the Common Law of England: And a Binding to good Behaviour is not by way of Punishment, but it is to shew that when one has broke the Good Behaviour, he is not to be any more trusted. Giving a Man the Lie in Westminster Hall, or in any great Concourse of People, is a Breach of the good Behaviour. At last the Court awarded a Procedendo as to the Assault, for they may have a Custom to punish by Information, such as assault the Magistrate. 1 Syd. 144. *Vide* 1 Vent 327.

Shirly & Right.

S. C. 2 Salk. 700.

A Capias ad Satisfac. issued upon a Judgment after a Year and a Day, without a Sci. Eac. and the Sheriff executes it, and after suffers him to escape, and an Action for the Escape; and if the Sheriff could take Advantage of this in Bar of the Action, was the Question; and that he could not these Authorities were quoted, Mo. 274. 2 Saund. 100. Dyer 175. 21 H. 7. 16. Poph. 205. 3 Cro. 893. 1 Leon. 30. 3 Cro. 271, 288, 436. 2 Rol. Ab. 560. 21 Ed. 4. 23. 8 Co. 121. A *Ca. Sa.* after the Year and Day; and Execution and Escape. Cumberb. 250. *Post.* 64. to 69.

Mountague offered a Diverſity, that where the Error appears on the Face of the Writ it ſelf, the Sheriff is not bound to execute it, and by Conſequence if he does execute it, he may let the Party go away again; as if a cap. ad Reſpondend. be taken out in Trinity Term, returnable in Hillary, for it ought to be returnable the next Term. Vide 2 Keb. 261. 2 Rol. Rep. 442. 1 Rol. Abr. 484. Stil. 337.

The Stat. of *Dies* in *Banco*, was made 51. H. 3. and Note the Stat. for Abridging Mich. Term. is 16, 17 Car. 1. c. 6. and the Stat. 32 H. 8. c. 21. was for Abridging Trinity Term.

Holt, C. J. In real Actions if there comes an Alias Summons, they give an intermediate Term before the Return of it, becauſe of the Statute of Dies in Banco in Writ of Dower. Vide Statute of 32 H. 8, for abridging Michaelmas Term. But in perſonal Actions, where a cap. ad Reſpondend. does lie, it muſt be continued down from one Term to another, and if ſuch Proceſs iſſue out of this Court in Trinity Term, returnable in Hillary Term, the Cauſe is thereby out of Court, for if it be not continued in every Term it is gone; And if a Sheriff ſhould take one by ſuch Proceſs, and let him go, he would not be liable, becauſe the Cauſe is out of Court; but here is an Execution returnable at a ſecond Term, where is the Miſchief in this Caſe? For the Sheriff is to detain him in Execution, and he has no Opportunity at the Return of the Writ to diſcharge himſelf; the Sheriff is to keep him till the Court call for him at the Return of the Writ; and then a Habeas Corpus goes to bring him in, and he is delivered to the Priſon of the Court, and if the Court think not convenient to have him the next Term, but will ſkip a Term, where is the Harm of that? For let the Return be when it will, he is to be kept in Cuſtody both before and after it: But upon a cap. ad reſpond. it is otherwiſe, for there, by putting in Bail, the Proceſs is determined, and by a long Return the Defendant is hindred from coming to make an End, and diſcharge himſelf of the Action. But it will not hold to ſay, that where the Sheriff is excuſed by the Proceſs, there he ſhall be liable to an Action of Eſcape, for an Eſcape of one taken by Vertue of that Proceſs; for if a Writ be teſted out of Term, yet he may ſafely execute it, but the Plaintiff that ſued it out, can't take Advantage of ſuch Writ: And this was Sir John Lenthal's Caſe: So he ſaid in the Principal Caſe, this at moſt was but an erroneous Matter. And per Curiam, Judicium pro Quer' Niſi.

1 Sand. 161, 162. 1 Lev. 254, 2 Lev. 109.

Libel was in the Spiritual Court, for that J. S. being the Parſon of ſuch a Church, did make himſelf drunk at the Sacrament, and that he was a Whore-Maſter: And upon ſuggeſtion, that they would proceed to a Deprivation, and that the Benefice was a Donative, a Prohibition was granted quoad the ſueing in Order to deprive, but not quoad the other Matter. Prohibition *quoad. Vide poſt.* 125. *Poſt.* 78, 113. 137, 148.

George & Pierce.

IN Order to a new Trial, an Affidavit was read, that one of the Witneſſes had declared that he had got a Guinea to ſtifle the Truth. Gould, An Affidavit of him who had the Guinea were ſomething, but his Saying is nothing. A Witneſs's laying a Wager in the Cauſe is no Hindrance to his being a Witneſs, for the other has an Intereſt in his Evidence, which he can't deprive him of. New Trial. *Vide poſt.* 53. 64, 117.

Per Holt, If an Executor De ſon Tort deliver the Goods to the Adminiſtrator before Action brought, he may plead Plene Adminiſtravit: If Adminiſtration be firſt granted, and then another take the Goods, he is not thereby Executor De ſon Tort. Executor *de ſon Tort.* 1 Salk. 313. 1 Show. 242. 3 Salk. 161. 3 Lev. 34.

If one be brought up upon an Attachment, you can have no more than his Anſwer upon Interrogatories, and if he forſwear himſelf, he is ſubject to a Proſecution of Perjury. Vide Cro. Car. 89. Interrogatories. 6 Mod. 43, 75.

Per Holt, The Owners of the Gate-Houſe Priſon have no Charter to ſue a Commiſſion of Gaol-Delivery, and it is hard to maintain a Right to a Gaol without ſuch a Liberty, and there is an Act of Parliament, that all Felons ſhould be committed to the County-Gaol; and the Meaning of it is, if there be not a Franchiſe and Power to ſue for Gaol-Delivery, and ſuch Suit muſt be made in Chancery. Gate-Houſe, Gaol-delivery.

Domi-

S. C. 2 Salk. 447.

Domina Regina & Maſon.

Poſſeſſion on an Inquiſition.

Record.

WHen a Man is put out of Poſſeſſion by Vertue of an Inquiſition retorn'd for the Queen, and another comes and pleads his Right, that is a diſtinct Record from the Inquiſition; and ſo if another comes and pleads his Right, that is another diſtinct Record. And if Demurrer be to all, then it is determined there, or may be ſent into this Court to be argued and determined; but if Iſſue be joined in it, then the way is to award a Ven. Fac. out of Chancery, retornable at a Day certain in the Queen's Bench. And the Record is delivered hither; per Manus of the Chancellor, &c. to be here at the Day of the Retorn of the Ven. Fac. but the Inquiſition is never ſent hither; but the Party comes in Chancery, and complains his being aggrieved by the Inquiſition, and prays he may be admitted to ſhew his Right, and plead againſt the Inquiſition, and that is a Monſtrance de Droit; and all the Operation of the Inquiſition is to make Title for the King, and the Party comes in as Plaintiff, and either traverſes it or ſhews his Right conſiſtent with it. And if he will traverſe it, he muſt ſhew Title in himſelf. The Caſe of Jefferſon & Dawſon was Part on Demurrer and Part on Iſſue, and if there be a Miſpleader and a Repleader awarded that muſt be in this Court; and where there is Iſſue and Demurrer, and the Party will not proceed on the Demurrer, the Court will give Judgment on the Demurrer; and tho' ſome Books have a Saying, that a Record may be ſent out of Chancery hither, even upon Demurrer, I would fain ſee where it has been done; per Holt.

Monſtrance de Droit. Vide 1 Salk. 441. 1 Salk. 395. 5 Mod. 57.

See 2 Sand. 252. to 259. 1 Mod. 94. 1 Lev. 209. to 212.

2 Salk. 455. pl. 3.

Foſter's *Caſe.*

Non Pros'.

ONE took out a Writ, and the Defendant voluntarily appeared, and gave Notice to the Plaintiff's Attorney of Bail filed; the Plaintiff does not declare, Defendant ſigns a non Proſeq. for want of a Declaration. Vide Statute 8 Eliz. and 13 Car. 2. And Holt held it well enough.

Gay & Croſs.

THE Plaintiff brought an Action on the Caſe for a falſe Return to a Mandamus to ſwear him Common Council-Man, for the Borough of Totneſs, which by Charter from Queen Elizabeth the Manner of their Election was chalked out for them; and a Uſage was given in Evidence to a Jury at the Bar, that the Election had gone quite contrary, which Uſage was allowed to be good Evidence of a By-Law whereupon it was founded: So the Counſel on both ſides conſented to have it found ſpecially, and to have it determined by the Court; whether ſuch a By-Law, and a long Uſage purſuant to it, could alter the Direction, or rather annihilate the Direction of the Charter? And the Jury having given their Verdict in private over Night, ſaid, that they had found the Matter ſpecially, and the next Day in Court delivered their Verdict for the Defendant generally, and would give no Reaſon for it, nor be moved to depart from it. And hereupon a new Trial was moved for; and the Caſe of Wood and Gunſton in Stiles, and a Caſe of the Welſh Drovers were quoted for new Trials, after a Trial at Bar. And though the Court were very much diſſatisfied with the Jury, and Holt ſaid, he never had known the like, and that he would have but little Value for the Verdict of a Jury that would not at a Judge's Deſire declare the Reaſon which had induced them; and that as the Judges do publickly declare the Reaſons of their Judgments, and thereby expoſe themſelves to the Cenſures of all that be learned in the Law, and yet there is no Law obliges them to it, but it is for publick Satisfaction; ſo the Jury ought for the ſame Reaſon, to declare the Reaſon of their Verdict, when required by the Court. Notwithſtanding all this, it being a Trial at Bar, the Court would not grant a new Trial.

Mandamus. *Vid. poſt.* 83. 2 Show. 179, 217. Corporation. Verdict. Trial at Bar. New Tryals. *Vid.* 2 Sal. 650. *Poſt* 64. 117, 156.

Rice & Serjeant.

A Man has a Judgment for a juſt Debt againſt A. and takes out a Fi. Fac. and gets the Sheriff to ſeize the Goods, but would not let him proceed farther; but ſuffered the Goods to remain in the Cuſtody of A. the Debtor: B. who has alſo a Judgment againſt A. for a juſt Debt, takes out a Fi. Fac. and the Queſtion was, whether he could ſeize upon the ſame Goods?

Fi. Fac. Fraud in the Execution. *Vid. poſt.* 118. 6 Mod. 184, 191.

Goods? And per Cur. He may; for the former was a fraudulent Execution, and the Sheriff might very well return nulla Bona upon the first Execution.

S. C. 1 Salk. 3.

Smith & Villars.

Bail. Recognizance. *Vid.* 1 Sal. 3, 50. Cumberba. 65, 184. 3 Sal. 235, 236. 6 Mod. 80. *Poſt.* 104.

THE Defendant pretending to be Earl of Buckingham, and being arreſted by the Name of J. Villars Arm', upon Motion concerning Bail to be put in by him; the Court ſaid he might without Prejudice put in Bail by the Name by which he was arreſted; becauſe being a civil Action, he need not join in the Recognizance, as the Cuſtom is in criminal Cauſes. And that in the Caſe of the Earl of Banbury, who was indicted by the Name of George Knowles Eſq; becauſe by the Courſe of the Court he ought to join in the Recognizance, and if he had entered into one by the Name of G. K. it would be an Eſtoppel upon him; therefore the Court indulged him to bring others who gave Bail for him, by the Name of G. K. Eſq; for their Act could not conclude him.

Domina Regina & Mayor, &c. Carliſle.

Attachment. *Vide antea* 1. 1 Salk. 201. 396, 148, 9. *Poſt.* 84, 85.

AN Attachment granted againſt him for Proceeding after a Certiorari delivered.

Submiſſion.

A Submiſſion of a Matter to a Reference is no Stay of Suit for that Matter, if it is not particularly ſo agreed on: Per Cur.

Copyhold.

A Copyhold Eſtate is not to be ſeized upon a Recognizance: Per Holt. Aliter, on a Judgment come ſemble.

Date. 1 Sal. 76. 2 Sal. 463. 6 Mod. 244. Oyer. 2 Sal. 498. Variance.

Per Holt. If a Deed has no Date, or an impoſſible Date, you may declare, that the Defendant by his Deed on ſuch a Day and Year did ſo and ſo, and upon Oyer there will be no Variance; but if you ſay that by his Deed of ſuch a Date, or bearing Date ſo and ſo, and upon Oyer the Deed has no Date or an impoſſible one, it will be a Variance.

Tolt.

Note, It was ſtrongly inſiſted by Lutwitche in the Common Pleas, that a Tolt did not lie in a Perſonal Action; and the Court ſeemed to be of the ſame Opinion.

Holt; It ſhould be a Rule for the future that upon removing of Indictments here by Certiorari, we ſhould not hear Motion in Arreſt of Judgment, till the Defendant has appeared. *Certiorari, antea* 10. 1 Sal. 78. 2 Hawk. 286, 287, &c.

Queen & Blacket & Robinſon.

LEave was given to file an Information pro Malegeſtura againſt them, for procuring a Gentleman's Son to marry a Woman of infamous Reputation. Information.

Brooks & Stroud. S. C. 1 Sal. 3.

TWO were made Executors, and an Action brought by them; they ſet forth, that they were made Executors, and that they both did prove the Will, and by the Probate produced it appeared that one only proved it; and the Matter being Pleaded in Abatement, Plaintiff has Judgment Ouſter, and 21 H. 4. was quoted: Two were made Executors; one of them proved the Will, they both have the Right in them; and the other can't refuſe till after the Death of him that proved, but then he may: If one of them is ſevered, the other ſhall go on. Abatement Reſp. ouſter. 2 Show. 252. *Qr. poſt.* 105.

Duke of Norfolk's *Caſe.* S. C. 1 Salk. 401.

VErdict was in Eaſter Term, and before Judgment the Plaintiff dies: Per Holt, That ſhall not hinder the Judgment from being entered, provided, ſays the Statute, it be within two Terms after. And as to the Statute of Frauds and Perjuries, that only requires the Time of ſigning Judgment ſhould be entered on the Roll, and that is only for the Benefit of Purchaſers; for if Judgment be ſigned in Vacation, yet it is entered as of the Term before; and none but a Purchaſer ſhall be admitted to ſay, it was ſigned at any other Time; and it is the Courſe of the Court to let all things be done in the Vacation, as of the Term before. Death *inter* Verdict and Judgment. *Vid. poſt.* 68, 94. Cumberb. 196, 263, 292, 441. 1 Sal. 8. 3 Sal. 116, 117, 319. 2 Show. 177. 2 Lev. 82. *Inſtit. Leg.* 509, &c.

In Caſe of Tenants in Common, there muſt be an actual Ouſter of one by the other, or elſe he ſhall not be compelled to confeſs Leaſe, Entry, and Ouſter: Per Holt. Ejectment.

In

Bail and *Sci. Fac.* *Poſt.* 196, 138.

In Sci. Fac. againſt Bail, the ſecond muſt be teſted on the Return of the firſt, and both can't be taken out at one Time; alſo, there ought to be 15 Days incluſive between the Teſte of the firſt and Return of the ſecond, per Eundem.

Information. Gaming. See Cumberba. 16. 1 Sal. 379.

Information filed againſt one for drawing in ſeveral to play with him for Money, and putting falſe Dice upon them: Ex motione Salkeld.

Domina Regina & Templeman.

Plea *Cul.* Evidence *non Cul.*

After Pleading guilty to an Indictment, you may give any thing in Evidence that juſtifies the Fact, or proves him not guilty of the Fact; for the Entry is non vult contendere cum Domina Regina, ſed pon. ſe in gratiam Cur. And it is not like the Caſe where one is found guilty by Verdict.

Smith & Angel.

Debt by Executors *verſ.* the Heir who pleads *rien per Diſcent niſi* a Reverſion, &c. ſpecially. Replication and Rejoinder. 3 Sal. 157, 178, 180. 2 Mod. 50. Judgment *pro Quer'* generally. Cumberba. 162.

DEBT by Plaintiff and his Wife as Executors of M. F. againſt Defendant as Son and Heir of J. A. upon ſeveral Obligations by which the Father did bind himſelf and his Heirs, upon ſeveral Conditions, &c. Defendant confeſſes the Action, and that the Bonds are the Deeds of his Anceſtors; but ſays that his Father was ſeized in Fee of four Parts in ſix of ſuch a Cloſe, and of three Parts in four of another Cloſe; and of three Parts in four of a Meſſuage, and Iſſues and Profits thereof: That the ſaid Obligor in his Life-Time by his Indenture bearing Date, &c. a Counter-part whereof he produced in Court, did demiſe the ſaid Parts and Shares to H. G. for 500 Years; by Vertue whereof he entered, and was poſſeſſed for the Term aforeſaid; that the Father died ſeized of the Reverſion which deſcended to the Defendant; that he was thereof ſeized, and that at the Time of exhibiting the Bill, or at any Time ſince, he had not any Land or Tenements by hereditary Deſcent, beſides the Reverſion of the Tenements aforeſaid; that after the Death of his Father, and the ſaid Deſcent 9 W. 3. there was a Suit in Chancery between Edward A. C. J. B. and Elizabeth Wife of the Defendant's Father, and the Defendant, in which Suit it was decreed and adjudged in the ſaid Court, that

that Elizabeth ſhould have one third Part of the Premiſſes for her Life for her Dower, by Vertue whereof the ſaid Elizabeth was ſeized of a third Part of the Premiſſes for her Life, and ſo prays Judgment; whether he, as Son and Heir to his Father, ought to be charged beſide the Reverſion of the Term aforeſaid; and of the third Part whereof the Wife was endowed when it ſhould fall? The Plaintiff craves Oyer of the Leaſe; by which it appeared, that in Conſideration of 300 l. he had demiſed the Premiſſes for 500 Years, provided that if the Father, or his Executors or Adminiſtrators, paid 50 l. per Annum to H. G. during his Life, then the Eſtate ſhould ceaſe. Plaintiff replies, that the Defendant after the Death of his Father entered, and was thereof ſeized, and took the Profits, beſides the third Part of his Wife, which would be ſufficient to pay the 50 l. a Year, and ſo prays Judgment; Defendant rejoins and ſays, he did not enter modo & Forma, and concludes to the Country: And Plaintiff demurs.

Holt delivered the Opinion of the Court after ſeveral Arguments at the Bar, and ſaid, It was not doubted, but that the Plaintiff ought to have Judgment, but the Queſtion was what Judgment we ought to give him; whether a ſpecial one, to have Execution of the Lands and Tenements mentioned in the Plea, or generally againſt him as Heir to his Anceſtor? We have conſidered both; and we are of Opinion, there ought to be general Judgment againſt the Defendant, by which his Body, his Goods, his Lands, which are not Aſſets, may be taken in Execution. *Opinio Curiæ.*

Two things are conſiderable herein.

1. The Pleading of a Reverſion of a Term for Years made by his Anceſtors; whether Pleading a Leaſe for Years, be good and allowable in a Defendant ſued as Heir to his Anceſtors? Whether that be ſufficient to hinder the Plaintiff from immediate Execution.

2. If Pleading of an Aſſignment of Dower to the Wife, and that he had a Reverſion expectant thereupon by Court of Chancery, be good?

As to the firſt, the Caſe is this: A Man by Bond obliges himſelf and his Heirs to pay ſo much Money, then makes a Leaſe for Years and dies, whereby the Reverſion in Fee deſcends to his Heir; the Queſtion is, Whether the Heir may 1ſt Point.

plead this Leaſe for Years in Bar of Execution, or confeſs Aſſets; without taking Notice of the Term for Years? There are indeed ſome few Precedents, and I have known it practiſed where it was pleaded: But I am not willing to deliver my Opinion as to that Point now, becauſe the Caſe does not require it; but it ſeems to me, as it ſhould not be Matter lying in the Mouth of the Defendant to plead any ſuch Matter; for he might without Danger confeſs, that he had Aſſets without taking any Notice of the Leaſe. Note, What makes compleat Aſſets? To have the Freehold and Inheritance of the Eſtate deſcend to him, and that he has from his Anceſtors; therefore he has compleat Aſſets. If it were a Leaſe for Life, made by the Anceſtor, and only a Reverſion in Fee expectant thereupon had deſcended from the Anceſtor, that would not be Aſſets in Poſſeſſion; but a Reverſion in Fee expectant, upon an Eſtate for Life; and there he had not a Freehold, as here he had, but a Reverſion expectant upon a Freehold; beſides it appears by the Statute of Gloceſter, and of 21 H. 8. That the Common Law, did not much regard Eſtates for Years, for ſuch Eſtate was ſubject altogether to the Will of him in Reverſion: For if he in Rverſion, had ſuffered a Recovery by Colluſion or Default, the Termor was bound by it; and his Term was loſt without Remedy, as appears by the Comment of my Lord Coke, upon that Statute. 2 Inſt. 321. 1 Inſt. 46. And after the Statute of Gloceſter, which gave Termor for Years Liberty to come and falſify a Recovery had againſt Tenant in Reverſion. Again, Leaſes for Years becoming more conſiderable, and yet more precarious, becauſe of the Frequency of common Recoveries, which now became a common Conveyance, the Statute of 21 H. 8. became a further Remedy for Termors; yet notwithſtanding theſe Statutes, it never lay in the Mouth of a Tenant to a Precipe to plead a Leaſe for Years, or to ſtop Execution upon any ſuch Plea. If an Aſſiſe be brought againſt Tenant for Life, he can't ſay there is a Leaſe for Years Precedent to his Right, tho' Tenant for Years himſelf may falſify a Recovery againſt him in Reverſion, ſo the ſame reaſon holds in this Caſe: For the Obligation of the Father attaches upon the Land, being Aſſets in the Heirs Hands, as Brown Aſſets 9 Sci. Fac. grounded upon a Fine to Execute a Fine, whereby Lands were conveyed by grant and render to one and his Heirs in Tail; Tenant pleaded a Warranty of the Anceſtors of the Plaintiff, and that Aſſets deſcended to him, Plaintiff replied that the Aſſets that did deſcend were extended for the King's Debt, and it was not held a good Plea, becauſe the Freehold and Inheritance did deſcend; and

they

they were preſent Aſſets, if it be ſo in caſe of a real Lien ſo as to bind the Land, in caſe of Warranty, ſure the ſame Reaſon where the Heir is charged upon Account of Aſſets, in an Action of Debt upon the Lien of the Anceſtor, the Books ſay he might Plead a Leaſe for Years as to the Value of the Aſſets, for Aſſets in real Action is no more than Aſſets are worth; ſo that if Plaintiff is not to have it diſcharged of the Term for Years, the Reverſion is leſs worth; then if it be a good Plea, the Conſequence is that an immediate extend. Fac. do go to appraiſe the Reverſion upon Inquiſition taken, and then to deliver it to the Plaintiff to enter into it; when it falls in Poſſeſſion, as in Dyer 246. Debt againſt an Heir who pleaded he had nothing but a Reverſion expectant upon an Eſtate for Life, Plaintiff joins with him and takes Judgment upon the Confeſſion; and to have Execution when Reverſion falls in Poſſeſſion; ſo if this be a good Plea, the ſame muſt be done here. Hern's Pl. 307. is a Precedent of this Matter. There is no Miſchief to him in Remainder, nor to the Leſſee, for he will defend his Poſſeſſion in Ejectment, by virtue of his Leaſe: But we don't give any concluſive Opinion in this Matter.

2d Point. The Dower to the Wife is ill pleaded, for it is not ſaid that the Wife was Endowed by Metes and Bounds, nor that the Lord Chancellor did Endow her; but that there was a Decree in Chancery, by virtue whereof he was Endowed; and that is not to be underſtood, for the Chancellor has nothing to do in Aſſigning of Dower, but in Caſe of Lands holden of the King in Chivalry, and the Heirs being in Wardſhip to the King; and in ſuch Caſe, when ſhe came in as his Wife, and prayed to be Endowed, for the King's Title appearing on Record, a Record was neceſſary to find her Title; and ſo an Inquiſition was taken, and upon her being found thereby to be his Wife, the Chancellor uſed to aſſign her Dower, or to award a Commiſſion for it. F. N. B. 363. And this was the Legal way for the Wife to recover her Dower of Lands in the King's Hands, by the reaſon of the Wardſhip of the Heir; for as every Guardian might aſſign Dower in Paiis, ſo the Dower in Chancery, is by the King himſelf, in a Judicial and proper Manner; but for Chancery to decree that the Wife ſhould have ſuch a third Part, would not veſt a Legal Intereſt in her, the Heir may do it in Purſuance to a Decree; and when he does, the Wife is in by virtue of the Aſſignment of the Heir, and not by virtue of any Decree. Then if the Decree be not a Title veſted, he has confeſſed Aſſets, for he ſet forth only a Reverſion depending upon 2 Point.

a Freehold, and does not ſhew there was a Freehold; and if the Aſſignment of Dower were good, pro Tanto, yet here is two Thirds whereof ſhe was not endowed, and that is only charged with an Eſtate for Years, and that is enough to charge him with a general Judgment. Plowd. 420 comes home very near to this Caſe in every Reſpect. It is Debt againſt an Heir if he plead any Plea, that is not a ſufficient Bar, if he ſuffer Judgment to go againſt him by nihil Dicit, or Confeſſion, it ſhall be a general Judgment; becauſe there is no way for the Heir to defend himſelf, but by ſetting forth the Truth, what Aſſets he has, where they lie, and ſo open the Truth of the Caſe to the Plaintiff; and let him take what Benefit he can of it, and if he does not do this there ought to be a general Judgment againſt him, as well as upon demurrer. This Authority was murmured at, but there is not a Word of it but what is good Law, Vide Mod. 520, 3 Cro. 639, the ſame Caſe. If the Heir will confeſs that he has Aſſets by Deſcent, in ſuch and ſuch Places, beſides which he has no more, and the Iſſue is that he has more, tho' he confeſſes enough; yet if more Aſſets be found, there ſhall be a general Judgment. 2 Leon. Vent. 11.

Cumberb. 162.

In this Caſe, it is not in the Power of the Court to give ſpecial Judgment, if the Plaintiff does not deſire it, for it would be erroneous. 2 Rol. Abridg. 71. If it be by Conſent of the Plaintiff, they may give a ſpecial Judgment: But how can we do ſo here? if it be upon the Confeſſion, we muſt allow the Plea good, that is, that 'tis a Reverſion expectant upon an Eſtate for Life, when it does appear that it is not ſo. If he had pleaded that he had only a Reverſion expectant upon an Eſtate for Life, and the Plaintiff had replied that the Tenant was Dead or had ſurrendered, and it is ſo found by Verdict; ſure there muſt be a general Judgment, becauſe he has pleaded a falſe Plea in Bar of the Plaintiff's Execution; and it appearing to us, that there never was ſuch an Eſtate for Life in Being, it is of the ſame Effect as if a Verdict had ſo found it. Let the Plaintiff have a general Judgment.

Judgment.

Proceſs of Hundred-Court. *Vide antea* Fol. 1 and the Caſes there cited. *Reddidit ſe.*

Per Holt, Lev. Fac. is not the proper Proceſs of a Hundred-Court, but it is a Diſtringas, but Levari may be by Cuſtom.

Poſt. 77, 98.

Upon bringing the Bail-piece to Mr. Clark, and giving him Satisfaction that the Principal rendred himſelf before, or upon the Return of the ſecond Sci. Fac. he will give you a Diſcharge or Superſedeas of the Sci. Fac. per Holt.

1 *Domi-*

Domina Regina & Ogden.

AN Order affirmed at the Quarter-Sessions of the Peace for the County of Dorset, it was an Order of two Justices of the Peace of the said County, founded upon a Clause in the Act of Parliament, in the 8 W. 3. for enlarging the Common Highways, Vide the Clause: There was an Ad quod Dampnum sued out, and an Ad nullius Dampnum returned; and an Order thereupon made for the inclosing such an Ancient Highway, and setting out a Place for another in such a Place; and an Appeal from this Order to the Sessions, and there the Inclosure is declared, to be a great Nusance to the whole Country, several Exceptions were taken to the Order of the Justices at the Quarter-Sessions.

Highway. See 1 Hawk. 201, 202. Cro. Car. 266, 267. Vaugh. 341. Yelv. 141, 142.

Ad quod Dampnum. See the Stat. 8, 9. W. 3. c. 15. 1 Hawk. 208. Order of Sessions.

1. That it did not appear to have been at the next Quarter Sessions after the Order made. Exceptions.

2. An Exception was taken to the whole Purport of the Order; that it did not Appear by it, what the Way to be inclosed was, or what the new Way, without which there was no Certainty, what the Subject Matter of the Appeal was; for this being a Method that the Satute has ordained for the Determination, and making a Final End of the Matter, sure then that Thing whereof a Final End is made, ought to Appear very Certain.

It is fit to consider the very Statute, what Alterations are made by it, and what not.

1. It is to be known that this Clause does not alter at all the Nature of the Writ, of Ad quod Dampnum; but that Writ is the same as it was before, and to be proceeded on, as if this Statute had not been made; there are not any words in the Statute, that do alter the Nature of the Writ, nor the Method of Proceeding thereupon, tho' there be something added.

2. This Writ after it is executed, is to be returned into the Court of Chancery; and in that Case the Sheriff having taken an Inquisition, makes a Return thereof indilate; so are the Words of the Writ, so that now the Writ is returnable

able into Chancery; and for this Reason it is, that if the Quee seen thereby, that there is no Harm to Enclose, that she may grant Leave to do it, and in Order to that the Inquisitionmust find that it is Ad Dampnum nullius, and there can be no Foundation of inclosing without such a Return.

3. Without Licence or Grant to inclose the old way, tho' the Inquisition find that such Inclosure would redound to the Damage of none, and it be so returned; yet none could lawfully Inclose, or if he did he would be guilty of a Nusance: For it is not the Inquisition and Return, that gave any Authority to inclose, but the Licence of the Crown grounded thereupon: And when there was such an Inquisition, Return, and Licence, without any Traverse of the Inquisition; upon Inclosure made, there was an Alteration made of the Way and the old Way ceased to be a Way, and the New one set out, became the common Highway.

It would be a strange Construction upon that Clause of the Statute, that a Man should have a Right to inclose without a Licence, to make so great an Alteration; as to make the finding of an Inquisition, tantamount to a Royal Licence: For tho' the Inquisition does not find it to the Damage of any Person; yet it is in the Election of the King or Queen, to let the old one stand or not. And there is nothing in this Act to induce us, to make so great a Leap as that is.

Suppose, an Inquisition be taken, and returned into Chancery, that would be a Foundation for a Licence; for the Words of a Writ are, what Harm would it be to us, or to any of our Subjects that such a Way describing it in Certainty, should be inclosed, and a new one describing in the same Manner set out: But you will say that the Ad quod Damnum, is now under the Conusance of the Justice of Peace, and an Appeal thereupon given to the Sessions; how can it then go into Chancery? Very well, if the Sheriff, after Inquisition taken, does get it inrolled as the Statute requires; returns it into Chancery, as he is bound to do by the Command of the Writ: And all that the Statute requires is, that the Inquisition be enrolled, at the Next Quarter-Sessions; and if it be, and no Appeal from it, or if there be an Appeal and a Judgment thereupon, for the Inquisition, the Traverse is thereby taken away: And it is a good Plea to a Traverse, that the Inquisition was enrolled, and no

Ap-

Appeal, or that an Appeal was brought: And the Judgment for the Inquiſition.

It may be aſked, when the Appeal is to be brought; the Words of the Statute are expreſs, that it be at the next Seſſions after the Inquiſition found; but they ſay farther, that it is to be by the Perſon grieved by the Incloſure; ſo that you muſt takes both the Word together, that is, it muſt be at the next Seſſions after the Inquiſition taken, and the Incloſure for it can't be ſooner; for till Incloſure there is no Grievance: And it muſt be ſomebody aggrieved by the Incloſure. Here is indeed an Incloſure; but it is not an Incloſure by Virtue of the Inquiſition, according to the Ad quod Damnum, for it is without Licence; and not by the Authority of the Act of Parliament; and therefore not ſuch, as does oblige the Party to Appeal. Therefore per Totam Cur. the Inquiſition was quaſhed. *Vide antea* 45. Inquiſition quaſhed.

Per Cur. & omnes Clericos, It is irregular to ſign a Judgment, without ſerving a Rule to bring in a Record. And a Judgment was ſet aſide for want of it. Signing Judgment.

No Man, tho' by Conſent of Parties, can be Attorney of both ſides, per Cur. For Conſent of Parties cannot change the Law, &c. Attornies.

The Court many Times will fix a tranſitory Action, where the Defendant has not a Probability of an indifferent Trial. Tranſitory Action. *Inſt. Leg.* 104. Cumberb. 47, 48, 483.

Domina Regina & Clerk.

PER Cur. an Information tried at the Bar is not within the late Statute of giving Coſts againſt the Proſecutor; for that ſays, the Party ſhall enter into a Recognizance of 20 l. And that Party ſhall have a Sci. Fac. thereupon, but 20 l. would be too ſmall Coſts, in the Caſe of a Trial at Bar. Information. Coſts.

Per Holt, If a Judge who tried a Cauſe, be ſince put out, upon a Motion made for a new Trial, he may certify the Court, what his Opinion was, when he tried the Cauſe. Judge's certificate.

Term

Term. S. Michaelis,

Anno 1 Annæ.

Elvis & Mercato.

S. C. 1 Salk. 314.

Attorney.

Attachment.

IN a Motion to put of a Trial, the Attorney made an Offer Die Lunæ, to bring Money into Court, and a Rule thereupon, that the other ſide ſhould ſhew Cauſe; why the Trial ſhould not be put of on thoſe Terms, at which Day the other ſide conſented; ſo the Rule was drawn Ex conſenſu, and the Trial put off: And now the Money not having been brought into Court, an Attachment was granted againſt the Attorney tho' it was objected by Mountague, That tho' the Attorney had made ſuch a Propoſal, yet he had not conſented the ſecond Day. But per Cur.

1. He ſhall not aver againſt the Rule, which ſays it was by Conſent.

6 Mod. 42, 86.

2. We will not have our Attornies trifle with us, and make a Propoſal to Day, and fly from it to Morrow.

Read & Tregeagle.

Judgment and Execution.

Poſt. 118. 6 Mod. 184,

R gave a Bond and Judgment to T. defeaſanced upon Payment of Money on ſuch a Day certain; and it was agreed by the ſame Deed between the Parties, that T. ſhould not ſue any Execution againſt R. before the 16th of July; the 15th of June T. ſues out a Fi. Fac. delivers it to the Sheriff, before the 16th of July, and gets it executed on the 16th of July, upon Demand and Non-payment. And Broderick moved to ſet it aſide, for that the Plaintiff by breaking his Agreement, had in-

incapacitated the Defendant to perform; for by the Delivery of the Writ to the Sheriff, the Property of them was bound; so that he could not sell any of them, to raise the Money.

But per Cur. Since it is for a just Debt, and Judgment executed, we will not now undo any thing; for perhaps, that would be a Means to frustrate the Judgment: And besides, you have no Oath, that any Purchaser was deterred, by Reason of taking out and delivering the Writ; and here R. had a good Remedy, by Action of Covenant.

And my Lord C. J. remembred the like Case; where Covenant was brought, and Damages thereupon recovered: And they all said the Rule was, where a Mischief was on either side, and a Remedy on the one, and none on the other, they would suffer that to continue, against which there was a Remedy. *Regula.*

And Holt said, An Audita querela would not lie in this Case: because that would pull up all by the Roots, and avoid the whole Judgment. *Audita Querela.*

After Writ of Error sued out, if a Sci. Fac. be brought against the Plaintiff in Error, to shew Cause why there should not be Execution on the Judgment; the End of it is, to compel the Plaintiff to assign Errors; Execution ought not in Strictness to be taken out, till non Pros' entered. Error.

Assumpsit by Administrator, for Goods sold and delivered by his Intestate, and a Promise likewise to him. Defendant pleads non Assumpsit infra sex annos to the Plaintiff; Plaintiff replies a Promise to the Intestate within six Years, and Issue thereupon, and Verdict for Plaintiff. And this being moved in Arrest of Judgment, and appearing thus upon the Record of nisi prius; Per Cur. If the Paper-Book, or Copy of the Issue was right, we will amend it; and made a Question, whether it be not within the Statute of Oxford? Amendment. *Vide post.* 156

Holt, Confession is the worst sort of Evidence that is, if there be no Proof of a Transaction or Dealing, or at least a Probability of dealing between them; as here there was, the one being a Sailor, and the other a Captain of a Ship. Evidence.

S. C. 1 Sal. 258.

Withers & Harris.

Execution. Cumberb. 250. *Antea* 5, 7. *Poſt.* 68, 69.

HOLT, If one will take out Execution within a Year after Judgment, he may continue it down after the Year by Vicecomes non miſit breve, without being put to a Sci' Fac'. And he ſaid, he had known it adjudged on Debate, there was no need of a Sci' Fac' to have Execution in Ejectment after the Year and a Day: But he ſaid he never could agree with that Opinion, nor ſee any Reaſon for it. For in all real Actions, as upon Fine Sur conceſſit, there muſt be a Sci' Fac' after the Year; and all the Court were of the ſame Opinion: But it was referr'd to the Maſter to examine, Whether it was after the Year or not, or whether there had been a Vicecomes non miſit breve, of any Execution taken out within the Year? And it appearing on Examination to be after a Year and a Day, no Proceſs taken out within the Year, held, it could not be the Proceſs in Ejectment; for Execution is an Habere Fac' poſſeſſionem for the Term, and a Fi' Fa' for Damages.

And Proceſs thereon in Ejectment.

Attorney.

Per eundem, You can't change your Attorney without Leave of Court, to be obtained on Motion, though he be ever ſo great a Cheat.

Wood & Sutton, *Marſhal of the Court.*

Bail. See 6 Mod. 57, 91. 1 Sal. 2.

JUdgment was againſt him in Debt for an Eſcape; and he brought Writ of Error, and put in ſham Bail, and ſo on, toties quoties, they were excepted againſt. Upon Affidavit of this, a Rule was made peremptorily for his putting in good Bail on ſuch a Day, or elſe Execution to go.

Iſſue. 2 Sal, 515.

When there is a Special Iſſue tendered, and the other Side joins in it, the Book is ſent back to the Defendant's Attorney; and he has four Days given him, either to join in the Iſſue or to wave it, and give the General one; and after the four Days, he ought to ſend the Paper back without any Demand of the Attorney of the other Side; and if he fails in it, the other may ſign Judgment for want of joining in Iſſue: But if the Attorney will take back the Book after the four Days, and receives Money for entering the

Iſſue or making up the Record, he ſhall not after enter his Judgment. Per Cur' & Clericos.

A Plea in Abatement was overuled, and a Reſpondeas Ouſter awarded, and the General Iſſue pleaded: It was a Queſtion, If the Defendant's Attorney ſhould deliver a Copy of the Iſſue, Declaration, and the Record of the Plea in Abatement to the Plaintiff's Attorney and pay for it? And the printed Rule of the Court was read, and the Court would conſider of it, though the conſtant Practice were agreed to be, that the Defendant's Attorney ſhould do it. And it was made a Rule, That it ſuffice for the Future, after Plea in Abatement overuled and General Iſſue pleaded, for the Defendant's Attorney to deliver a Copy of the Declaration and Iſſue, without any Copy of the Plea in Abatement. Note, It is a conſtant Practice for a Plaintiff to ſign Judgment by Default, for want of a Copy of the Iſſue and paying for it, and ſo execute a Writ of Enquiry.

Abatement.

Copy of the Iſſue.

Rule of Court.

—— & Tempeſt.

DEBT upon a Bond, a ſpecial Non eſt factum pleaded, with a Concluſion of Et hoc parat' eſt verificare, beſides the Plea referred to a Condition in the Bond without any Oyer had of it, and a Demurrer for both Cauſes. As to the Firſt, it was ſaid, It was either way, vedel't, to aver or to conclude to the Country. And Keb. 3. fol. 132. Hill. 25 Car. 2. was quoted. And the Caſe of Day & Roberts in this Court in the Year 93. to which Opinion Holt inclin'd, as if in Bar to a Debt upon a Bond, one ſhould ſay, That he delivered it as an Eſcrow, to be delivered over as his Deed upon ſuch a Thing to be done; which being not done, the Plaintiff got the Deed, Et ſic non eſt factum, Et hoc parat' eſt, &c. and leave the Plaintiff to tender Iſſue in the Replication. As to the other it ſeemed a fatal Exception. And the Plaintiff had Judgment.

Non eſt factum ſpecially pleaded. 6 Mod. 217. 218. *Vide* 1 Sal. 274. Demurrer. *Inſt. Leg.* 576. Judgment.

Sci' Fac' againſt Bail who had rendered their Principal before a Judge, but he immediately eſcaped, and they moved to file the Bail-piece, in Order to plead a Render of Principal. Per Cur. We can't deny Leave to file the Bail-piece, for without it they may plead Nul tiel Record' to the Sci. Fac'; for one can't proceed upon the Sci' Fac' without Bail-piece be filed. Per Holt

Bail render the principal. *Poſt.* 77, 85, 98.

Execution by Tipſtaff. *Qr.* 3 Sal. 46.

Per Holt, If we ſee one, againſt whom there is a Judgment of this Court, walk in Weſtminſter-Hall, we may ſend our Officer to take him up if the Plaintiff deſire it, without a Writ of Execution.

Falſe Impriſonment. See 1 Sid. 229. Moor 711. 3 Cro. 180, 408. 3 Sal. 46.

Per Holt, If one be arreſted after the Return of a Writ, falſe Impriſonment lies againſt him that does ſo arreſt him. Here Complaint was made to the Court, That one was arreſted in Trinity-Term, by Vertue of a Writ returnable in Eaſter-Term, and a Bail-Bond taken for Appearance at the Time of the Return of the Writ.

Per Cur', There is good Matter to plead againſt an Action upon the Statute of 23 H. 8. And though Bond be antedated, yet it may well be done with a primo Deliberat' at the true Time; and the Fact was referr'd to the Maſter to examine, in order to puniſh the Officer for Oppreſſion.

Fuller's *Caſe*.

Execution. *Poſt.* 114. Priſoner.

HE being committed to the Queen's Bench for a Fine to the Queen, and charged in Execution at the Suit of ſeveral others, the Marſhal had a Jealouſy of him and put Irons upon him; upon which he writ a Letter to the Attorney General craving his Help; which being communicated to the Court, They ordered the Marſhal to keep him according to Law, declaring, That if he died through cruel Uſage, it would be Murder in the Jailor: But owning alſo, he might juſtify putting him in Irons if he feared an Eſcape, or if he were otherwiſe unruly.

Domina Regina & Buckbridge.

Indictment quaſh'd. See in Sal. 382. 6 Mod. 256, 311.

INdictment againſt him, for that he was Communis poculator, Anglice, a common Drunkard, and Communis profanus Jurator & perturbator pacis & aſſiduus Domorum tiplatoriarum frequentator, Anglice, a frequenter of Tippling Houſes, and quaſhed; for that the Charge was too general and looſe.

Feme Sole having a Warrant of Attorney to enter Judgment unto her, and married before it was entered; King moved, That it might be entered, and the Judgment should be to the Husband and Wife; and he took a Difference between such a Warrant made by a Feme Sole, and one made to her; for a Marriage in the first Place would be a Countermand of the Warrant, as being to the Disadvantage of the Husband. And for this he quoted a Case in Point, Pasch. 9. W. 3. where Leave was denied to enter against Husband and Wife, upon a Warrant by the Wife before Marriage; and compared it to the Case of a Grant of a Reversion by a Feme Sole, who marries another before Attornment, the Grant is countermanded: But if she had granted it to A. and before Attornment had married him, an Attornment after were good, 1 Inst. 310. 4 Co. 61. a. and to this the Court inclined. But upon reading of the Warrant, it appear'd to be to enter Judgment as of such a Term which was now past.

Warrant of Attorney, *Baron* and *Feme*. 2 Sand. 213. Cumberba. 242.

Watts & Rosewell.

S. C. 1 Sal. 274.

The Case being again moved, and 1 Vent. 210. quoted as an Authority in Point, That the Conclusion was bad; for that by the general Conclusion he had waved the special Matter of the Plea: For it is a Rule in Pleading, That when a Man Pleads Special Matter and concludes generally, he thereby waves the Special Matter. And it was agreed on both Sides, That here he might have pleaded general. V. 1 Vent. 210. Keb. 140. was quoted contra. But there being no Judgment in Keb. the Plaintiff had Judgment nisi. Absente Holt.

Conclusion of the Plea. *Post.* 105. Cumberb. 86. 311, 479. 2 Sand. 190. 1 Sand. 283. 1 Sal. 2, 3. 2 Sal. 520, 565, 629. 3 Sal. 208. 209, 211, &c. *Inst. Leg.* 475, 476. &c.

If a Judge at a Trial does erroneously over-rule a Matter offered in Evidence, the regular Way is to tender a Bill of Exception; yet if upon such a Matter, the Party will suffer the Trial to go against him, it is good Cause of a new Trial. Per Cur'.

Bill of Exceptions.

New Trial. *Post.* 64, 117.

In what Cases new Trials have been granted. See Cumberba. 18, 75. 357, 442. 6 Mod. 22. 307. 2 Sal. 645, 648. 649. 2 Show. 155, 165. 1 Lev. iii.

In what Cases denyed. See Cumberba. 14, 17, 84. 106, 170. 6 Mod. 18. 2 Sal. 644, to 650, 653. 1 Sal. 273. 1 Show. 336. 1 Lev. 9, 97, 124. 3 Sal. 361, &c.

Hyon & Ballard.

PRoceedings on Bail-Bond for want of Bail above; upon Motion to ſtay Proceedings, Defendant produced a Releaſe under Seal of the Plaintiff, and thereupon the Plaintiff's Attorney ſuſpecting it, conſented to deliver a Declaration forthwith, and that the Defendant ſhould plead the Releaſe, and ſo try it; which being done, the Plaintiff was nonſuited at the Trial; but after, it being diſcovered to be a notorious Forgery, a Motion was made for a new Trial: But the Court ſaid, They could make no Rule in the Caſe, the Plaintiff being out of Court upon the Nonſuit; but ſince the Rule to ſtay Proceedings upon the Bail-Bond was not abſolute, but till the Court ſhould farther direct, That, ſaid the Court, was ſtill before them; and therefore, let the Rule be, That they ſhew Cauſe why Proceedings ſhould not go on. Quod Nota.

New Trial.

Domina Regina & Inhab' de Paroch. de Caple *in* Surrey.

ORder of two Juſtices was to move a Man and his two Children out of the Pariſh of C. where he might become chargeable, he having not rented a Tenement of 10l. a Year. Held, That ſaying they might become chargeable, was not well; but it ſhould be, That they were likely to become chargeable: But it was held, That ſaying they had not rented a Tenement of 10l. a Year did ſuffice. It was held bad as to the Children, for they are only removeable as Perſons not ſettled and likely to become chargeable, or ſo young as they are not able to provide for themſelves: And it was quaſhed as to the Children.

Order for Removal quaſhed.

Domina Regina & Sir John Bucknell.

INdictment was againſt him for not repairing of a certain Bridge, &c. which he was bound to repair, Eo quod he was Dominus Manerii de la More. And it being moved hither after Conviction, it was moved by Broderick, That there were but three Ways that a Man could be liable to ſuch a Charge, by his Deed, by Preſcription, or ratione tenuræ;

Indictment for not repairing Bridges. *Vide poſt.* 98, 99.

that this here could be none of them; ergo bad. v. Stil. 400. Latch. 106. Noy. 93. 1 Sal. 358, 359. 6 Mod. 150, 307, 255.

Holt, A Man is not bound to repair a Bridge, because he has a Manor, or is Lord of a Manor. *Post* 98.

But it must be said, That this is some Charge upon the Manor that can oblige the Man to repair, and that only can be one of these two Ways:

1. That he held the Manor by the Service of repairing the Bridge, &c. that is, ratione tenuræ; and this being a Charge upon the Possession, is like any other Service for which the Tenant in Possession is chargeable. Every Tenant in Possession, be he but Tenant for Years or at Will, is bound to repair; and immediately upon Default of Repair, he is indictable.

2. The other way of Charge is by Prescription, and then it must be the Tertenant; and all those whose Estate he has, did use and were bound to repair; and here you neither shew Tenure or Prescription. But as to charge to repair a Bridge, it will be well to say, that omnes occupat'. But where one goes to charge the Estate of another with any Thing for his own Benefit, he must either say, That he and all those whose Estate, &c. or at least omnes terr' Tenentes: And here Judgment staid per Cur'. *Vide* 6 Mod. 4.

Domina Regina & Harris.

AN Order of Justices for discharging an Apprentice upon the Statute of 5 Eliz. was quashed, it being not signed by them as that Statute requires. And Cheshire said, That one Piece of Wax could be the several Seal of several People, putting their Seals severally to it. Apprentice: Order quashed.

Post Denning & Close.

A Plaint was levied in an inferior Court before the Debt contracted, and an Arrest upon a Process upon the Plaint adjudged ill: Per Cur'. Arrest: Inferior Court.

Writ of Enquiry set aside daily for excessive Damages. Writ of Enquiry.

Lucy

S. C. 1 Sal. 294, 134, 136.

Lucy & *Biſhop of St.* David's. *Vide poſt.* 117.

Excom. cap. Retorn.

HE was taken up by an Excommunicato cap. and in the Gaol of Newgate; and the Writ being not yet retornable, he removed himſelf up by Habeas Corpus: And per Cur. He has no Day in Court, till the Writ of Excommunicat. cap. be actually retorned, for the Command of the Writ was, to take and keep him; and to retorn the Writ, how he had executed it: But upon ſuch Retorn likewiſe the Party has no Day in Court, but muſt bring himſelf in by Habeas Corpus. And before he can plead to the Writ, it muſt be retorned here on Record, for the Writ is to be adjudged good or quaſhed; as it is good or bad upon their Plea, and the enrolling of the Writ on the Record, at its Iſſuing out, is not enough to give Day in Court, or to appear to, and plead. And the Counſel of the other ſide inſiſted on it; and obtained Leave to examine the Hab. Corp. which did recite the Writ of cap. with the Writ: And here it was complained of, that a double Writ of Excom. cap. was taken out with a double Retorn, to the end if it were taken by one and diſcharged, he might be taken up again by the other, and ſo vexed; which Practice the Court did very much diſapprove of, tho' it was agreed, there might be two if there were two Excommunications for the ſame Cauſe: So he was remanded. But being brought up again at the Day on which the Writ was retornable, and the Writ being then retorned, he offered a Plea in Parchment, which reciting the ſeveral Writs of Excom. cap. by which he had been taken up and detained; one upon a ſignificavit of Excommunication for not paying Coſts, upon a Sentence againſt him before the Archbiſhop, upon his Ordinary Juriſdiction, and the other upon a ſignificavit, upon a Sentence on an Appeal of the former Sentence before the Delegates: And his Plea was, that he was made Biſhop of St. David's, and called to Parliament by Writ at ſuch a Time, after that he ſate in Parliament as a Peer; and ſo concluded in Abatement, becauſe a cap. did not lie againſt a Peer.

Plea theretc.

Significavit. *Poſt.* 57, 117.

Note, He further ſet forth in his Plea, that he was brought up to this Court by Hab. Corp. and turned over to the Cuſtody of the Marſhal, and then pleaded; but the Truth being otherwiſe, the Court made him ſtrike that Part out of his Plea; for the Filing of an Habeas Corp. here did not make

him a Priſoner to the Marſhal; for the Court notwithſtanding, may remand him to Newgate. Another Matter in their Plea was: It begun with a pet' Judicium de Brevi pred', concluding with unde pet' Judicium, &c. But the Court held that well, the Plea having begun Right.

Note, The Queſtion intended was, If a Peer ſhould be excommunicated and continue ſo 40 Days, what Remedy ſhall there be againſt him? And it was ſaid, there was none but that of being expelled the Pales of the Church, and the Communion of the Faithful: But Powell ſaid, he knew no Law but a Cap. Excom. lay againſt a Biſhop, or other Lord: But Holt, The Queſtion is not before us; and therefore let us not meddle with it: And he ſaid, he did not believe they were in Earneſt with their Plea. Queſtion.

But it was excepted to the ſignificavit as recited in their Plea, and ſo was the Writ of Excom. cap. too, that he was condemned in Coſts, in quodam Negotio Officii ſive correctionis, which was ſaid to be ill for Incertainty; for it was ſaid, the Writ of Excom. cap. ought to recite the ſignificavit Right, that the Court might know, what Proceſs to award upon the Statute of 5 Eliz. which in all Caſes of Excommunication, orders the Writ to be ſent into this Court, and entered on the Roll here; and then delivered to the Sheriff; and in Caſe he be not taken thereupon, to Iſſue another cap. and this in all Caſes, except the nine mentioned in the Statute; but if it be for any of the nine mentioned in the Statute; then upon a non eſt inventus returned, to iſſue a new Proceſs with Proclamation and Penalty. So that the Court can't here tell what Proceſs to iſſue, without the Cauſe be certainly mentioned in the ſignificavit, recited in the Excom. cap. that is, whether it be one of the nine Cauſes or not: And they can't judge on the Original ſignificavit, for that is not here but in Chancery; and Chancery can't relieve them thereupon, becauſe they are not to make the Proceſs upon it; but this Court is. But before the ſaid Statute, if the ſignificavit had not certainly mentioned the Cauſe, it was ſufficient. *Significavit.* Exceptions.

And Holt put the Caſe of Fowler a Quaker, in this Court, ſome Years before he was excommunicated, pro ſubſtractione decimarum ſive alior. Jurium Eccleſiaſticor. which likewiſe was judged uncertain: And there, upon Conſideration, 1 Salk. 293.

it was reſolved, that before that Statute of the 5th of the Queen, the Cauſe need not be mentioned in the Writ of Excom. cap. For there if the ſignificavit was not good, they applied to Chancery, where the Writ is returnable; and there it was quaſhed. But the Statute of 5 El. has made great Alterations; which Statute orders, that the Writ be brought into this Court; and enrolled here before it was delivered to the Sheriff; ſo the Power that was in Chancery before the Statute is now taken from it, and given to this Court; for if the Writ be returned non eſt Inventus, the Alias cap. ſhall go out of this Court; if it be one of the nine Cauſes, ſays the Statute, there, upon Return of non eſt Inventus, there muſt be Proceſs, with Proclamation and Penalty; ſo there muſt be an Alias cap. if it be not one of the nine Cauſes, and if it be, there muſt be an Alias Proceſs, with further Proclamation and Penalty; and this muſt now be the Right way by neceſſary Conſequence of Law: For if the ſignificavit be in Chancery and bad, there can be no Remedy there, for the Writ is here, and the Proceſs is to be made here; and they can't ſupercede a Writ returnable here, eſpecially after the Court here is poſſeſſed of it. Then if the Writ be there, how can we give Remedy according to the Statute, if we do not know what the Cauſe of Excommunication is? And how can we know that otherwiſe, but by the Writ reciting the ſignificavit? for we can't know by the Writ in Chancery, which we have not; and it ought to appear to us to be a Cauſe of Eccleſiaſtical Conuſance, as it ought to be: And he quoted Trollop's Caſe. In the Caſe of Fowler, the Writ was quaſhed and he diſcharged; but that can't be done till the Writ be returned, for it can't be done on the Entry made on the Roll, at the Iſſuing of it out. And the Caſe of King and Hill, Trin. 12 W. 3 was, in quodam Negotia concernen. Eruditionem ſive inſtructionem liberorum, and it was quaſhed for Incertainty. And whereas in this Caſe, Powell objected the Caſe in Cro. Car. 196. for there the Writ only ſaid, for Nonpayment of Coſts, and held well enough.

Holt ſaid, That he had, upon the Debate and Conſideration of the former Caſes, viewed many Precedents; ſome immediately after the Statute was made, and all of them mentioning the Cauſe in Certainty; and beſides the Reaſon of the Thing made it abſolutely neceſſary; for to what Purpoſe ſhould the Statute enable us to iſſue Proceſs, and to vary our Proceſs, according to the Nature of the Offence, if

if we have no means to know the Offence? And he said the Writ in the Register, was quite altered by the Statute, and the Writ is only pro contumacia: And he said further, We are not to issue Process here, as Instruments or Conduit-pipes, but Judicially as Judges: And it will not be an Objection to say, that we may award Process at all Hazards, and let the Party grieved come after and plead to it; for we will never grant an ill Writ, that the Party may avoid it in pleading. And as to the Plea of Peerage, he said it was a foolish one; and the Writ and his sitting in Parliament signified nothing; for he was a Peer by being created Bishop, and the Writ and his Sitting in the House, added nothing to it. And Day being given to the Queen's Counsel, till Thursday following, to answer the Pleas, and object, the Bishop's Counsel moved to have him bailed, and quoted Latch. 174, 204. Mo. 406. Cro. Car. 501. where one was bailed after Plea pleaded; but the Court refused to bail him. And Powell said, It would be of ill Consequence to bail him, or if they should judge the Writ good, then they would bail a Man, not bailable by Law; and he was remanded to Gaol. And being brought up again, he insisted on his Plea; not waving however his Exception to the Writ. And now Broderick moved, that he ought not to be admitted to plead, by which perhaps the Matter might be finally determined in his Favour, without a Sci. Fac. to Mr. Lucy the Promoter, who had been at the Charge of the Prosecution; and by Consequence concerned in point of Costs, the Excommunication being for Non-payment of them: To which it was answered, that tho' the Writ, nor the Statute of the Queen, did require the Sheriff to bring him into Court upon the Return of the Writ; yet the Writ was returnable, and he coming in upon a Habeas Corpus, and pleading to the Writ, at the Day of the Return of it, the Court could not deny his Plea; and that he was not bound to bring a Sci. Fac. to which the Court inclined; but if he had come in after the Return of the Writ, and desired to plead for his Discharge, there perhaps a Sci. Fac. would be necessary. And Note, Here he had Oyer of the Writ returned before he put in his Plea, which was judged necessary. Note likewise, there were two other Writs out, and the Sheriff returned upon the Habeas Corpus, that he had him in Custody upon both of them; but the two latter were not yet returnable, one of them being returnable the last Day of the Term. *Vide infra.*

And

Opinio Curiæ. And per Cur. his Plea could not go to them, they being not in Court till they were returned; for the Enrollment of them, is only before they are delivered out to inform the Court, that there are such Writs gone out; upon which if there be a Return of non est inventus, they may award a new Process, or if it be ill, when it comes back, to receive Plea or exception to it, and so quash it, and set the Party at Liberty; but still they are not the Writs of this Court, so as this Court can supercede them: And the Chancery neither can't supersede them, which was observed to be very inconvenient; for here *Note,* would be a Writ erroneously issued out, and it would be out of the Power of any Court of England to supercede it.

Vide Supra. So then the Plea being received, and going generally to the Writ, it was again questioned, whether there should not be a Sci. Fac. to the Promoter? And that there should, were quoted the Case of Codrington ver. Rodman Jobes, and 1 Cro. 168. 2 Rol. Ab. And he compared it to the Case of pleading a Pardon, where there must be a Sci. Fac. And Holt said, that in Case of Pardon by Parliament, tho' it extend to all the King's Subjects; yet the Court is not bound to take Notice of it, if it be not pleaded, if the very Act does not expressly command them to do it; and the Court said, that the Consideration of a Promoter in this Case, in Regard to his Costs, would be different from a Case, where one sues for Tithes or for Defamation, or the like; for there the whole Suit is the Plaintiff's: But here the Suit was the Queen's, and Lucy only Promoter.

Opinio Curiæ. Per Cur. One may have a Day given him upon a Hab. Corp. for the Queen, because she is always present in Court. And if a Man outlawed, be taken upon a Cap. utlagatum, and brought in Custody into Court, upon the Return of it, that is a sufficient Day for the Defendant to plead against the King: And yet there he can't plead to have Pardon allowed, without a Sci. Fac. against the Party to the Original Suit, which Sci. Fac. is to be taken out, and grounded upon the Letters Patents of Pardon suggested; but the present Case is not like that, for here the Promoter is not such a Person as ought to have a Day in Court, before the Plea on the Excom. cap. be determined. And because they insisted upon the Plea here, the King's Counsel had Time ad respondend to their Plea. Note, It was not ad replacitandum. And here again

agan they prayed he might be bailed; and for Authorities were quoted 1 Cro. 507, 552, 558. 1 Bul. 122. Latch. 174.

Holt, It has been done, but it is Matter discretionary in the Court, whether they will do it or not, And why shall they do it upon such a Plea as this, which is meer Fact?

And though Powell said, by the Statute of W. 2. he ought not to be bailed; yet it was agreed, That Act did not absolutely bind the Court, but that they had a discretionary Power, and it was done not long ago in the Case of Davison, who was excommunicated for teaching without Licence.

Holt, If a Man be taken in Execution, and he bring an Audita querela, upon producing a Deed of Release, and Proof made thereof, we do Bail him though that be Matter of Fact: But here it is notoriously known that the Doctor is deprived, and some of the Judges of this Court have been of the Delegates when the Sentence was confirmed; and though judicially we can't take Notice of that Sentence, it not being judicially before us, yet we can take such Notice of it as to guide our Discretion by it. And it was said by the Court, That one had never been bailed in this Case, but upon such Exception taken as the Court plainly saw was not maintainable; but according to your Plea, a Bishop can't be excommunicated, so as to be any way more punishable than in the Primitive Times, before the Church had any Help of the Lay-Power. And he was committed again to Newgate, there being two other Writs on which he was taken, yet unreturned.

Note, After this and before the Day of Return of the other Writs, Mr. Attorney General came and informed the Court, That the Doctor had served a Rule on Sir Samuel Astry Clerk of the Crown, to reply to his Plea by such a Day; and at the Day he took out a peremptory Rule to plead, and served it on Mr. Attorney. And because the Court was acquainted by Mr. Attorney, That the Queen was concerned in the Point of Interest, there being an Information of Intrusion against him in the Exchequer for the Temporalities. And the Court were of Opinion, the first Rule ought to be on the Attorney General; and for that there never is a peremptory Rule in the 1st Instance, the Rule on Mr. Attorney was set aside; It was agreed, if this were a common Crown- Rule to reply.

Note. Cauſe, as a Riot, Miſdemeanor, &c. the Rule ought to be on Sir Samuel Aſtry: But here the Queen being concerned in Point of Intereſt, it ought to be on Mr. Attorney General. Vide poſt.

Fiſh & Horner.

Bail. IT was agreed, That if a Plaintiff accept of an Aſſignment of the Bail-Bond, and the Defendant put in the ſame Bail, that were put in to the Sheriff at the Return of the Writ, the Plaintiff cannot except againſt them; ſecus, where he has not taken an Aſſignment.

Debt on Judgment pending Error. *Vide Poſt.* 140, &c. *ib.* 1 Mod. 79. 4 Mod. 314. 5 Mod. 68. It was Debt upon a Judgment in the Common Pleas pending a Writ of Error, and the Writ of Error pleaded in Abatement; and to maintain the Plea, the Caſe of Cremer and Wickett, lately in this Court, was cited. But per Powell, It has been often attempted, but never could obtain; and ſo, he ſaid, it had been reſolved by all the Judges upon Conſideration had: But he ſaid, the Court would diſcountenance ſuch Proceedings; and therefore would not hold the Party to Bail.

Time to plead in Abatement. See 2 Salk. 517. Cumberba. 19. 251, 253. Note here, upon Debate about the Time in which one might plead in Abatement. Mr. Clarke the Secondary ſaid, That it had been ſettled here, that if a Declaration be delivered the laſt Day of a Term, the Defendant ſhall have four Days in a ſubſequent Term to plead in Abatement. And if a Declaration be delivered the laſt Day of a Term, as of a Precedent Term, the Party ſhall have four Days after the actual Delivery of the Declaration to plead in Abatement. But Judge Powell ſaid, One could not plead as of a Precedent Term without Imparlance; to which Mr. Clarke anſwered, he might enter it upon the Poſt-Roll without any Imparlance, and then the Plea is of that Term of which the Declaration is.

And Note, The Declaration muſt be as of that Term in which Bail is filed; and the Defendant in another Term is not bound to accept a Declaration as of a Term Precedent. And Mr. Clarke ſaid, That though by Conſent the Defendant does accept a Declaration the laſt Day of Trinity-Term as of Hillary-Term, yet he ſhall have four Days in Michaelmas-Term to plead in Abatement.

Bradford a Quaker-Woman, being charged on Oath to have published a Book called the Dutch Catechism, was bound to appear at the Old Baily, and obliged to give four Persons Bail in 200 l. each; but being a Feme Covert, she was not bound her self. Bail Feme Covert.

It is a standing Rule of Court, That in a Country Cause after an Assize, or in a Town Cause after two Terms, they never stop Proceedings upon a Bail-Bond upon filing common Bail. Stay Proceedings on Bail-Bonds.

Domina Regina & Lilly.

Indictment for Assault and Battery, and taking out of the Custody of A. and B. several Goods mentioned in the Indictment, quæ quidem bona one J. G. Serjeant at Mace to A. and B. then Sheriffs of London, virtute ejusdem Warranti, to them duly made in that Behalf, then had taken in debita juris forma, by Reason whereof they had the Goods in Cudody. Indictment, Property.

1. Exception: Not laid that the Property of the Goods was in any Body.

2. Not said that there was any Judgment or Execution thereupon: And for these Exceptions it was quashed.

My Lord Wharton & *Sir* John Robinson, *Mil'*.

A Trial at Bar concerning Boundaries of Lands: The Parson of the one Parish, the Land lying in two Parishes, was refused, because he might enlarge his own Parish, and by Consequence the Tithes. But one who about seven Years before had taken the Profits under the Title of one of the Parties, was received a Witness, because now he might plead the Statute of Limitation. Evidence, Witness, Parson's Bounds of the Parish.

Per Holt, If A. be bound in a Bond to B. to pay him 20 l. when B. puts in his Answer in Canc. there B. to bring Action, ought to give A. Notice of his having put in his Answer. Notice of Answer in *Canc.*

Tompkins

Thomkins & Hill.

Evidence, New Trial. *Vide* 6 Mod. 222, 242. *antea* 53. 2 Salk. 49. *Poſt.* 117.

IT was agreed by the Court, That if any Judge of Niſi prius allow or over-rule Evidence, which he ought not to have done, upon Application to the Court they will grant a new Trial; for all Writs of Niſi prius are under the Controul of the Court out of which they Iſſue. Vide antea 31, 53.

S. C. 1 Salk. 258. *Vid. ib.*

Withers & Harris.

Execution a Year and half after Judgment. *Ant.* 5, 7. 29, 50. Argument againſt the Execution.

JUdgment was in Ejectment upon Terms, That there ſhould not be Execution till ſuch a Time, which was a Year and a half after; and whether this Judgment could be executed without a Sci' Fac' was the ſole Queſtion.

Mountague, It can't; for in all Caſes both of real and perſonal Actions, if the Plaintiff take not Execution within the Year and Day, the Plaintiff is put to have his Sci' Fac'. A Year and a Day is the Time limited by Law for many Purpoſes, for proſecuting his Right; as to bring an Appeal, to make claim on a Fine by common Law; and at common Law in a real Action after Judgment, if the Party did not ſue Execution within a Year, he was put to a Sci' Fac'. In a perſonal Action, he was put to a new Action upon the Judgment until the Statute of W. 2. c. gave a Sci' Fac'. And the Reaſon was, becauſe, that in that Time ſeveral Things might happen, which would be a good Bar of Execution, if the Defendant had Opportunity to plead them, which Opportunity is now allowed by the Sci' Fac' but nothing is pleadable to a Writ of Execution. 1 Inſt. 290. b. 191. a. And the Reaſon why a Sci' Fac' lay at common Law, was, for that in a real Action one could have no other Advantage of his Judgment: But in a perſonal Action, where an Action would lie on a Judgment, no Sci' Fac' lay in that Caſe; and he ſaid, No reaſonable Diverſity could be made between the Caſe of Habere Fac' ſei'nam and this Proceſs in this reſpect: For if a Defendant in Ejectment had any Matter pleadable in Bar of Execution in one Caſe, why ſhould it not be ſo in the other? And he ſaid, there was but one Caſe that he could find, that afforded the leaſt Ground for ſuch Diſtinction; and that is, 1 Sid. 35. 2 Keb. 370. It was a Judgment in Ejectment in the Common Pleas, and Record brought hither by Error within the Year

and Day, ſays the Book. But the Court took it to be after the Year. The Plaintiff in Error died, and the Plaintiff in Ejectment took out Execution without a Sci. Fac. and a Superſedeas prayed. And the Court ſaid, that though after the Year there ought to be a Sci. Fac. to have Execution of the Damage, yet there need none to have Poſſeſſion of the Land, and the Book takes Notice that it was ſaid at Bar, the like Judgment had been before given in another Cauſe: But this was a Cauſe where the Defendant himſelf had brought a Writ of Error, and after, within a Year he died, ſo that it was not the Fault of the Plaintiff that Execution was not ſued ſooner. And upon Writ of Error brought, if the Plaintiff in Error diſcontinue his Writ, or it abates, or Judgment be affirmed, though in the mean Time above a Year paſs, yet the Plaintiff in Ejectment ſhall not there be put to a Sci. Fac. but where the Plaintiff himſelf delays for a Year, he ſhall be put to Sci. Fac. Cro. Eliz. 706, 5 Co. 88. Gernon's Caſe. In Debt upon an Eſcape, in which the Plaintiff declared on a Judgment had by him againſt A. in June before, and that he had proceeded againſt him till he had outlawed him; the Defendant brought a Writ of Error, and the Judgment was affirmed in the King's Bench, and within the Year the Defendant A. was taken by a Cap. Utlagat' and the Sheriff ſuffer'd him to eſcape; and judg'd that the Action did lie, and that he was in Execution at the Suit of the Plaintiff, immediately upon his being taken upon the Cap. Utlagat. without any Prayer, becauſe there were no Laches in him; but if there had been Laches in the Plaintiff, there he had not been in Execution, without a particular Prayer made by him to have him ſo in Execution, as in Caſe of Judgment in Debt: Where there is a Fine likewiſe for the King, if the Defendant be taken upon a Capias pro Fine after the Year, he ſhall not be in Execution for the Plaintiff without a Prayer for that Purpoſe, becauſe he had paſs'd his Time of a Year and a Day without taking out Execution; but if he had been ſo taken within the Year, he would be in Execution at his Suit preſently; and the Reaſon of theſe Caſes governs the Caſe before quoted out of Siderfin; for the Writ of Error being by the Defendant, which ſuſpended the Execution till after the Year and Day, the Plaintiff ſhall not thereby be put to his Sci. Fac. there being no Laches in him; and he quoted Cro. El. 416. 1 Ro. Ab. 899. Cro. Jac. 364. 15 H. 7, 5.

Argument for the Execution.

Peirre Williams, contra. 1. He agreed, That if the Plaintiff would recover his Damages, he ought to bring a Sci. Fac' before Execution of the Damage after the Year; for the Day, he said, that was not material, for the Damages are meerly personal; and therefore, no Execution can be of them in this Case without a Sci. Fac. as well as in Judgment in Debt. 2. He held, that the Plaintiff might go by way of Sci. Fac. if he please, but contended that it was not necessary to do so. He said, the Question in the Case in Sid. before quoted was, Whether a Sci. Fac. did lie? but it was allowed to be well without it. v. 2 Keb. 55. Cole's Case. And he said, an Habere fac. Possessionem lay at Common Law after the Year without a Sci. Fac. for in all Cases where a Man's Writ was determined by a Judgment, though he had pass'd a Year and a Day before Execution, yet he had some Benefit of his Judgment; and therefore, if it were in Debt, he had his Action upon the Judgment, being Matter of higher Nature than his first Cause of Action; if the Action were real, he had a Sci. Fac. But in this Case of Ejectment, if after the Year he could not have an Habere fac. Possessionem, he was without Remedy; for it being a personal Action, a Sci. Fac. did not lie before the Statute, and he could not have a new Action upon his Judgment so he had no Manner of Advantage of his Judgment, if he had pass'd the Year and Day; which were very absurd. And the Reason of a Sci. Fac. in a Real Action at the Common Law, was, for that the Party might have a Release or other Matter to plead; that it was thought hard in such Case to suffer Execution to be without an Opportunity of Pleading, because thereby the Freehold is not only devested, but the Party put to an Action of an higher Nature, which sometimes the Nature of his Case does not allow of: But that Reason holds not in Ejectment, for the worst that can be, is to bring a new Ejectment, which is determined within the half Year at most. He said, it was a Common Course of Mortgages for the more speedy getting Possession, to give Judgment in Ejectment; yet if after the Year, he should be put to his Sci. Fac. upon such Judgment, it could be of no great Use to him. And he said, That after Judgment one might enter and execute his own Judgment; and that the Assistance of the Sheriff was only to keep the Peace. 2 Sid. 156. 1 Ro. Rep. 313. Noy 71. Palm. 363.

Holt, C. J. As to the taking of Judgment in Ejectment by Mortgagee, it is a Thing not to be much encouraged, and I never knew any Body use it but on; and what Difference can there be between this and a real Action? for quoad the Term and Possession, it's real. At Common Law, if one had a Term of twenty Years to come and were turn'd out, his Remedy was Ejectment. As Assize or Writ of Right was for a Disseisin of the Fee-Simple or Freehold, so Ejectment was his Remedy when outed of his Term, and a Recovery in Ejectment bound the Term and Right of it; for if there were a Recovery by A. against B. it bound him, and he could not falsify it, but the Recovery made him a good Title; and so in Ejectment, a Recovery made a good Title; and the Party against whom, nor his Heirs, could not falsify it. Now if the Recovery were in a real Action, you can't sue Execution till after the Year without a Sci. Fac. And why not so in an Ejectment? For if you have a Judgment, and you let it lie still a Year and a Day, and it be not hinder'd by a Writ of Error, (for in such Case if the Plaintiff be nonsuited, or the Writ abate, or Judgment be affirmed, he may have Execution without a Sci. Fac.) you shall not execute it after the Year without a Sci. Fac. And as to the Statute of W. 2. He said he was not satisfy'd with Coke's Inference from it, that no Sci' Fac. did lie upon a Judgment in a personal Action; for that does not seem to have been so; for the Statute begins with its Enumerations, where it gives a Sci. Fac. First, of Records before such as had Power to take such Records as Recognizances, and then Fines executory, sive contractus, sive Conventiones, sive Obligationes, sive Servitia aut Consuetudines recognita, sive alia quæcunque Irrotulata, &c. V. 1 & 2 Co. and many other Books. By Coke's own Rule, where one begins with a Superior and then descends with a graduate Enumeration of Particulars, and concludes with these general Words, Et alia, the general Words shall comprehend nothing but what is of an inferior Nature to the first Degree or Particular of his Enumeration; and here to bring in a Judgment had in the Court above under the Et alia, would be contrary to that Rule: But without Doubt, it lay at common Law in real Actions, and why should the Law differ in the Case of Ejectment from any other Case? I can find no Reason for it. The Party has delay'd himself by not suing Execution in Time; and the Right of a Term is as much bound by a Judgment in Ejectment, as the Right of Land is in a Judgment in a real Action con-

Opinion of C. J.

Regula.

concerning the Freehold or Inheritance, and none can falsify such Recovery, or Recovery in a real Action, but the Issue in Tail by the Statute de Donis; and that only indirectly, as by saying that it was by Default, if the Truth be so: but he can't directly falsify it in the Point tryed; as that there was a faint Title and no Evidence; but a Stranger to a Recovery in a real Action may falsify, and so he may in Ejectment: And I see no Inconvenience to put them to a Sci. Fac. and I do believe it's not usual, for either the Party takes Execution presently within the Year, or he's delayed by Writ of Error; if the latter, he may have Execution after the Year, or he has sued Execution within the Year, and continued it by a Vicecomes non misit Breve.

Antea 5.

Death of one Plaintiff or Defendant.

Vide antea 39. *Post.* 94.

If there be two Plaintiffs in a Personal Action, and one of them dies, that shall not put the other to a Sci. Fac. or if one of the Defendants die; therefore likewise a Sci. Fac. is not necessary, because the same Party still remains on Record, and this has been lately adjudged upon solemn Debate here; I Doubt, but if there be a real Action and Judgment thereupon, and the Tenant dies within the Year, whether there can be Execution there, without a Sci. Fac. tho' it be within the Year: And I do not know any Authority in Point of it: In personal Action he shall not, because Execution is had against the Party Defendant, and you say in the Writ Fi. Fac. de Bonis & catallis of the Defendant, which can't be after his Death; or capias his Body, which can't also be after his Death. An Elegit is Terris Tenementis Bonis & catallis of the Defendant. But in real Action, you say nothing but Habere Fac. seisinam; therefore it seems to me that Execution may be there had within the Year, tho' Tenant die, without a Sci. Fac. and therefore you see Shelly's Case; where the Tenant died in the Morning the common Recovery was had; but that Case does not come up to my Purpose, because there the Writ of Execution might be tested of that Day. If in Personal Action Execution be sued out, the Death of the Defendant shall not bar the Execution of it; but if it were not out, there must be a Sci. Fac. But if Demandant die within the Year and Day, there must be a Sci. Fac. because they are other Parties who sue the Execution; and whether in Ejectment after Death of Defendant within a Year, you can sue Execution without a Sci. Fac. is the Question, but it seems you may; because in the Writ of Hab. Fac. possessionem, you don't say against whom the Execution is to be had, but it's only to

have the Poſſeſſion; but after a Year and Day, there ought to be a Sci' Fac' not only againſt the Defendant, but alſo againſt the Tertenants.

Powell agreed, That there ought to be a Sci' Fac. and that there was no Difference between this and other Caſes, but as to Coke's Opinion upon the Statute of W. 2. cap. that before the Statute it did not lie in perſonal Actions, he ſaid the Law had been ſo taken ever ſince; and he ſaid the Judgment in Ejectment is not of the Poſſeſſion, but of the Term; and it was the higheſt Writ a Leſſee for Years could have; and in a Writ of Annuity their muſt be a Sci' Fac' after the Year at Common Law; but he agreed, if Writ of Error be brought and ſuperſeded, or Plaintiff nonſuited, or it abate, and Judgment be affirmed; there, after the Year, a Plaintiff ſhall not be put to a Sci' Fac' to have Execution: And he ſaid, that in the Common Pleas, they never took Poſſeſſion upon a Judgment in Ejectment, without a Sci' Fac' after the Year; and he ſaid, where one took Judgment in Ejectment for Security of his Mortgage, he may ſecure his Execution after the Year, by taking Execution out within the Year; and entring Vicecomes non miſit breve: And this he ſaid was my Lady Allibon's Caſe. Of this Opinion were the other two Judges, and Holt declared, he ſubmitted to Coke's Opinion, tho' he ſaw no Reaſon for it; and he ſaid, that a Writ of Error did not ſuperſede the Poſſeſſion, or hinder the Party of his Entry, if it were lawful before; it does indeed lie upon the Hands of the Court, that they can't award Execution; but the Party may enter if he will, and that has been lately reſolved in the Caſe of Badger & Lloyd. Trin. 9. W. 3. B. R. Rot. 373. See 1 Salk. 232. Powell, &c. *Antea* 5, 7, 50.

Newſon & Bawldry.

DEclaration in Prohibition for Libelling in the Spiritual Court, for the Payment of a Pariſh-Rate, made at an Aſſembly of 20 Pariſhioners, 15 whereof were againſt the Rate, and 5 only for it; and that the Money was expended in repairing the Chancel and railing it, and raiſing the Floor ſome Steps higher: To which it was pleaded, That the Communion-Table was, ab Antiquo, placed in the Chancel, and that there were ancient Rails about it, which were out of Repair; that at a Meeting of a Majority of the Pariſhioners, the Rate was made to replace the Communion-Table in the Church-repairs. Rates. See 1 Salk. 164, 165. *Poſt.* 121, 122.

Chancel, and to repair the ſaid Rails; the Plea alſo contained ſome other Things which was thought decent to be done at that Aſſembly, but the Matter being ill pleaded, they were directed to amend their Plea; in order to bring the following Points in Judgment.

Plea amended.

1. Whether if the Communion-Table were not in the Chancel before, or if there were no Steps up to it, and the Pariſhioners on a Meeting don't find that ſo decent, the Majority of them can make a Rate to oblige all for altering the Place of the Communion-Table, or carrying it into the Chancel, or for raiſing it higher? And the Court inclined they could; for as to the Degrees of Order and Decency, there is no Rule, but as the Pariſhioners agree among themſelves; and tho' they are compellable to put Things in decent Order, yet there is no Rule for the Degrees of Decency, but the Judgment of the Majority.

2. Whether a Majority of Pariſhioners may make a Rate to bind the reſt for repairing or adorning the Chancel: For that is the ſpecial Freehold of the Parſon. Cheſhire here quoted the Caſe of Roſe and Hawkins, 9 W. 3. in this Court; where a Libel was for a Pariſh-Rate, to repair a Church and Chancel, and a Prohibition granted for two Reaſons; one becauſe the Chancel ought to be repaired by the Parſon; the other, for that it was ſuggeſted, the Rate was not made by a Majority; yet becauſe they had not gone to try that Point below, the Court ſaid it was no Cauſe.

S. C. 1 Salk. 258. 2 Salk. 650. *Poſt.* 121, 156.

Fenwick & Gravenor.

In Ejectment, the Wife made Defendant.

HE pretending the Defendant to be his Wife, delivered Ejectments to the Tenants, and ſhe, denying the Marriage, prayed to be made Defendant; which was oppoſed by the Plaintiff's Counſel, for that if ſhe ſhould have Judgment, he ſhould loſe his Coſts, ſince he could have none againſt his Wife. Holt, It is due of Right to the Tenant in Poſſeſſion, and Landlord to be made Defendants; for otherwiſe the Tenant in Poſſeſſion, might combine with the Leſſor of the Plaintiff, and Duſt the Landlord of his Rent; and to deny the Lady that Right, would be upon the Preſumption of her Marriage, which would be directly to determine the Point in Queſtion; and there is no Inconvenience of the other Side; for the Plaintiff, if he

has Judgment, may have Coſts againſt the Tenants in Poſſeſſion. Vide Reſiduum Paſ. 2 Annæ in 1 Sal. 258. See alſo ib. 257.

Shortridge & Lamplough.

S.C. Sal. 678.

ERror of a Judgment in the Common Pleas, in an Action of Covenant upon a Deed of the Leſſee, brought by the Aſſignee of the Reverſion; the Covenant was to build ſeveral Houſes on the Premiſſes: And the Caſe was this, A. ſeized of the Reverſion of the Lands leaſed, did bargain and ſell the ſame to B. for a Year, in Conſideration of five Shillings in Hand paid; and after did releaſe all his Right, Title and Intereſt in the Reverſion to B. and his Heirs, but did not ſhew that there was any Conſideration for the Releaſe, or that there was any expreſs Uſes thereon limited; and for this it was urged by the Defendant, that the Releaſe muſt have enured to the Uſe of the Releaſor: And by Conſequence the Plaintiff has no Title to the Reverſion, and by Conſequence not to this Action; and for this Cauſe, there was a Demurrer to the Declaration, and a Judgment for the Plaintiff, and Writ of Enquiry executed, and Final Judgment in Common Pleas, and Writ of Error brought.

Error on a Judgment in Covenant in C. B.

Leaſe for a Year, and a Releaſe, but without Conſideration or Uſes declared.

Raymond for the Plaintiff in Error. After Uſes came to be practiced in Edward the Fourth, and Henry the Sixth's Time, during the Quarrels of the Families of York and Lancaſter, and all along till Henry the Eighth's Time, the State of the Land and Uſe were two ſeveral Things, and one might deveſt himſelf of the Eſtate and keep the Uſe, or Vice verſa, or give the Eſtate to one and the Uſe to another; and if he had made a Conveyance of his Lands without a Conſideration, or any expreſs Uſe limited, the Conveyance was to his own Uſe: And this was the Law till 27 H. 8. c. 10. as appears both by Practice and Authority of Books. The Queſtion then will be what Alteration the Statute of H. 8. has made? The Intent of that Statute was to deſtroy Uſes, by drawing the Poſſeſſion to them, and not them to the Poſſeſſion, ſo that ſince that Statute the Uſe draws the Legal Eſtate to it. If a Man at this Day make a Feoffment in Fee to another and his Heirs generally, without Declaration of Uſe or Conſideration, it ſhall be to the Uſe of the Feoffor; ſo of Fine or Recovery, and all other Conveyances. Vide Dyer 146. in Point, in the Caſe of a Feoffment; for he ſays, if there be no Conſideration ap-

Argument *pro Quer'* Uſes at Common-Law, and by Statute.

appearing, or Uſe expreſs upon a Feoffment, it ſhall be intended to be to the Uſe of Feoffor. 2 Rol. Ab. 781. Cro. Jac. 200. Caſtle *verſus* Dod. Co. 58. Latch. 82. in Recovery. Pal. 462. Co. Lit. 23. When one makes a Feoffment to particular Uſes, ſo much of the Uſe as he does not diſpoſe of remains in him as his old Uſe; and he ſaid that there was no Difference when there were particular Uſes limited and no Uſe at all; for what draws the Uſe out of Feoffor? 'Tis either the Conſideration or the Expreſſing it to be to the Uſe of another; and that Reaſon holds in both Caſes, whether general Feoffment or Feoffment with particular Uſes. 3 Lev. 406. Held that there was no Difference between, where one ſeized in Right of his Mother, makes Feoffment in Fee to the Uſe of himſelf and his Heirs, and where he makes it generally without limiting any Uſe; for that in both Caſes he ſhall be in of an Eſtate deſcendible to the Heir of Part of the Mother; for in both Caſes the old Uſe remains ſtill in him; and the ſame Rule will hold in this Caſe of Releaſe, without any Conſideration or expreſs Uſe, the old Uſe will ſtill remain and be in the Releaſor; becauſe the Uſe and Eſtate are diſtinct, and tho' the Eſtate paſs, the Uſe does not without a Conſideration or expreſs Limitation of it; and they are as much diſtinct Things in a Releaſe, as in any other Conveyance: And the Precedents are, that when a Releaſe is pleaded, there always Mention is made of a Conſideration or expreſs Uſe. 2 Saund. 11. 277. 2 Vent. 120. Co. Ent. 264, 220. 474. There are indeed many Caſes, where they were not ſo pleaded: But they paſſed ſub ſilentio, and therefore not to be regarded ſpecially, being againſt the Reaſon of the Law. 3 Lev. 233. Covenant brought by an Aſſignee of a Reverſion, to which Grant the Tenant attorned for Non-payment of Rent; and the Books ſay, that Judgment was ſtayed for an apparent Fault in the Declaration, becauſe it was not ſaid to whoſe Uſe the Reverſion was, or any Conſideration of the Grant mentioned; and this he relyed on, as an Authority in Point.

Note. But Note, The Caſe in the Book mentions the Grant to have been upon Conſiderationed mentioned in another Deed, which Deed not appearing was conſidered, as if there had been no Conſideration at all; and then it appears to be the Intent of the Party, that there ſhould be a Conſideration, which not being, it can't be thought that his Intent was to paſs it without any Conſideration.

Obj.

Obj. A Releaſe enures by way of Enlargement of Eſtate; and a Leaſe and Releaſe make but one Conveyance in Law: So that there being a Conſideration, that ſhall run through, and be communicated to the Eſtate enlarged. But in Anſwer; Sure they are diſtinct Conveyances: One operates by the Statute of Uſes, the other by the Common Law; they are indeed ſo far one Conveyance, that the whole Eſtate paſſes by them both: And the Eſtate for Years is merged and gone, by the Releaſe coming upon it, being to the ſame Perſon; but indeed if the Releaſe were to the Uſe of another, or returned back to the Releaſor; the Eſtate for Years would not be merged, becauſe of the Saving in the Statute of 27 H. 8. ſaving Rights of other Perſons. Leaſe and Releaſe.

And he farther took Exception to the Writ of Enquiry; for he ſaid, There was a Variance between the Declaration on which the Judgment was, and that recited in the Writ of Enquiry; and therefore it can't be a right Enquiry, nor a Writ of Enquiry for their Judgment: The Writ of Enquiry does not ſet it out in hæc Verba, but by way of Recital; and then it recites all in the Preſent Tenſe, inſtead of the Preter-perfect, as it ought: And they give Damages to the Teſte of the Writ of Enquiry, when there ought to be Enquiry to the Time of the Action brought: And he compared it to the Caſe in 2 Saund. 169. where Verdict gave Damage for Loſs of Service after Declaration; and for this Judgment was arreſted. Vide Hob. 189. and the Caſe of Prince *verſus* Molton, Trin. 9. W. 3. Variance.

See 2 Sand. 170, 171, 207. 1 Sand. 284. 285. 2 Show. Caſe 42, 82.

Wells contra. He agreed, That in all ſorts of Conveyances, if there be not a Conſideration or Uſe expreſſed, or neceſſarily implied, the Uſe ſhall remain in the Conveyancer, and ſhall draw back the Eſtate to it, and the Intent of the Parties is moſt to be conſidered in the raiſing of Uſes; and therefore if there be but a Penny paid by him, to whom the Conveyance is made, it will raiſe the Uſe to him, without any Declaration: Not ſo much for the Conſideration, as that the Payment of the Penny ſhews the Intent of the Parties to be, that he who gives the Penny ſhall have the Uſe; for there can be no Reaſon why a Man ſhould give even the leaſt Sum of Money to another, to make a Conveyance of his Eſtate, to have it back to himſelf again. So if a Feoffment be with Intent to make one a Tenant to the Precipe, to have a Recovery ſuffered againſt him; the Tenant to the Precipe ſhall Argument *pro. Def.* of Uſes guided by Intent.

have the Estate to his own Use, otherwise he could not be right Tenant to the Precipe, to have a Recovery suffered against him: And the Design of suffering the Recovery was the Intent of the Party at the Time of the Feoffment.

Releases, how they operate.

Nothing passes by a Release to the Lessee in Possession, but by way of Enlargement of the Estate of the Lessee; for it does not operate to give a new Estate of the Reversion, but to encrease the Estate in Possession according to the Words of it. So it does not work by Merger of the first Interest, but by enlarging of it: But it is true, after the Release, the Lease does not exist distinct from the Estate by the Release; for tho' it does not continue as a Term, yet it is Part of the Interest that he now has in him by the Release; for it is not like a Grant to a particular Tenant by him in Reversion, which does drown the particular Estate.

So that if the Release does enure, only to enlarge the Estate, and Interest enlarged must be to the Use of Lessee for Years, or it can't be said to be an Increase of it; and indeed, if the Practice had not prevailed to the contrary, it were very odd to limit the Use of a Release to any but him that has the Lease: And it is for that we find the Clause in Leases, on which the Party intends to build a Release, that the Intent of the Lease was to pass an Estate by Release upon it, for the Benefit or Use of a third Person.

And it would be absurd to say, that my Conveyance should have no other Operation, but to extinguish or merge the Estate that Grantee has already, to have it brought back to me; and what need could there be of such a Way? If the Party had any such Intent, it might be soon done by Surrender.

If it had been expressed in this Deed, that he had already made him a Lease for Years; and that for the Enlargement of that Estate he made this Release, there had been no Doubt but that the Release was to his Use; and there is no Difference between the Cases, since this Release in it's own Nature enures by way of Enlargemeat: Besides, here is also a valuable Consideration: For the Lease and Release being but one Conveyance the five Shillings that are the Consideration of the Lease shall be participated to the Release; and also the Acceptance of the Release is in it's own Nature a Release, for it implies an Alteration of the Estate of Lessee, which to consent

to

to is a Conſideration moving from Leſſee; and the only motive of the Leſſee's parting with the old Eſtate, was to get a new one. He that takes a Releaſe by way of Enlargement of Eſtate muſt not only have the Intereſt, but alſo a Privity of Eſtate between him and the Releaſor. 1 Inſt. 273. a. If A. make a Leaſe to B. and he make an Under-Leaſe over, A. releaſes all his Right to the Under-Leſſee and his Heirs, it's void as to enlarge the Eſtate for want of Privity; ſo that it's a Privilege inſeparably incident to him that has a Privity in Eſtate to be capable of a Releaſe of Enlargement; and that is ſo for the Benefit of Releaſee.

Raymond ſaid, the firſt Leaſe could not be ſaid now to have Continuance; for after the Leaſe, if the Leſſor, before the Leſſee had ſuffered Judgment, had releaſed, the Judgment would have attached before the Releaſe.

Holt, C. J. You would have the Writ of Enquiry bad, becauſe you ſay it gives Damages to the Teſte thereof, when it ſhould only be to the Time of the Declaration or Bill; the Writ directs the Sheriff to take Inquiſition what Damages the Plaintiff had by Virtue of the Breach of Covenant; and not for the Houſes being out of Repair, at the Time of the Action brought: Suppoſe the Houſes were out of Repair, at the Time of Action brought, and become more out of Repair before Judgment, and the Writ of Enquiry; the Jury that enquires, ought to give the Party, not ſuch Damages as would put them in Repair at the Time of the Action brought, but ſuch as would be enough to put them in Repair at the Time of Enquiry.

Opinion on the Writ of Enquiry.

Conſequential Damages.

The Queſtion here is, Whether the Statute of 27 H. 8. c. 10. has altered the Ancient way of pleading? For this manner of pleading was good before the Statute without doubt; and it appears by ſo many Precedents ſince the Statute, that this way was uſed, even in Caſe of Feoffment: And it was thought ſufficient to alledge the Eſtate in the Feoffee, without any more. Plow. 478. Feoffment in Fee was pleaded, Virtute cujus he was ſeized without any more ado, and ſo there are many other Caſes ſince the Statute in Coke's Entries, tho' there be no Conſideration or Uſe expreſſed; yet it does not follow, that it is to the Uſe of the Feoffor, for that is Matter of Fact extrinſecal to the Deed. If ſince the Statute of quia Emptor Terrar. a Feoffment were made by Deed,

Queſtion and Opinion upon the pleading,

and touching Uſes.

Deed without Conſideration or Uſe declared in the Deed; yet the Uſe might be declared by Paroll, till the Statute of Frauds and Perjuries; and even ſince that Statute, it may be declared by writing only without Seal. Now for us to conſtrue a Deed to be to the Uſe of Feoffor, when it might be to the Uſe of Feoffee, for any thing that appears, would be very odd, therefore we ſhall intend it to be to the Uſe of the Feoffee, if no more appear; and if it were not ſo, it ought to come of the ſide of the Feoffor or Grantor, by Averment that there was no Uſe limited to the Feoffee, that is to confeſs the Feoffment when it is pleaded; but to avoid the Effect of it by Averment, and eſpecially in Caſe of a Feoffment or Releaſe to Feoffee or Releſſee and his Heirs, without limiting any particular Uſe; for if it be not taken to be to the Uſe of Feoffee or Releſſee, the Conveyance can't be of any Uſe at all; for it can't be thought, that one would be at the Trouble and Charge of any of theſe Conveyances, to be ſeized juſt in the ſame Manner as he was before, and of the very ſame Eſtate: For if he had a Warranty to the firſt Eſtate, he ſhall have Advantage of it, if he ſhould be impleaded for the reſulting Eſtate: If he were ſeized as Heir of the Part of the Mother before, he would be ſo after; but before the Statute of H. 8. ſuch Conveyance might be of ſome Uſe, though no Uſe were declared upon them, videlicet, to cheat the Lord, and hinder Tenants to Precipe's from being known, &c. But now it can't be intended to have been to any other Purpoſe, but to paſs the Uſe and Eſtate, where there is no Alteration made, and therefore it ſhall be intended to the Uſe of the Feoffee, &c. if the contrary be not ſhewn on the other ſide by Averment; and the Authority in Coke upon Littleton does not contradict this: For it ſays, where there is a Feoffment in Fee made, and ſome particular Uſe limited, ſo much of the old Uſe as is not limited over remains in him, as his old Uſe; for there it appears by limiting the particular Uſe, that the Feoffment was made to another Perſon, than to grant an Eſtate to the Feoffee, to wit, to raiſe the particular Uſe: But where there is no Reaſon appearing, it ſhall be intended to the Uſe of the Feoffee, if the contrary be not made out on the other Side.

Powell ad idem. And he ſaid, That he was not ſatisfied that the Nature of the Conveyance would admit of a reſulting Uſe; for tho' it be a Conveyance much uſed now, to raiſe Uſes upon to a third Perſon by expreſs Words, yet in Striſ-

nels it is a Common Law Conveyance. And if a Lease be made for forty Years, and a Release thereupon without Consideration or limiting of any Uses, sure it can't be intended to be to the Use of the Lessor; for the very extinguishing the Estate of the Lessee is a good Consideration; and suppose it were a Confirmation, sure it would be the same: But the Chief Justice and he said, That if there were a particular Use limited on the Release, the rest would result back.

Gould said, That he himself had taken the like Exception in the Common Pleas, in a Case between Reginald and Bishop of London *versus* Pratt, 7 W. Rot. 430. but was over-ruled by the whole Court; and he quoted Lit. fo. 267. Vaughan 44. Lit. 3. 459. Judgment affirmed. Judgment affirmed.

Goodwin & Hilton.

Vid. 6 Mod. 231. *Post.* 85, 98. *Antea* 51.

'TWAS alledged by the Attorney General, and not denied by the Court, That before the two Scir' Fac's returned, the Bail may discharge themselves by Render of their Principal. Per Holt, The Reddidit se can't be entered upon the Bail-piece; for the Sci' Fac' is grounded upon that, and the Reddidit se would destroy it: But the Remedy of a Bail is upon an Audita querela to be grounded on the Reddidit se. And per Cur. If the Render appear to be fraudulent, though it has the outward Shew of a real one, that should not discharge the Bail, as if there was a previous Agreement to let him escape, while he should remain in Custody of the Tipstaff. And it was offered at the Bar, to have been ruled in the Case of Lee and Knipe, That the Principal ought to be two Days in Custody, before an Entry should be made of a Reddidit se. And here it was agreed per Cur' and the Attorney General, That the Bail may render their Principal pending a Writ of Error, tho' during that Time the Plaintiff can't charge him in Execution. Vide Hob. 112. which was quoted contra.

Bail render the Principal.

Reddidit se. *Vid.* 6 Mod. 132, 231, 238, 309. Cumberba. 4. 2 Show. 79, 147, 398, 443. 3 Sal. 57, 58, 158.

Domina Regina & Smith.

S. C. 1 Sal. 377.

CONVICTION on the Statute of Deer-Stealing in the King's Forest of Rockingham: The Killing was in the Time of the late King, and the Conviction in the Time of the Queen. Broderick objected, That it was necessary to shew in what Capacity

Deer-stealing *Vid.* 1 Sal. 147, 182. 6 Mod. 83.

King's Capacity.

pacity the King was seized of the Forest; for by the Statute, a third Part of the Penalty is given to the King. And therefore if the King was seized in his natural Capacity, it ought to go to his Executor; if in his politick Capacity, it ought to go to the Queen. Holt, The King can have nothing in his natural Capacity, if it be not in Right of his Dutchy, or an Estate-Tail by the Statute of Donis; for if the King Purchase Lands to him and his Heirs, he shall have it in his politick Capacity. And where-ever the King is said generally to be seized, it shall be intended a Seisin Jure Coronæ, and Dutchy-Lands would now be in the Queen, if they were not kept separate by Act of Parliament. And if the Queen should create a Duke of Lancaster at this Day, he would not of Consequence have the Dutchy-Lands: And further, it is not material upon the Conviction or Judgment who shall have them.

Dutchy-Lands.

Another Exception was, that the Conviction laid the Killing to be in the Forest of Rockingham, where Deer were usually kept, and without the Leave or Consent of any intrusted with the keeping of the said Forest or the said Deer; and a Forest has many Walks and Officers, and it ought to exclude the Leave and Consent of any of them. Holt, It has been indeed held, That Judges are not bound to take Notice of the Law of the Forest, ex officio: But I know no Reason for that. But if you had Leave of any particular Keeper of any particular Part of the Forest, you could not be found Guilty; for Leave of Deputy is Leave of Principal; and Conviction was affirmed.

Forest-Law.

S. C. 2 Sal. 552.

Rigaut & Gallisard.

Prohibition, Assault, Solicitation of Chastity.

DEclaration upon a Prohibition, That at Sessions of the Peace held at Westminster such a Day and Year of King William the Third, the Plaintiff was indicted for making an Assault upon one Louise Rigaut, the Defendant's Wife, with Intent to have a carnal Knowledge of her; and it was laid to be against the Peace of the late King, &c. and that likewise the now Defendant brought an Action of Assault and Battery against him in Trin. 12. of the late King, which was likewise laid to be contra Pacem, which Suit is still depending: And yet the said Defendant has ordered him to be sued in the Bishop of London's Court, for Solicitation of the said Louise Rigaut's Chastity, to commit Adultery with him.

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The Defendant pleads for a Conſultation, That he is not charged below for any of the Crimes charged in the Indictment or action, and to this Plea there is a Demurrer.

Mountague for a Conſultation: This is a Matter whereof they have proper Conuſance; for by the Libel it appears to be Crimen incontinentiæ in the particular of ſoliciting a married Woman to commit Adultery with him. Vide the Words of the Statute of Circumſpecte agatis, non puniendo eos ſi placitum tenuerint, &c. de his quæ ſunt merè Spiritualia, viz. de Correctionibus, quas prælati faciunt pro mortali peccato, viz. pro Fornicatione, Adulterio & hujuſmodi, 2 Inſt. 487, 488. And it appears by the Word hujuſmodi, That they have Conuſance of Things of leſs Nature than Fornication, as Solicitation of Chaſtity; and of higher, as Inceſt. And the Reaſon that the Common Law takes no Notice but of Facts committed, whereas the Civil Canon Law puniſhes Intentions, if wicked; and they go upon the Rule, That a Man muſt not look after a Woman to luſt after her; for if they will carry that Deſire further, as to endeavour tho' by fair Means, to put their Deſire in Execution, they will puniſh them. Argument for Conſultation.

Then the Queſtion is, If the Indictment and Conviction for the Aſſault and Battery, and the Action depending, will alter the Caſe, they are ſeveral Proſecutions in their Nature and Deſign: The Indictment is to entitle the King to a Fine for the Breach of his Peace, and ill Example to his Subjects in the Aſſault; and the End of the Action by the Husband and Wife, is to recover Damages for the particular Injury done to them; and for each of theſe, the Puniſhment is Corporal or Pecuniary: But the Suit below is for Reformation of his Manners and Salvation of his Soul; and if he be convicted below, he is only to do Penance, which by Commutation may be changed into Money, as the Statute of Circumſpecte agatis allows; and an Action may be brought in this Court for the Sum commuted for. Vid. Articuli Cleri. c. 6. Quando eadem Cauſa diverſis Rationibus coram Judicibus Eccleſiaſticis & Secularibus ventilatur, 2 Inſt. 622. So the one Law puniſhes the Wickedneſs of the Mind; the other, wicked Acts; as in Caſe of laying violent Hands upon a Clerk. Vid. the Caſe of Uſury in the ſame Book, 442. And the Maxim of Nemo debet bis puniri pro eodem delicto, does not hold in this Caſe; for that is to be underſtood, that a Man Queſtion.

ſhall

ſhall not be twice puniſhed in the ſame Manner, as gives Damages twice, or be twice fined upon an Indictment. As if a Man bring Treſpaſs for Maihem, and recover Damages, he ſhall not after have an Appeal; for the firſt Recovery may be pleaded in Bar to it; and the Reaſon is, becauſe both tend to have Damage. 4 Co. 43. If A. ſteal the Goods of B. and he brings Treſpaſs for them, and is barred, yet he may bring his Appeal of Felony for thoſe Goods. By the Statute of 7 Jac. 1. c. 4. every lewd Woman that has a Baſtard chargeable upon the Pariſh, is to be put to the Houſe of Correction and puniſhed for a Year, yet ſhe may notwithſtanding be puniſhed in the Spiritual Court: So if a Man find another Man in Bed with his Wife, he may have an Aſſault and Battery againſt him and recover Damages; he ſhall be likewiſe puniſhed in the Spiritual Court for Adultery. Vid. Sir Philip Coot *verſ.* Bertey. Vide Duke of Norfolk *verſ.* Sir John Germain.

Argument for Prohibition.

Eyres contra. One is not puniſhable in the Spiritual Court, for a Solicitation of Chaſtity, where there is Force uſed to gain that, tho' he be in Caſe of a Solicitation only; for the Force gives ſuch a temporal Mixture to the Offence as ouſts them of Juriſdiction. 2 Inſt. 488. Merely Spiritual in the Statute is where there is no Mixture of the Temporalty. Fornication, when by Conſent of Parties, is within their Conuſance, and ſo is Solicitation: But if one will go farther and uſe Force, which, if perfected, would amount to a Rape, and by Conſequence Felony, they have no Pretence; for the Solicitation and Force being at the ſame Time, makes an entire Offence puniſhable at the Common Law.

Now, As to have one Crime puniſhed here and there, the laying of violent Hands upon a Clerk is within the expreſs Words of the Statute of Circumſpecte Agatis, puniſhable there, after it is puniſhed here, but not before, N. B. 430. that if they proceed ſooner, a Prohibition will lie. Vid. Pal. 379. Suit was in the Spiritual Court for theſe Words, You are a Bawd, there were two Couple a Bed in your Houſe; and Prohibition granted upon Suggeſtion of an Action depending for the ſame Words at Law.

Opinio Curiæ.

Holt. The Prohibition ought to ſtand; for it was but one intire Act, and they below can't divide it: For the Plaintiff in the Prohibition has averred the Fact for which they are indicted, and that for which the Suit is below, to be the ſame;

and to give them Jurisdiction below, you should have come and rejoin'd, and traverſ'd its being the ſame Fact; but that it was for other Cauſe than is in the Indictment, and that perhaps would have divided it. And he put this Caſe, which he ſaid had been adjudged in my Lord Hyde's Time; The Libel below was for ſaying the Proſecutor had a Baſtard; the Defendant comes and ſuggeſts for a Prohibition, that he did accuſe the Plaintiff below, before a Juſtice of Peace, of getting a Baſtard-Child, and that the Juſtice did adjudge him to be the reputed Father of it; and that he ſpoke the Words before the Juſtice. And it was reply'd, that they were ſpoke at large, and no otherwiſe than before the Juſtice of Peace; and to this it was pleaded by Way of Eſtoppel, That ſince he had been adjudged before the Juſtices to have been the Father, he could not ſue below for Defamation; and of that Opinion was the Court.

Here you ſhould ſay, that it was for another Offence than the Solicitation in the Indictment; or that it was at another Time and Place than is laid in the Indictment; and their Laying in the Libel another Time and Place than is in the Indictment, is not enough; for below they lay it at what Time and Place they pleaſe. If a Man ſolicite a Woman, and goes gently to Work with her at firſt, and when he finds that will not do, he proceeds to Force, it is all one continued Act, beginning with Inſinuation and ending with Force.

Note, In ſome Caſes there is a Jurisdiction; as in Caſe of *St. Alban's*

Penſion, Annuity, and Laying violent Hands on a Clergyman. *Vide* the Abbot Caſe in 5 *Co.*

And in the Caſe of the Duke of Norfolk and Germaine, it was not pretended to be Force; and an Indictment will not lie for a Plain Adultery, but Libel below will; though the Law indulges the Husband with an Action of Aſſault and Battery for the Injury done to him, tho' it be with Conſent of his Wife, becauſe the Law will not allow her a Conſent in ſuch Caſe to the Prejudice of her Husband, becauſe of the Intereſt he has in her: And he compared it to the Caſe of calling a Woman a Whore and Thief; there ſhe ſhall not ſplit the Words and puniſh him below for calling her a Whore, and at Law for calling her a Thief. He agreed, if Adultery be committed with another Man's Wife, without any Force, but by her own Conſent, though the Husband may have Aſſault and Battery, and lay it Vi & Armis, yet they ſhall in that

Caſe puniſh below for that very Offence; for Indictment will not lie for ſuch an Aſſault and Battery, neither ſhall the Huſband and Wife join in the Action at Common Law; and therefore they proceed below either civilly, that is, to divorce them; or criminally, becauſe they were not criminally proſecuted above; and the true Action for the Husband in ſuch Caſe, is a Special Action, Quia the Defendant his Wife rapuit; and not to lay it per quod Conſortium amiſit. Vid. Raſtall, tit. Treſp. Cur. acc. for that the Offence is not meerly Spiritual.

Note.

S. C. 1 Salk. 294, 295.

Domina Regina & Cantuell, *al'* Sangway.

Excom' capiend. See 1 Salk. 106, 134, 293, 294. *Antea* 56. *Poſt.* 117.

She was excommunicated below, pro Jactitatione Matagii, and taken up upon a fifth Proceſs of Excom' capiendo, in which there was a Proclamation with Penalty; and being brought up by Habeas Corpus, and the Writ of Excom' capiendo being return'd, that is, the Writ on which ſhe was taken,

Exceptions.

Cheſhire took Exception, 1. That this being none of the nine Caſes ſpecified in the Statute, this ought to have been a ſimple Capias, and not a Capias with a Penalty. 2. That there was no Addition as the Statute requires. But per Cur. As to the firſt, all we can do is to diſcharge the Penalty. And as to the Second, this being not one of the nine Caſes mention'd by the Statute, there needs no Addition; and if it had required an Addition, they doubted at firſt, Whether they could relieve her upon Motion? but that it ought to be pleaded. But upon Conſideration, they inclined, they might relieve her upon Motion, the Fault appearing on the Record before them; and if a Plea were neceſſary here, it was ſaid at the Bar it would be a miſchievous Caſe: For here ſhe was excommunicated at the Suit of her Husband, and he would not join in Plea with her.

Holt anſwered, A Feme Covert may plead alone in a criminal Matter as this here is, as if ſhe were attainted of Felony, ſhe might plead a Pardon, but he agreed, That when Husband or Wife are taken upon a Capias utlagat', the Wife ſhall be diſcharged. And he ſaid, that the Reaſon of the Additions being requiſite by the Statute in the nine Caſes, and none other, was in Order to a Proclamation and Penalty, but

but that to an Imprisonment, by Virtue of an Excom' capiendo, there was no Occasion for it.

Gould, till the Cause of Brown in Jones, the Law was held, that if one were taken upon a Process of Outlawry with a Penalty he should be discharged; but in that Case and since, it has been held, she ought to be discharged of the Penalty only, Cro. Ca. 196, 197. And where it was said, that they were willing to absolve her below, but that they must have her in Person to give Caution de parendo mandatis Ecclesiæ, it was answered by the Court, that that need not be, for they might take a Bond with a Penalty reasonable from other Persons, with Condition that she should submit herself; though it is True, the most usual way is to take juratory Caution; and the Court declared, they could not discharge her by Law, and so she was remanded. And Holt here would not determine, whether, the Writ being with Proclamation and Penalty, when it ought not so to be, that made the whole nought, or only quoad the Proclamation and Penalty? *Opinio.*

Greenway & Freeman.

THE Statute of two Thirds in Number and Value was pleaded in Bar, and the Defendant to bring himself within the Benefit of the Statute shews, that he absconded at the Time mentioned by the Statute, but did not shew for what he absconded; and for this the Plaintiff had Judgment on Demurrer. Vid. post. Bankrupts. *Antea* 10, 16. *Post.* 96.

Domina Regina & Twitty.

MAndamus to swear in Church-wardens, to which it was returned, that they were not chosen, and held a good Return; for if both were not chosen, the Writ does not command him to swear one of them, so the Return is an Answer to the Command of the Writ. It was also held by the Court, That if the Writ of Mandamus were to swear them that were chosen generally, they might return generally that they were not chosen; but the Writ setting forth Specially that they were chosen debito modo; they may Specially return that they were not chosen debito modo; but such a Return to a general Writ would be ill. Vid. a Case in Sid. That if *Mandamus* to swear Church-wardens. See 6 Mod. 89. Cumberba. 105 *Inst. Leg.* 160. *Post.* 118. *Antea* 37.

if the Court does not see Cause of Restitution, though there be no good Return to the Writ, yet they will not grant a peremptory Mandamus.

Hall & Hill, & al'.

S. C. 1 Salk. 201. 2 Salk. 650.

Attachment against Officers of an inferior Court.

1 Salk. 148, 149, 201, 396. *Antea.* 38.

New Trial

DEfendants were Judges of a Court at Bristol, in which the Plaintiff had obtained a Verdict and Damages for 28 l. and the same Day he goes to the Town-Clerk, and gets his Costs taxed, he being the proper Officer, and takes out a Capias against the Principal; and upon Return thereof a Sci. Fac. against Bail, who after the Return of a second Sci. fac. surrendred the Principal; after which, and a Year's Time elapsed from the Verdict and taxing of Costs, the Corrt granted a new Trial; which being complain'd of to the Court in Trinity-Term, Rule was made for an Attachment, nisi.

And now the Attorney General came to shew Cause, and alledged, the Judges below were in no Fault, for there never was any Judgment enter'd below; and until Judgment enter'd, the Hands of the Court are not tied from granting a new Trial at any Time before Judgment, if they see Cause; and if they mistake that for a Cause which is none, that only is an Error of their Judgment, for which they are not punishable: And though here a new Trial was granted after a Writ of Error allow'd, that will not alter the Case; for it is frequent to have a Writ of Error allowed before Judgment; and the Proceeding against the Bail was groundless, there being no Judgment enter'd; and such Proceedings did not hinder the Court's being at large to grant a new Trial. And he quoted the Case of Tiny & Roberts, where the Plaintiff having omitted entering Judgment as soon as he might have done it, the Court granted a new Trial; and he said, here the Court were not bound to enter Judgment without Prayer of Plaintiff, though an Inferior Court. 2 Vent. 189.

To this it was answered by Broderick and the Solicitor General, that the Costs were taxed here by the proper Officer, and that he thereupon had made out Process against the Defendant; and that is Warrant enough for Execution, though there be not a final Entry of the Judgment upon the Roll,

Roll, which is never done in those Courts till Writ of Error brought; where they are forced to make up the Records, indeed they sometimes enter in the Margin. Jud. pro Quer.

Holt. The Writ of Error ought not to be allowed till Judgment given, and it is a good Return to it, that Judgment is not yet given; which the Attorney General confessed as to the Point of the Return, but affirmed, That they frequently do allow them before Judgment. Holt likewise agreed, That a Judge is not punishable for an Error in Judgment; but he said, It is rare for the same Judges to grant a new Trial before themselves: as here, after a Trial at Bar, though that he said had been done, though never with his Consent; but 'tis usual to grant a new Trial after a Trial at Nisi Prius, but that is ever after fresh Pursuit, that is, the very next Term; but there it was granted after a Year, Costs taxed, and as much Entry of a Judgment, as is in any Case there, and Execution taken out; and it is no Excuse for them to say, they are not Lawyers; for they ought to take Advice of Lawyers; and if they are so presumptuous as to take upon themselves the Knowledge of the Law, it ought not to be suffered, though there be no Corruption in them. And he remembred the Case of the Steward of Windsor Court, who was both Counsel and Judge, and after Bail to the Writ of Error brought upon his own Judgment: But upon Complaint the Judgment was set aside and Restitution awarded. But he said, they would not grant an Attachment for an Error in Judgment, where it is a Matter within their Judgment; but where it is no Matter within their Judgment, as here it was not, they having already given their Judgment, why should not we grant it? *Opinio Curiæ.* *Antea* 1.

Note, Here it was agreed to be the Course of the Court, That where upon an Affidavit made, a Day is given to hear Counsel on both Sides, the Party may read as many Affidavits as he pleases in Corroboration of the first, and concerning the same Matter, but must read none concerning new Matter. Affidavits.

It was also agreed, the Particular can't be render'd by Bail after Plea pleaded: And here the Rule was, That the Rule for new Trial be set aside, and the Rule for Attachment discharged upon Payment of Expences of the Complainant, and Judgment entered below as of the due Time. Bail render the Principal. 6 Mod. 132, 231, 238. Cumberba. 4. *Post.* 90, 98. *Antea* 51, 77. 2 Show. 79, 147.

Domina Regina & Parker.

Plead. Time. Queen.

INdictment, to which the Defendant demurred; and upon Motion, the Queen had ſix Days to plead peremptorily, or join in Demurrer; and within the ſix Days their Clerk in Court died: And now after three Terms they applied to the Court, which told them, if they had come in any reaſonable Time they would relieve them. And here, Per Cur' Non Pros' ought not to be entered upon an Indictment, but upon Motion in Court and Leave thereby obtained.

Non Pros' on Indictment. See 2 Salk. 456, 457.

Eſt & Eſſington.

S. C. 1 Sal. 130.

Cuſtom of Merchants on Bills of Exchange. See *poſt.* 155. Cumberba. 4, 9. 32, 152, 227, 452. Indorſement. 6 Mod. 29, 30, 36, 37, 80, 81. Salk. Tit. Bills of Exchange in Tab.

IT was an Action by the Indorſee of a Bill of Exchange againſt the Drawer, declaring upon the Cuſtom of Merchants, and that A. to whom the Bill was made, indorſavit ſuper Billam præd. content. Billæ præd. to him the Plaintiff ſolvend. And here it was agreed by the Court, That Indorſement is a Term known in Law, and ſignifies a Writing on the Back of a Paper or Parchment containing another Writing. To this Declaration two Exceptions were taken in Arreſt of Judgment: 1. That the Words of the Indorſement were not ſignificative enough to paſs the Property of the Bill to the Plaintiff, according to the Cuſtom of Merchants. 2. Exception, That it appears there were three Bills for the ſame Sum, and that whereon the Action is brought was the firſt, and ſays, my ſecond or third not paid, pay this my firſt. But per Cur. However that Matter would have been on Demurrer, it will be well after Verdict; for if the ſecond or third were paid, there had been no Promiſe at all, for the Promiſe is conditional to pay this, if the ſecond or third be not paid; therefore if the ſecond or third were paid, the Jury could not find for the Plaintiff. And as to the firſt Exception they held, That that would be likewiſe good after Verdict; for without finding an Indorſement, they could not find for the Plaintiff. And it is not true to ſay, That at this Rate, and for this Reaſon, it may be ſaid, if there were no manner of Indorſement, that Defect would be cured by Verdict; for here there is a Kind of an Indorſement ſet forth, and the Jury could not find for the Plaintiff, without finding this to be a good Indorſement, and ſuch as amounts

Opinio Curiæ.

to

to an Agreement, to have the Money paid to the Plaintiff. A Bill of Exchange may be accepted by Parol, but not transferred otherwise than by Writing upon the back of it, and that transfers the Property by the Custom of Merchants. And they put the Case of Debt for Rent, by Grantee of Reversion, without shewing Attornment, and helped by Verdict; and so in Case of Bargain and Sale, pleaded without Inrolment, good after Verdict. And per Holt; If a Man writes on the back of a Bill of Exchange, This is to be paid to J. S. or the Content of this Bill is to be paid to J. S. and sets his Hand to it, it will be a good Indorsement. (Quære per me, why not a Declaration of Trust?) But if there be no Indorsement at all set forth, Verdict can't help: And Judic. pro Quer'.

Grips & Ingledew.

S. C. 2 Sal. 658.

DEBT upon a Deed of Articles, whereby the Defendant had agreed to pay the Plaintiff 35 l. for every Hundred Stacks of Wood, lying in such a Wood; and so for as many more as should be felled till Michaelmas following. And Plaintiff declared for so much Money as eight Hundred Stacks would give at that Rate; And also for as much as some odd Stacks more, would give in Proportion to the Rate of 35 l. for the Hundred: And to this Declaration there was a Demurrer, because he declared for more than the Articles intitled him to; there being no Agreement for any thing under a 100 Stacks; so he demanded more than his Due upon his own Shewing.

Agreement. Variance *inter* the Deed and Declaration. See 1 Sand. 206, 282, 285, 286. *post.* 143. Hob. 178. 2 Salk. 658, 659. Yelv. 66. *Post.* 148. 1 Sid. 417. 5 Mod. 213.

Atcherly pro Quer' took this Difference; Where a Man is not to recover upon his Deed or Evidence, but upon a Matter of Fact arising out of it, and enquirable by the Jury, which is to be the Measure of Damages, then one need not expressly keep up to the very Tenor of his Deed; but he may enter non Pros' for what he demands too much, and have Judgment for what is justly demanded: And he said that upon this Rule there have been Declarations for less and more than was due, and Plaintiff had Judgment. 2 Cro. 498. Debt upon the Statute of Ed. 6. for not setting forth Tithes; and Demands 33 l. as treble Damage, the single Value being 11 l. and 8 d. as he had averred; and it was moved in Arrest of Judgment, that three Times 11 l. and 8 d. did not make 33 l. but 33 l. 2 s. so he declared for less then his Demand; and that he ought not to do, without shewing

Argument *pro Quer'.*

how the reſt was paid: But per Cur. it was held well upon this Difference; Where the Sum is certain upon the very Bond or Contract, without any Matter dehors to help it; there one ought not to vary from his Bond or Writing, without ſhewing how the reſt came to be ſatisfied. But when the Certainty of the Demand can't appear, but from Matter of Fact dehors of the Deed or Contract, which the Deed or Contract refers to; there if you Demand more or leſs than is due, it ſhall not vitiate. 2 Cro. 529. And he quoted 1 Saund. 207. Hil. 7. W. 3. Rot. 469. Cumberba. 365. 5 Mod. 212, 213, &c. Thwaites ver. Lady Aſhfield. 1 Rol. Ab. 785. Stil. 175. And he produced the Roll of the Caſe of Barber and Pomroy into Court: And the Judgment appeared to be entered for the Plaintiff: It is Hil. 24. Car. 1. Rot. 951. And he quoted the Book of Placita Latina rediviva, 412. Hob. 178. Debt for one Hundred Pounds on three ſeveral Bonds; and it appeared on the Declaration, that one of the Bonds was not due.

1 Roll. Abr. 785. Stile 175.

Opinio Curiæ. Note, here it was agreed by the Court, That ſo much a Hundred, and ſo much a Hundred by Retail was the ſame Thing, and that here either Party may tell them out; and that if he that had told them, had not told them right, then the other might ſhew that, and join Iſſue upon it. And it was agreed here, That the Property of every Hundred that was cut, at the Time of the Agreement, did veſt in the Plaintiff; and ſo of the reſt, as they were cut down. If the Sale had been of 500 Stacks out of 700, then Buyer might chuſe: But if it were 500 to be ſet out by Seller, the Setting out would be a Condition precedent.

Argument *pro Def.* Demand entire, or ſeveral. Cumberb. 365.

Of the other ſide, a Difference was taken between an entire Demand and ſeveral Demands joined in one; for in the latter, if the Plaintiff fail in one of them, and is right in the other, he may have Judgment for what is well, releaſing what is ill: But where the Demand is entire, and the Plaintiff in making it out, ſhews he has Right but to Part of it; there the Judgment muſt be againſt him in the whole, becauſe he is wrong in his Demand. There are ſome Books which make Difference where an Action is grounded upon a Wrong, and where upon a Contract: But the true Reaſon of that Difference (as was ſaid) is becauſe Contracts generally are entire; for let it be for Wrong or on Contract, 'tis the ſame upon the Difference of the entire and divided Demand; and for this the Caſe in Hob. 178. was relyed on, for they are

several Causes put in one Action. If Action be brought upon a single Bill, payable at several Days, and one of the Days is not yet come, the Plaintiff shall not have Judgment, for that Part that is Due; but according to the Motion on the other side he should; and the Reason why it can't be done is, because it's an entire Demand; and it was said, that the Difference taken in Godfrye's Case. 11 Co. 45. would not affect this Case; That is, a Man brings an Action for two Things, and of his own Shewing it appears, that he can't have Action for one of them, or a better Writ; there the Writ shall be well for that Part for which it is good; And the Case in Cro. is not like this, for there the Defendant severed it by his Plea; for the Jury might apportion it, or the Defendant could do it by his Plea, but he himself cannot do it, by shewing he has no Right to Part of what he demands; and the Judgment here will not be final; but he may have a new Action, for what is due; and the Reason of this will hold in a real Action; for if an Assize be brought of a Manor, the Defendant can't abridge this, by claiming less or shewing Title to less than a Manor; for he must recover the whole Manor or nothing: But if it be for so many Acres, there he may abridge and recover Part, because then the Demand is several of several Acres; but where he demands an entire Thing, he can't abridge his Demand; but if he join several Causes of Action in one, there tho' he fail in making Title to Part, he shall recover the Rest, and in the Case in Stile's, Germin was strong against Roll.

Vide 1 Rol. R. 77. Hob. 133, 164, 178. 5 Mod. 213, 214.

Holt C. J. This is no entire Demand, more than every Action of Debt is, let it consist of ever so many differing Particulars, as the Case of the three Bonds before put: Suppose each Bond were for 20 l. the Precipe is of 60 l. and that is all one Precipe; and yet when he comes to declare, he declares upon three Bonds, each of 20 l. that makes up the Sum in the Precipe; notwithstanding if it does appear that one of the Bonds is not yet Due, then the Court ex Officio shall abate the Suit as to that Bond, and give Judgment for the Rest; so in the Action the Demand is entire, but it is not so in the Original Foundation of it, for that is several; and this is the Difference, if there be a certain stated Sum specified in the Deed it self, that shall not be abridged by any Remittitur or Release of the Plaintiff, if he declare upon that Deed. As if a Man bring Debt upon a Bond of 30 l. and declare upon a Bond of 20 l. this will be bad,

Opinio Curiæ.

becauſe he has brought his Action for more than his Due, and this reſts upon the Deed only, and the Sum in it does not amount to his Demand; but if Action be brought upon a Deed which refers to a Matter of Fact, that makes the Duty more or leſs: If then the Fact which is referred to, will entitle him to a leſs Sum only, and he demands more than the Fact which the Deed refers to upon Computation will entitle him, there let him remit ſo much of his Demand, as the Fact does not make out, it will be well; and he ſhall have Judgment for the Reſt, for that Fact which is not made out, is not contradicted by the Deed. And he ſaid, that the Caſe of Barber and Pomeroy was an Authority in Point: It was Debt for Rent, and upon Computation it appeared, he demanded more than by the Matter of Fact out of the Deed appeared to be due to him, and there he releaſed what was demanded too much, and took Judgment for the Reſt. And no Diverſity between a Demurrer and a Verdict, for that Caſe was upon a Verdict, and this upon Demurrer; And he ſaid, the Caſe of the Lady Aſhfield, Antea 88. before quoted, had been adjudged upon the Authority of the Caſe of Barber ver. Pomeroy.

1 Roll. Abr. 785. Style. 175.

Cumberba. 365.

Powell acc. The Plaintiff muſt make his Demand entire, tho' he make his Title of ſeveral Particulars, as ſome by one Bond, ſome another; yet being in the nature of ſeveral Demands, and made up of ſeveral Particulars, he may recover on one and not on the other; and the Caſe of Baker and Pomeroy is exactly this Caſe in it's Reaſon: And he ſaid, this was not a Demand of one entire Sum mentioned in the Specialty; but of that which might be more or leſs by Matter of Fact out of it; as an Indenture of Leaſe refers to Days of Payment, and one Demands more Rent, than there were Days of Payment paſt: So here he demanded more Money than there were Hundreds of Stacks, and the one's Caſe being on Verdict, and the other's upon Demurrer, makes no Difference: And Godfry's Caſe was upon Demurrer; and the Queſtion there was, whether the Writ ſhould abate for Part, and fail for Part, or fail in all? And the ſame Queſtion is of the Count here.

11 Co. 45.

Powis accord. And quoted Hob. 133. And he ſaid, That the Objection that was made, that thus the Defendant might be enſnared into a Demurrer, when he might have a good Plea to bar the Plaintiff; he ſaid, if he had ſuch a Plea he ought to plead it.

Gould conceived a Difference between a Demurrer and a Verdict in this Case, and said, If an Assize were for 4 l. Rent, one could not abridge that Demand; and so he said it was in Real and Personal Actions: Debt for Rent, part Seck, and part Charge, the Writ abates in all. 10 H. 6, 5. Dyer 65. Yelv. 66. Judgment *pro. Quer'.*

Holt. As to the Case of Assize for 4 l. and shewing only Disseisin of three, that is quite another Thing; for then he brings an Assize of a Rent, of which he was not at all disseised; and he said, This was a Debt indeed arising by Deed, but not a stated Debt in the Deed it self: And he said, the Case was no more, than a Man's Avowing for a Quarter's Rent more than is due, and a Demurrer thereupon: He should have a Return irreplevisable for what is due; so of Rent and Nomine Pœnæ and Title only for Rent, and by three Judges, Judic' pro quer. releasing the Overplus.

Yoxon & Bennet.

ERror of a Judgment affirmed in the Court of Chester upon a Writ of Error of a Judgment given in the Corporation-Court of the City, in an Action upon the Case for a Libel; the Declaration set forth, that the Plaintiff was an Alderman of the City of Chester, a Justice of Peace, and a Grocer by his Trade; and that the Defendant did maliciously, &c. publish a Libel of him in these Words, which he caused to be fixed up in several places of the Town: These are to advise all good Persons to shew me, where I may see Alderman Yoxon, to receive my Money of him. A Demurrer to this Declaration, and Judgment for the Plaintiff in the Mayor's Court, affirmed in the Chief Justice's Court; and here it was assigned for Error, that upon the Plaint levied below, the Process to bring the Defendant into Court, was directed to, and executed by the Serjeant at Mace; and after an Interlocutory Judgment in the Demurrer, they directed a Precept to the Sheriff of the County to call a Jury, and enquire of Damages; and it was urged, they could not charge that Officer: But that the same Officer who executed the Mesne Process, should execute the Judicial one; and they said, no Prescription could be to justify these Proceedings, because they had no Sheriff till the Time of H. 7. for till the 21st Year of that King, the City was Part of the County at large; and they had no Sheriff, but that of the County; and therefore this Sheriff could not be an Officer to the Mayor's Court, which is by Prescription. 2. Er-

Famosus Libellus, of an Alderman.

Errors assigned on a Judgment in *Chester.* See 2 Salk. 417, 418, 425. 6 Mod. 124. 42 Lev. 200. 1 Mod. 55. 3 Mod. 139. *Antea* 28.

2. Error was, that upon an Interlocutory Judgment in an inferior Court, the way to enquire for Damages is, for the Serjeants at Mace to Summons an Inquest to appear in Court, and to make enquiry in Court: For it never was suffered in an Inferior Court, that the Judge of it should send his Precept to another Officer, to enquire of Damages; for that is the particular Prerogative of the Courts of Westminster-Hall, to send to the Sheriff to enquire of Damages; and is more than even the Courts of London have ever attempted to do.

3. That the Original was an Attachment per Corpus, which is only a Process in Trespass vi & Armis, and not in Case; for in Case the Original Process is an Attachment per Bona, but not to arrest a Man's Body presently.

4. That the Joinder in Demurrer is pet' Judic' pro Dampnis occasione Transgr' pred', instead of occasione Transgr' super Casum.

Argument *contra*.

Cheshire contra. It is said before to be Transgr' super Casum, and then Transgr' prædict' must be super Casum.

As to the 1st Exception, he said, the City of Chester was an ancient County long before H. 7th's Time; and it had Sheriffs Time out of Mind, and Process directed to them, and Abundance of such Precedents; and the Act of H. 7. was only a Confirmation; and he said, all their Precedents were thus, that the Serjeant at Mace did execute the mesne Process, and the Sheriffs Process after Judgment: And that such a Thing might be good by Grant, and what may be by Grant, might have been by Prescription; and he said, that by Law, the same Person may be Judge and Minister. Vide 1 Cro. 138. Jones 193. 12 H. 7, 3. By the same Reason, several may Discharge the Office of one. Vide Mod. 598. Noy. 64. Course of Court is the Law thereof, and need not be shewed specially in Pleading. But that the Courts above are to be satisfied of it, by Precedents and Certificates of the Judge of the Court. 2 Co. Wiscot's Case: And there is a Difference in the Manner of taking Bail in this Court, and the Common Pleas; and so formerly of Return of Sci. Fac. But this Court did allways require two Sci. Fac. and Returns to them both, but one sufficed in the Common Pleas.

Post. 95.

Holt,

Holt. Suppoſe the firſt Proceſs to the Serjeant at Mace were wrong, yet Appearance and Pleading will cure it; for where a Man has a Day on the Roll, he may appear, if he will, at that Day, though there be no Return of the Writ; and Precedents are ſhewn as ancient as 5 Eliz. of the manner of Proceedings. And Powell ſaid, They could not take judicial Knowledge if the City of Cheſter had a Sheriff only by Act of Parliament in Time of H. 7. for that Statute, only ſays, then it was made a County, and the Statute of 43 Eliz. c. 16. ordains, That the Officer of an inferior Court, ſhall not ſwear a Jury to enquire of Damages before him; but the Method is for them to ſummon a Jury to enquire of Damages, and to ſwear them in Court before the Steward or Judge of the Court: And Precedents were ſhewn here, of Writs anciently directed to the Sheriff of Cheſter, and that there is a Court by Preſcription holden there, called the Sheriff's Court. *Opinio Curiæ.*

And per Powell, An Officer called Sheriff, might have been without a County, and ſo known Time out of Mind, and a ſubſequent Act of Parliament making it a County alters not the Preſcription: But he ſaid, This could not be made good but by Preſcription; for the ſame Officer that executes one Proceſs ought to execute all; and therefore, if upon Exception to the Sheriff, Proceſs be directed to the Coroner, tho' the Exception be after removed, it ſhall never after go to the Sheriff; and tho' there be no Precedents of theſe Proceedings but ſince the Time of H. 7. yet if the Current of Precedents have been ſo ever ſince, we ought rather to run with the Tide, than to reverſe all the Judgments that have been given ſince; for in ſome Caſes, Communis Error facit jus, and per tot. Cur. Judgment was affirmed, without Regard to the Inqueſts being taken before the Sheriff. Judgment affirmed.

Oades & Woodward.

S. C. 1 Sal. 87.

UPON a Report by Mr. Clarke Secondary, the Caſe was; One Woodward had given a Warrant of Attorney to enter Judgment againſt him, as of Michaelmas or any other ſubſequent Term, and before Judgment entered he died; and after the Attorney entered up Judgment, as of a Term when the Party was alive, and the Debate was upon the Regula- Warrant of Attorney to enter Judgment, and dead before entered. *Antea* 2.

rity of the Entry, for that the Attorney's Warrant was determined by the Party's Death. Holt declared himself desirous to know how the late Practice had gone, for he had known various Reports of it formerly; at one Time it had been reported, That if the Plaintiff had entered Judgment before the Continuance-Day after the Defendant's Death, it would hold good, but not after; at other Times it had been reported, That he may enter it at any Time before the Essoin-Day of the next Term, as of the precedent Term when the Party was alive; so he said, it had gone both Ways.

Attorney General said, If the Party does not enter his Judgment within the Year and Day, he can't do it after without Leave of the Court, not to be had without Affidavit that the Parties are living; and why is that required, if within the Year it may be entered after Death of the Party? Holt. The Reason is, That if he enters it after the Year, he must enter it as of that Term on which he has Leave; but within the Year he may enter of a precedent Term. And Shelley's Case was quoted at the Bar, where Judgment was given after the Party was actually dead, because he was alive in the Morning the first Day of Term. And per Holt, If one dies in the Vacation after Postea settled, after Judgment is frequently entered; so if the Rule be for entering of Judgment in Term-time, and the Defendant dies before it is entered, it shall be entered after; so if the Defendant dies after Verdict against him, after Day in Bank, Judgment shall be entered against him.

Death *inter* Verdict and Judgment. *Vid. antea* 39, 68.

And it was objected to be a very unequitable Thing; for by this Means, one Creditor would run away with all and leave the rest nothing; and this was said to be against both Conscience and Law; for it was a Rule in Law, whenever a Thing is doubtful at Law, to go by Equity; and that this was a kind of a Fraud; and that a Letter of Attorney was in its own Nature revocable, and that Death was an actual Revocation; and therefore the Attorney had no Authority to confess the Judgment, and that the Statute of Frauds and Perjuries had made a Difference in the Case; for before that Statute, a Judgment referr'd to the first Day of the Term of which it was entered: But since that Statute, it refers only to the Time of the actual Signing of it, which Time is to be marked on the Side of the Roll; But that can't be done in this Case,

Antea 39.

because the Attorney has no Authority at the Time the Judgment was actually entered, though he had one at the Time it is said to be entered; and a Warrant of Attorney is revocable though the Party covenant not to revoke it.

Of the other Side, Shelley's Case and Sir George Savill's Case in Palmer were strongly insisted on. *Antea* 2.

Holt. If this be Fraud, it is a Pia Fraus, to get a just Debt by due Course of Law, and he agreed, That a Warrant of Attorney was revocable in its Nature: But if there be a Warrant of Attorney to confess a Judgment, and after, the Defendant comes and revokes it before it is entered, yet the Attorney shall enter it notwithstanding the Revocation; and the Course of the Court has been so Time out of Mind; and the Course of a Court is the Law of it. If Judgment be entered in Vacation, and Writ taken out against the Party's Goods as of the Term before, yet the Writ shall levy the Money of his Goods in the Hands of his Executors. If a Fine be acknowledged before Commissioners in the long Vacation, and no Writ of Covenant taken out, then the Party dies immediately, they shall after enter the King's Silver, and take out a Writ of Covenant as of the Term before, and no Body ever stopped upon it; nor was it ever moved in the Common Pleas, Don't receive this Fine, for the Party died before the Writ of Covenant sued out. And the Statute of Frauds and Perjuries does not extend to this Case; for if Judgment be given against him, and Execution taken out in the Testator's Life-time, it binds the Goods in the Hands of the Executors; and the Statute of Frauds and Perjuries is purely for the sake of Purchasers, and in regard to Lands; but makes no Alteration as to Goods, but binds them only from the Delivery of a Writ to the Sheriff. Warrant of Attorney revoked. *Antea* 92.

Another Exception was, That upon Search, it was found that no Bail had been filed. But Holt inclined to compel the Attorney to file Bail now; for if it were an adversary Action they would do, and why not so here? And he said, he was very well satisfied as to the other Point: But upon the last, it was suffered to go over till next Term. Bail filed after.

Per

Sci. Fa's. returned. *Antea* 40. *poſt.* 138.

Per Holt. There can't be two Sci' Fa's, taken out together, but the firſt muſt at leaſt be ſeven or eight Days out before the Return of it, and then the ſecond to be purchaſed.

Nicholls's *Caſe.*

Bankrupts. Two Thirds Statute private. *Vide antea* 10. 16, 83.

WHEN one pleads the Statute of two Thirds, if he would take Advantage of the Clauſe of being in Cuſtody, he muſt ſhew it to have been on the ſeventeenth of November; if of the Clauſe of abſconding, he muſt ſhew he abſconded for Debt at the Time of the Statute made. And Holt ſaid, he took the Statute to be a private Law; for tho' it concerned a great many, yet it concerned a particular ſort of People; and here the Plaintiff had Judgment, becauſe the Defendant did not ſhew in his Plea, that he had abſconded at the Time of the Act made, but only ſaid it was on the ſeventeenth of November. Vide antea.

Thomkins & Pincent.

S. C. 1 Sal. 141.

Rent on a Demiſe.

Variance, &c.

IN Debt for Rent, Plaintiff declared on a Demiſe, bearing Date the 25th of Auguſt 11 W. 3. for ſeven Years from the 24th of June before, paying quarterly at the moſt uſual Feaſts following, the Sum of 3 l. 10 s. viz. Michaelmas, St. Thomas, Lady-day, and St. John Baptiſt, the firſt Payment to begin at the Feaſt of St. Michael, and ſo from thenceforth every Year quarterly, at the moſt uſual Feaſts during the ſaid Term, or within twenty Days after the ſaid Feaſts.

Object. The Rent is payable at Michaelmas, St. Thomas, Lady-day, and St. John Baptiſt, and this Action is brought, primo Anno integro finito 25th of December, and payable then within twenty Days, viz. the tenth of January; ſo that the twenty Days were reckoned from the right Day on which the Rent was due, viz. 21 December, St. Thomas's Day.

Opinio Cur.

And per Cur. This Exception, viz. That the Rent was payable on the Twenty-firſt of December, and then the Year ended as to the Rent; and then the Rent had been payable and demandable, if there had not been twenty Days more; the Declaration is bad, for it was for other Rent than was

demandable and payable by the Leaſe. And the Caſe of Parker and Harris was quoted: A Rent was reſerved half yearly from Michaelmas, an Action brought for half a Year's Rent ending the 25th of March, which was not half a Year from Michaelmas; and the Rent being reſerved half-yearly without mentioning any Day there, there muſt be a full half Year before it is due; but otherwiſe, where it is made payable at ſuch and ſuch Feaſts, quarterly or half-yearly; there, though the Quarters or half year in Reality be not then expired, yet as to the Reſervation and Payment it is. And here the Court ſaid, That in this Caſe an Action could not be brought for the Rent till twenty Days were paſſed; but it was due immediately after the Feaſt and payable. And here, foraſmuch as the Rent declared on, and the Rent reſerved by the Deed, were quite different, the Court told the Plaintiff, that he could not diſcontinue, for this Judgment could be no Bar againſt the right Rent.

Owen and others of the City of Coventry were bound by Recognizance, and appeared for two Terms; and no Proſecution being againſt them, it was moved to diſcharge their Recognizance, or diſpenſe with their Appearance: But the Court ſaid, they could not do it; and all they could do was to reſpite their Recognizance. Recognizance reſpited.

Ode & Norcliff.

S. C. 1 Sal. 4.

IT was pleaded in Abatement, That the Defendant was one of the Clerks of the Common Pleas, and ought not to be ſued out of that Court without his Conſent. Plaintiff replied, That he did conſent, but laid no Venue where, and therefore bad per Cur. Privilege. Abatement. *Poſt.* 106.

Certiorari to remove Orders made concerning foreign Salt, and the Orders returned were concerning Salt in general; and held they were not well removed: For ſpecial Certiorari can't remove general Orders, tho' General will remove Special ones. *Certi rari* ſpecial Orders general

Goodwin & Hilton.

PEnding Writ of Error, Bail rendered Principal the 20th of December before; and in February following, the Defendant meeting the Plaintiff at large, he told him, he had Bail render the Principal. *Antea Vid.* 51, 77 8 5. &c.

rendered himself in Discharge of his Bail. The Plaintiff's Attorney having no Notice of the Render, took out a Capias against the Principal, and Sci' Fac' against Bail, who pleaded Nul tiel Person as the Principal in Rerum natura; and upon Examination of the Regularity of the Render this Matter appeared.

1. It was agreed by the Court, That Bail might well render during Writ of Error.

2. That by Course of the Court, there ought to be an Entry made by the Defendant's Attorney with all convenient Speed, in a Book to be kept for that Purpose in the Office of King's Bench, to the Intent the Plaintiff may know how to proceed; that is, to charge the Party in Execution, or to take a Fi. Fac. or other Writ.

3. That by the late Rule of Court, Besides this Entry, there must be two Days Notice to the Plaintiff's Attorney before a Committitur can be entered, or a Discharge upon the Bail-piece. Note, It was also agreed, That the Course of Render is upon the Reddidit se, signed by the Judge, to get a Certificate from the Clerk of the Papers to the Master of the Office, which is his Warrant to enter a Discharge upon the Bail-piece; but such Certificate does not make the Reddidit se better or worse. And here was an Entry made in the Book kept in the Office long before the second Sci. Fac. returned, but likewise long after the Reddidit se; and it would have been well as to that, but that it appeared the Defendant had escaped long before.

Reddidit se. *Antea* 85, 77, 51. 6 Mod. 309. 3 Sal. 57, 58, 198. 2 Show. 398, 443.

Costs. Executors. *Post.* 118.

Executor shall pay Costs for not going on to Trial: Per Cur. So if nonsuited. See 6 Mod. 91, 92, 94.

S. C. Sal. 385. 6 Mod. 150.

Domina Regina & John Bucknal, *Mil.*

Bridge repaired. *Vid. antea* 54, 55. 3 Sal. 77, 381.

HE was Lord of the Manor of Le More in Hertfordshire, which Manor was held by the Service of repairing a publick Bridge; and though all the Demesnes of the Manor, except the Copyholds, were alienedy yet it was held per Cur. That all the Alienees were chargeable in Proportion, yet the Queen might charge any of them with the whole, and let him have Contribution against the others: And though the Lord had

had nothing but the Copyhold, yet for as much as the Freehold thereof was in him, he was chargeable, and the Court would direct the Information to be againſt all the Parties liable; but let him that is charged, have his Remedy againſt the reſt: Per Cur.

Holt declared, If Complaint were made to him, that ſome Juſtice of the Peace had iſſued a Warrant to take away Goods out of a Man's Poſſeſſion to which he pretended a Right, he would ſend for the Juſtice and bind him over; for People muſt take the legal Remedy, that is Detinue, Trover, or Replevin.

Juſtices bound over. *Vid.* Noy. 103. 1 Sid. 192. Pop. 153. Cro. Jac. 643. Stil. 182. 1 Rol. R. 247. *Blackerbey's* Caſes 49. 133.

Wortley Mountague & *Lord* Sandwich.

UPON Motion for a new Trial, the Caſe appeared to be this: An Executor ſeveral Years before had left ſome Houſhold-Stuff in the Houſe by the Conſent of the Heir who uſed them after; and within ſix Years of the Action brought, the Executor demands the Goods, and the Heir refuſed to let him have them; whereupon Trover was brought, and the Statute of Limitation pleaded. And per Cur. the Uſer before the Demand was no Converſion nor Evidence of it; for it was with the Conſent of the Executor till then. And the Demand being within ſix Years, the Refuſal which enſued it, and is the only Evidence of a Converſion in the Caſe, was within the ſix Years; and if a Trover be before ſix Years, and a Converſion after, the Statute can't be pleaded.

Limitation pleaded by Heir againſt Executor, 2 Sal. 521, 422, &c.

Antea 5, 12.

Domina Regina & Sturney.

HE was convicted in a ſummary Manner on the Statute of the 13 & 14 Car. 2. for a Fraud in a Cuſtom; and the Conviction being removed here, was quaſhed on Motion. For per Cur. The Statute directs no particular way of Trial, but only that the Offender ſhall be fined at the Seſſions; and whenever an Act of Parliament makes an Offence, and is ſilent on the Manner of trying it, it ſhall be intended to be a Trial per Pais according to Magna Charta.

Fraud in Cuſtoms, &c. how tried. *Qu.* 3 Sal. 329, 331. Cumberb. 8, 14.

S. C. 1 Sal. 78.

Domina Regina & Darby.

Subornation. 2 Show. 1, 2. 1 Lev. 118. 6 Mod. 202. Arreſt of Judgment.

HE being convicted of Subornation of Perjury and a Judgment, quod capiatur pro Fine, and brought in upon the Capias, and offered to move in Arreſt of Judgment; and Court and Bar ſaid, They never had known a Motion in Arreſt of Judgment, after a Judgment quod capiatur pro Fine, And it was inſiſted on for the Queen, that the Judgment was compleat: But the Certainty of the Fine could not be known till the Party be brought into Court, and that in the mean Time there is a ſhort Entry made of the Judgment quod capiatur: But after the Fine is ſet, then there is an Entry made at large, and that is called the Fine-Roll; and if Judgment ſhould be arreſted now upon the Motion, the Entry muſt be quod capiat. inde ſine Die, which would be contrary to the Judgment before, upon which the Cap. pro Fine iſſued; and the Judgment is as final as it can be, when it is quod capiatur pro Fine, tho' the Roll be not made up till he be brought in upon the Capias. And the firſt Caſe in Palmer was quoted, where it was ſaid, That a Writ of Error would lie of this Judgment before the Fine ſet.

Capiatur pro Fine.

But Note, There it was a Judgment that he ſhould be ouſted of his Franchiſe, and likewiſe taken pro Fine; and they ſaid this was ſtronger than the Caſe of Ejectment; for there Judgment is not compleat till Damages be found, and yet a Writ of Error lies of the Judgment before any Damages found; and the Reaſon is, becauſe by the Judgment that is given the Poſſeſſion is touched immediately; and where a Judgment is final for any Part, Writ of Error will lie. And here they would have the Capias pro Fine to be in Nature of an Execution, quod Holt negavit, becauſe it is not certain; And he ſaid, that upon an interlocutory Judgment in Caſe of Treſpaſs, a Capias pro Fine ſhall go, yet after they may move in Arreſt of Judgment; and theſe are likeſt of any to the Caſe in Queſtion. And it is not like a Judgment quod computet; for after ſuch Judgment you can't move in Arreſt of Judgment; for then there is no more to do, but to ſee what is behind: And upon the Doubt, Time was given till the next Day; and it was agreed, That if ſo be it could not be moved in Arreſt of Judgment, it might very well be urged in Mitigation of the Fine, and for that the Exceptions were heard.

1. The Information ſets forth, That there was a Cauſe in Chancery between A. & B. and that a Commiſſion did iſſue out of that Court to examine Witneſſes in the Cauſe, and that J. S. was ſworn a Witneſs before the ſaid Comiſſioners, (without ſaying in that Cauſe, or what he had ſworn,) That the Defendant did ſolicit him to forſwear what he had ſworn before; and it not appearing that the Oath was in any Cauſe pending, or that it was in any material Point, were two Exceptions; for that ought to be ſet forth, that the Court might judge whether it was a Point material or not; for it could not be Perjury if it were not, and then Solicitation could not be a Subornation.

2. That J. N. was to have been a Witneſs in the ſame Cauſe, and that the Defendant went and deſired him to ſwear ſuch a particular Thing, without averring that it was falſe, or that he knew nothing of it; and theſe Objections ſeem'd of Weight to the Court. And Holt ſaid, How ſhall we judge of the Nature of his Offence, and by Conſequence what Fine to ſet, if we do not know it from the Record of his Conviction; And if a Man be indicted of Perjury, and it don't appear what he ſwears, and that it was in a Cauſe depending, and material to the Point in iſſue, the Indictment will be bad: and the Court is to judge what is material, and that they can't do, if it be not ſet forth; and bythe ſame Reaſon, Subornation muſt be of ſuch a Thing as would be Perjury if ſworn, and ſo muſt be ſhewn certainly: But as to the other Point, it ſeem'd to be a Common Law Offence, to offer Money to ſwear to a particular Thing whether True or Falſe.

See 2 Show. 12. 2 Salk. 514. 1 Salk. 374. Cumberba. 460, 461. 6 Mod. 167, 168. 5 Mod. 343, 349. &c. 3 Salk. 199, 269, 270.

Indictment of Perjury.

Domina Regina & Swanſon, Baynton, Hartley, & Spur.

See State-Trials.

THEY were all indicted upon the Statute of 3 H. 7. againſt Stealing of Women, &c. The Indictment did ſet forth the Woman's Age, that ſhe was an Heireſs to J. S. was worth in Goods and Chattels ſo much, and ſo much in Land of Inheritance; That ſhe was a Virgin: And upon Evidence, the Caſe appeared to be thus: Baynton perſonating a Country Lady, though in Truth a Woman of the Town, took a Lodging in the Houſe where Mrs. Plaiſant Rawlins

Felony in ſtealing a Woman. See Hale's P. C. 119, 317. 1 Hawk. 109, 110. 2 Hawk. 313.

lodged, (for that was her Name) and after some Time introduced the said Swanson into the House, as her Brother, where he frequently had the Conversation of the said Rawlins: In the mean Time, Mrs. Baynton used to magnify her pretended Brother's Merit and Goodness, insomuch that the said Rawlins had likewise declared her Liking of him, and wished he would marry her. But to get her abroad without any of her Friends, Baynton deluded her Aunt and her, to go with her to Church; and against the Time got Bailiffs, to take out a Writ for Rawlins and her Aunt, and so they way-layed and arrested them, and conveyed them from Westminster where they lived first, to the Garter-Tavern in Drury-Lane; and they separated the Aunt and her, and carried her to Holborn to the Vine-Tavern, where Swanson came as her Bail, and there married her, continuing under the Arrest; Baynton telling her, that if she did not marry him, she must go to Newgate: And Swanson and Baynton were found guilty. For the Court delivered it to the Jury for Law: That tho' the said Rawlins had a Fancy for the Man, yet because she was not privy to the Contrivance of coming out to him, and knew not before-hand, or consented so to come to him, and being married whilst she continued under that Restraint and Violence, tho' perhaps she consented to the Marriage; yet the said Fact was a Crime within the Statute; for here was a forcible taking away, and her subsequent Consent while under the Restraint, could not be look'd upon, but an Effect of the continuing Force; and that tho' Swanson had known nothing of the first Force, yet he knowing her to be under it, and marrying while he knew her to be under it, made him approve of the first Force, and so partake of it, so as to be guilty. Note, Upon this Statute, all Aiders and Assisters are Principals. And Note, The Man was hanged: Hartly and Spurr, the Bailiffs, were acquitted.

Note.
Post. 132.

Le Noyer's *or* Penoyer's *Case.*

Amendment.
See Cumberba. 51, 126, 569, 398.

In an inferior Court the Record was made, in the Part of issuing the Process, preceptum fuit, instead of precept. est; and because the Draught of the Counsel given to the Clerk, to enter up by, was Right, it was moved now to Amend the Record by it. But per Cur. there never was any amendment by Draught of Counsel; for it is a Thing of no manner of Authority, alterable at Pleasure, and no Offence to change

change it: And the Caſe there put of a Bond, is not like this, for a Bond is an Authentick Thing, and an Alteration in it is Forgery, and if the Party himſelf does it, beſides the Forgery, he avoids the whole Bond: And the Statute is to amend where there is a Letter too much or too litle, tho' the Fault of the Clerk. And Holt ſaid, He would gladly have an Action brought againſt an Attorney, that makes ſuch a Fault in Entry, contrary to Advice of Counſel: For they ſometimes do it out of Malice, and ſometimes out of Preſumption; beſides no Dimunition lies of a Record of an inferior Court.

No Diminution lies to an inferior Court. See Cumberba. 370.

Reignol & Taylor.

ERROR of a Judgment in Treſpaſs at the Stannary-Court. 1. Exception was, that in the Record ſent up in the Stile of the Court ſet forth; they do not ſay, that it was held within the Juriſdiction of the Court. Vide 1 Co. 51. 1 Inſt. 58. 1 Rol. Ab. 533, 434.

Error. inferior Juriſdiction.

Holt and Cur. Where you declare in the inferior Court, you ought to lay the Fact or Cauſe of Action, to have ariſen within their Juriſdiction; or if you declare, that at a Court held, ſuppoſe at Maidſtone, ſuch a Thing was done, there you muſt ſay, that the Court was held within their Juriſdiction of the Court, but when you only ſet forth the Stile of a Court, you need not ſhew it. Another Error was, that it was not alledged, that the Plaintiff was a Tinner; and by ſeveral Acts of Parliament concerning their Juriſdiction, they ought to ſhew it: And for this Judgment reverſed Niſi.

Vide 1 Lev. 50, 69, 96, 105, 137, 156, 208, 289. 2 Lev. 87, 230. 1 Mod. 32. 2 Mod. 141. 3 Salk. 216. 2 Show. *Caſe* 130.

Cole & Henry.

ERROR of a Judgment in Ejectment in Ireland, in the Court of Queen's-Bench. 1. Error aſſigned was, that no Juror's Name was entered on the Record. 2. That the Judge who tried the Cauſe, calls himſelf the Queen's Judge; and it no where appears that the King was then Dead. Holt, We are to take Judicial Knowledge, who reigns over us, and whom we owe Allegiance to; and tho' it be decent to take Notice of the Demiſe of the King, yet it is not of Neceſſity. And when there is a full Jury, there never

Error. *Ireland.*

Vide 6 Mod. 142. 1 Salk. 266.

never is an Entry of their Names in a superior Court. Et Judic' affirm.

Harwood & Parrot.

Baron and Feme.

CASE by Husband and Wife, for malitious Indicting the Wife of a Riot, 2 Counts. First, shewing the Plaintiff's Wife was of good Reputation: and that the Defendant to lessen it, did indict her of a Riot, of which she was acquitted. 2. Count was the same, and that the Husband was put to great Charge: as to the first, it was held to be no Scandal to be guilty of Trespass; and as to the other, the Court inclined, that the Husband alone ought to have brought the Action, for he alone could be put to the Charges: But they delivered no positive Opinion.

1 Salk. 114, 119. 2 Show. 255. Cumberba. 311. *Vide post.* 105. 3 Salk. 63, 105.

Wood & Branford.

Error. *Certiorari*, *Vide* 6 Mod. 113,114,206. 1 Lev. 99. 1 Jon. 199. 1 Sid. 39. *Vide post.* 124. *&c. ibid.*

ERROR of a Judgment in Dower in Common Pleas, and in Nullo est Erratum pleaded, It was assigned for Error, that it was against an Infant who appeared by Attorney, when he should have appeared by Guardian. And per Cur. Tho' it be after in Nullo est Erratum pleaded, yet we may grant a Certiorari ad informandas conscientias, and a Dowager is a kind of a Purchaser.

Shield & Cliff.

Misnomer. Cumberba. 40. 287. 1 Salk. 6, 7. 6 Mod. 115. 3 Salk. 238, 239. 2 Show. 504. *Antea* 38. *Inst. Leg.* 511, *&c.*

CLIFF being sued upon a Bond, by the Name of Peter, he pleaded in Abatement, That he was baptized by the Name of Paul, and not by that of Peter; and concludes to Country. And per Cur. A Respondeas ouster awarded.

S. C. 1 Salk. 4.

Haywood & Davis, & al'.

Trespas. Abatement. Tenants in Common.

TRespas against two, for taking a Pail of Water out of the Defendant's Well; Defendant pleaded in Abatement, that the other Defendant and Plaintiff were Tenants in Common of the Well; Plaintiff replies, that he was Sole seized Absque hoc, that he was Tenant in Common with any, and concludes to Country. And per Broderick,

Where an Abſque hoc takes in the whole Matter of the Plea, there he that takes a Traverſe, may conclude to the Country: But where an Abſque hoc is upon a particular Fact, which does not comprehend the whole Plea, there he ſhall not conclude to the Country, but aver. And it was agreed by all, that in the Caſe of Abſque tali cauſa, one may conclude to the Country. Concluſion del plea. *Vide infra.* *Ante* 53. Cumberba. 86, 311.

Holt. In Treſpaſs, it is no Plea in Abatement for a Defendant to ſay, he was Tenant in Common with the Plaintiff, becauſe he may give it in Evidence upon not guilty; but here the Defendant that was a Stranger pleads Tenancy in Common in the Plaintiff with the other Defendant; and that he may well do. And where one pleads Tenancy in Common, or Jointenancy in Abatement of the Writ; and Plaintiff pleads in Support of his Writ, he ſhall conclude to the Country generally; for it is there an Abſque hoc upon a ſpecial Occaſion to maintain his Writ, and Abſque hoc there is merely put in for Form: And is no more, than that the other who is ſeized jointly, or ſeized in Common with him, has nothing there. Vide Dyer 333. Where you traverſe a ſpecial Point, you muſt conclude with Averment, and not to the Country: But this is not a Traverſe of a ſpecial Point. And per Cur. Reſponſ. ultra. 1 Lev. 261. *Qr. antea* 39.

Wittingham *verſus* Broderick.

JUdgment in Com. Banco, in Treſpaſs by Huſband and Wife, for taking away their Goods, reverſed, becauſe Wife ought not to join. Baron and Feme. *Antea* 104. 2 Show. 255. Cumberba. 185.

Crogate *verſus* Martin.

NOT concluding to the Country upon Iſſue compleatly joined, good Cauſe of Special Demurrer. Per Cur. Male Concluſion. Demurrer. *Vide ſupra.*

Q. 2 Show. 545.

Cliffton & Swezeland.

Privilege. Abatement. *Antea* 97. 1 Salk. 1, 2, 4.

HE pleaded Privilege of Common Pleas in Abatement, without concluding to Record. Holt, He need not do it, but he may leave Plaintiff Liberty to reply; and deny his being a Person privileged there, which Plaintiff can't do if Defendant conclude to the Record: And his not saying prout patet is no good Cauſe of a general Demurrer, and upon the prout patet per Recordum, there ſhall go a Certiorari to certify the Record, and if they produce one and ſhew they have Privilege, Plaintiff is eſtopped.

S. C. 2 Sal. 649.

Clerk & Yewdall.

Quantum Meruit.

IN a quantum Meruit Plaintiff declared, That at the Requeſt of the Defendant, he had done ſuch and ſuch Services for him, and ſets them forth; and that in Conſideration thereof the Defendant promiſed to pay him quantum Mereretur: Verdict pro Quer', and moved in Arreſt of Judgment, that the Conſideration being paſt, it ſhould have been quantum Merebatur or Meritus fuiſſet. Vide Stile 444. Aſſumpſit for Mariners Wages; and laid, that in Conſideration that B. deſerviret inſtead of deſervivit, and Judgment arreſted upon that Exception. Holt, In all our Judgments the Entry is quod recuperet, which is a Subjunct; and yet it is a preſent Act, and not a future one: For it would be ill to make it future; and it muſt be tranſlated, that he do recover, in the Preſent-Tenſe. So if Preſent of Potential or Subjunctive be the ſame with preſent of Indicative, why ſhall not Preter-Imperfect-Tenſe of both Moods be the ſame? And if this had been merebatur, you had allowed it good. And the Merit is not paſt, when the Work is done, but continues till Satisfaction. And Plaintiff had Judgment.

Gramatical Conſtruction. *Poſt.* 108.

How & Prin.

S. C. 2 Sal. 694. Lutw. 1294. N. Lutw. 410. Scandal.

IN Caſe; Plaintiff declared, That he was a Juſtice of Peace of the County of Glouceſter; and alſo Deputy Lieutenant of the ſame County; and that he did intend to ſtand Candidate for Knight of the Shire of that County, to ſerve in the Parliament, to be held at Weſtminſter, the 13th of November the ſame Year; That the Defendant knowing the Premiſſes, and intending to hinder him to be choſen Knight of the Shire as aforeſaid, and alſo to diſcredit him in the Country amongſt his Neighbours, ſpoke theſe Words of him, Do not Vote for *How*, for he is a *Jacobite*, and for bringing in the Prince of *Wales*, (*innuendo* the pretended Prince of *Wales*) and Popery, (*innuendo* the Popiſh Religion) to deſtroy our Nation, (*innuendo* the Nation of *England*) And that at another Time, viz. on ſuch a Day in May laſt; He the Plaintiff being a Juſtice of Peace, and Deputy Lieutenant of the ſaid County, and alſo a Privy Counſellor to her preſent Majeſty, the Defendant did ſpeak theſe Words of him. I (*innuendo* the Defendant) was arreſted at the Suit of the Right Honourable *J. How* Eſq; (*innuendo* the Plaintiff) and it has coſt me, (*innuendo* the Defendant) 5 l. for my Breakfaſt, and if you (*innuendo* the Perſon to whom the Words were ſpoke, whoſe Name was ſet forth) don't Vote for him, (*innuendo* the Plaintiff,) He will ſerve you ſo too. I know why he did it, it is becauſe I would not give my Conſent to bring in Popery, and the Prince of *Wales*, to deſtroy the Nation. Verdict and 400 l. Damages for the Plaintiff, and after many Hearings in Arreſt of Judgment, Holt Ch. J. delivered the Opinion of the Court.

Opinio Curiæ.

I and my Brothers have conſidered of this Declaration, and we never ſpoke of it together till now; and yet we all happen to be unanimous in Opinion, that both theſe Words are actionable: As to the firſt Words, it may be fit to explain the Meaning of them; and we do take it, that the true Senſe of them, as they were ſpoken was: That by them Mr. How was charged to be a Jacobite, and that he had a Deſign and a formed Reſolution, to bring in the pretended Prince of Wales and Popery, to the Deſtruction of this Nation of England.

Obj.

Conſtruction and Intendment of Words. *Antea* 106.

Obj. This is no direct Charge; and that of bringing in Popery is uncertain; for it is not ſaid, where it is to be brought in. But theſe Words being ſpoke with reſpect to an Engliſhman, it muſt neceſſarily be underſtood, that he was for bringing of it into England, the Words being ſpoken here, by one Engliſhman of another.

And it muſt be neceſſarily underſtood, that they are both Engliſhmen, for every Man in England, prima facie, is to be underſtood to be of Engliſh Birth, till contrary appear. And for Authorities here, he quoted 5 Co. Caudrey's *Caſe*, upon the Statute of 2 Eliz. intitling her to iſſue Commiſſions to her natural Born Subjects to have Eccleſiaſtical Conuſance; and the Objection was there taken to the ſpecial Verdict, that it was not found the Commiſſioners were natural Born Subjects: And the Anſwer to that was, That every one in Commiſſion by the Queen, ſhall be intended to be a natural Born Subject, till the contrary appears; and here it would be a very foreign Intendment, to intend one that ſtands for Parliament Man to be a Foreigner, or a Juſtice of Peace to be ſo, till contrary appear.

Then if it be taken, that he was an Engliſhman here in England, of whom it's ſaid by an Engliſhman here in England, that he is for bringing in Popery; it muſt be neceſſarily intended, that it was here in England, eſpecially when it is ſaid in the Words, to be to the Deſtruction of our Nation: So that the Words meant, That J. How, was for bringing in Popery into England, to the Deſtruction of England. Beſides if the Words could have Reference to the bringing in of Popery into any other Nation, it ought to be ſhewed on the Defendant's ſide; and if that had been done, the Verdict muſt have been for the Defendant: For if the Defendant had been a Scotchman or a Dutchman, and that had appeared upon the Trial to the Jury, in Evidence, they muſt have given their Verdict for the Defendant; but, prima facie being ſpoken of and by an Engliſhman, it ſhall be intended into England. And this appears upon the Conſideration of Cromwell's Caſe, in 4 Co. To ſay a Man is a Murderer abſtractedly is actionable, but if the precedent Diſcourſe will after the Signification, which the Words prima facie bear; the Defendant upon Action brought muſt ſhew it; as in an Action brought for ſaying the Plaintiff

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is a Murderer, the Defendant pleads not guilty, and it is proved he said it, he may shew that the precedent Discourse was about Hunting: And that the Plaintiff said to the Defendant, he had killed so many Hares, upon which the Defendant said to the Plaintiff, he was a Murderer; that alters the Signification of the Words, and turns the Verdict for the Defendant. So here, if there were a Communication concerning another Country, with another Man than an Englishman, that had altered the Case, and the Defendant must have been acquitted: But without such Mitigation, it must necessarily be intended, that he meant the Plaintiff to be a Person for bringing Popery into England.

As to the Prince of Wales, who is meant by that? You object, we can't take Notice of a Prince of Wales; for there is no such Person in Rerum Natura.

Answ. at the Time of speaking those Words, the Law of England takes Notice of a pretended Prince of Wales; as appears by the Statute of 8 & 9 W. 3. So that there was a Person, of whom the Law took Notice, living, and pretended to be Prince of Wales; and why is he called pretended Prince of Wales, but because he himself and others take Notice of him as such, and pretend him to be so?

And he compared it to the Case of a Bastard, supposed to be the Son of such a Father; in Law he is not his Son; but when he has the Reputation and Pretence of being his Son, that Pretence is enough to give the Law such Notice of him, as to enable him to purchase by that Name: Therefore it's plain as can be, that J. Howe is by these Words charged with a Design, to bring in the Prince of Wales and Popery into England, to the Destruction of it.

Then this being the natural Sense of the Words, the Question is, whether the Words be actionable? I am not for declaring my Opinion what the Law should be, in Case the Words had been spoken of a private Man, because it is going further than we need; and to prejudge a Point, that is not now in Question, but may come in Question; and therefore for my self, I give this Opinion only upon Account of the Person of whom they are spoke, as it appears on the Declaration.

It appears in the first Words, That he was a Justice of Peace in the County; and likewise a Deputy Lieutenant: And an Action lies against a Person, for Words spoke of one in an Office, upon two Accounts.

First, To charge one in an Office under the late King, or present Queen, with such ill Principles, that are of such a Nature that they make him unfit to bear that Office or Employment, is actionable: For if he had such Thoughts to bring in the pretended Prince of Wales or Popery into this Kingdom, it is fit he should be removed from that Trust: Then he as Justice of Peace, ought to punish Popery, to proclaim those that will not come to Church, to try and commit them: Sure then, one that is for introducing Popery, ought not to be intrusted with an Office, the Duty whereof is to punish and suppress it.

Secondly, He is Deputy Lieutenant, and as such he has Power to defend the Government of the County against all Pretenders; and his being of such Principles, as he is hereby charged with, makes him obnoxious to the established Government; and not to be trusted by it, in a Post that is for Defence of that Government, that he is said to be so averse to; when it may be for the Advantage of the Government, to continue him in it; and a Disreputation to him to be turned out of it upon Suspicion. 3 Lev. 50. The Case of Sir William Clarges in the Common Pleas. He set forth, that he was a Justice of Peace, Deputy Lieutenant of such a County, and likewise at the Time of speaking the Words, that he intended to stand Candidate for a Borough, to be Burgess in Parliament: And that the Defendant said of him, that he was a Papist; he is not charged with any Act of Popery, but only that he was a Papist; and that only shews what his Principle and Affection is: Yet being spoke of one in Office of Trust, the whole Court of Common Pleas held, that they were actionable, for the very being a Papist is good Cause to remove him out of his Place; and that Case did not rest singly upon that Resolution: But a Writ of Error was brought of it into this Court, and here the Judgment below was affirmed. Vide the same Case in Raymond.

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In the next Place, if these Words be well considered, they are still more scandalous, for they don't only charge him with having ill Principles, but likewise with having formed a Design to put those ill Principles in Execution, by bringing in Popery and the Prince of Wales, even to the Destruction of the Nation: Then if he has such a formed Design, that is a very great Crime; and the Case in Lev. is a very strong Case for me, and so is 3 Co. 191. 1 Lev. 335. Sir William Waldegrave's Case, and both the said Books agree in the Report of that Case: He declared that he was a Justice of Peace, Deputy Lieutenant of the County, and a Captain of the Queen's Guards; and that the Defendant having Discourse of him with such an one, his Servant, he said, thou servest no true Subject, without accusing him with any particular Act, but only generally, that he was not a true Subject: And adjudged, that being spoke of one in that high Station, they were actionable; and that Case has not been yet questioned, but on the contrary, was quoted for good Law in Yelv. 104, 202. Action brought by a private Person for saying, he was not a true Subject, and held it would not lie for a private Person.

The Defendant's Malice in speaknig these Words, is pretty full upon this Consideration. 1. They were spoke when the Plaintiff had a Design to stand for Parliament Man; and that the Defendant knew, and the Words were with Design to hinder his Election, don't Vote for *Howe*, &c. Why? Because he is so and so principled, and so and so resolved to put those Principles in Execution: They were spoke on Purpose and that is a great Indication of Malice; and he designed Credit should be given to his Words.

Obj. May be he designed to bring in Popery and the Prince of Wales, by Act of Parliament.

Answ. That is a very strange way of introducing it in a Protestant Country: But suppose we should intend it here, Are these Persons fit to be entrusted in a Protestant Government, or to be chose Members of their Parliament, that would be for making a Law to subvert the Government and our Religion; and to set up a Pretender to the Prejudice of the Title of the Queen? And is not that Occasion to remove him? And even in that Sense, the Words would be highly Scandalous, and it would be Time to remove

move him out of an Employment, which gives him such Credit in the Country.

Obj. He is not charged with any Act done: This is answered before, in the Case of Sir Walter Clarges, and also that of Sir William Waldegrave; and to make Words scandalous, it is not necessary to charge one with an Act; but it is enough to charge him with having an ill Design, and ill Principle: and for that, see 1 Brownl. 5. the Defendant said of the Plaintiff being an Attorney, he is a very good Attorney, but he will plead on both sides; he does not say, that he ever has done it, only (he will,) and held they were actionable, because it shews he was of knavish and corrupt Inclination. Another Case is 15 Car. 1. 1 Rol. Abr. 86. Ellis versus Hunt. March's Rol. 1. In Action the Plaintiff set forth, that he was a Journeyman-Shoemaker, and a Cutter of Leather; and that the Defendant said of him to his Master, You keep such a one, who will cut you out of Doors; and the Words, cutting out of Doors, were taken in the Sense, that he would undo him; and there the Plaintiff is not charged with doing any Act, but only that he would do it, and yet the Words were judged actionable, because of his ill Intent.

Obj. This Office of Justice of Peace, or of Deputy-Lieutenant, are not Offices of any Profit; therefore being turned out of such Employment, is no Loss to him; and the Case of Major Bill was quoted, You a Justice of Peace? you will make such another Justice of the Peace as Major *Bill*, who is a Blockhead, an Ass, a Coxcomb, and a Buffle-headed Justice. And judged that an Action did not lye for these Words, because he was not accused of any Corruption in his Employment, or any ill Design or Principle; for it was not his Fault that he was a Blockhead, &c. For he can't be otherwise than his Maker has made him; but if he had been a wise Man, and had wicked Principles charged upon him, when he has not them, an Action would have lain; for tho' a Man can't be wiser, yet he may be honester. If a Man be in a Place of Profit, and he be accused of Insufficiency, he shall have Remedy by Action: But if he be only in a Place of Honour, he shall not have Action for Words of Insufficiency; but even there, if he be accused of ill Principles, and ill affected to the Government, he shall have an Action.

2 Salk. 659.

And the Scandal in the preſent Caſe goes farther; for it muſt be ſuppoſed, the Defendant deſigned to be believed, when he ſpoke theſe Words, becauſe he uſed this Argument to hinder others from voting for the Plaintiff; for he that hears him, muſt believe that he has detected this either from ſome Speech or ſome Act done by him the Plaintiff; for no Man is ſuppoſed to know the Deſign or Purpoſe of another, but from his Words or Act; and therefore, when one ſays poſitively that A. is for ſuch a Thing, he muſt take upon himſelf, that he has detected ſome Act or Word of him, that gives him good Reaſon to make this Inference. And it is the moſt reaſonable Thing in the World, to adjudge ſuch Words to be actionable; for they that are in publick Employment, would find it impoſſible to act with Temper, if the Law did not give them Remedy: For if the Defendant had not been brought to an Account for thoſe Words, what would become of My. How? For it would be preached up in all the Country, and there would be no way to hinder it, it would at laſt run to common Fame, and that alone is good Cauſe to hinder a Man's being employed; for no Man that is under an ill Fame, ought to be truſted with a Place or Employment of Truſt, and then no Man could ſafely be in his Place. The ſecond Words are actionable for the ſame Reaſon before given; and though it be objected, that the ſecond Words, at leaſt the latter Part of them are Nonſenſe, He arreſted me for not conſenting with him to bring in Popery and the Prince of *Wales*; for none can be arreſted for not conſenting to ſuch a Thing. Anſwer, The not doing of it can't be the Cauſe or Foundation of the Action, but it may be the Motive why he was arreſted. Jud. pro Quer. per tot. Cur. Et poſtea affirm. ind. in Domo Procerum. Judgment.

Harrow's *Caſe*.

LIBEL in Spiritual Court for Subſtraction of Tithes, for Agiſtment of Cattle: They pleaded below that they were Inhabitants of that Pariſh, and the other Tithes were better for the Agiſtment of Cattle there; and this Matter they alſo ſuggeſted for a Prohibition; but in their Declaration upon a Prohibition, they alledged they were Occupiers. Prohibition. Tithes for Agiſtment. *Vide Poſt.* 137. 2 Sal. 655.

Variance between the Suggeſtion and Declaration.

Per Cur. The Declaration ought not to vary from the Suggeſtion, and if you do not declare purſuant to Suggeſtion, Conſultation ought to go; for if you diſcontinue your Prohibition, it ſhall go of Courſe; and the Reaſon why agiſted Cattle ſhall not pay Tithes, is, becauſe the other Tithes of the ſame Pariſh are the better for the Agiſtment there. And Holt ſaid, If you have an Houſe in one Pariſh and live there, you muſt not pay Agiſtment for my Cattle there. But if you be not a Houſe-keeper there, you muſt pay Tithes for Agiſtment. And here the Court would give them Leave to diſcontinue paying Coſts, and pray another Prohibition. And if there be Cattle of Plow agiſted in another Pariſh, they muſt pay Tithes there where they agiſt, becauſe they are not Cattle of Plow there.

Pauper. *Vide* 1 Sid. 261. 2 Salk. 506.

Per Cur. If a Pauper be Nonſuit, there ſhall be Coſts taxed, and he ſhall not after go on without paying the Coſts, or ſhewing according to the Act of Parliament that he was whipped.

Vide 6 Mod. 60.

Le Sage & Pere.

Principal, Intereſt and Coſts. *Vide poſt.* 140. 6 Mod. 11, 25, 60, 153.

After Judgment in Debt upon Bond, the Court will not make a Rule upon a Plaintiff to take his Principal, Intereſts and Coſts; and they held in ſuch Caſe, the Plaintiff ought to have his full Coſts out of the Penalty.

Domina Regina & Lee.

One in Execution not chargeable with an *Excom' Cap. Antea* 52.

It was moved, That he being in the Marſhal's Cuſtody might be charged with an Excommunicato capiendo. Here was an Excom. cap. taken out of Chancery, and a Non eſt inventus returned; and it was urged, That it was to no Purpoſe to take out another, when he is actually in Cuſtody of the Officer of the Court; and it was compared to the Caſe of one in Cuſtody upon Meſne Proceſs at the Suit of A. He ſhall be charged in Execution at the Suit of B. But it was anſwered of the other Side, That there was a vaſt Difference; for the Capias upon a Judgment is, ita quod Habeas Corpus ejus here at the Return of the Writ, and there in a Manner the Court is poſſeſſed of him, becauſe there the Proceſs

ceſs is to bring him in hither: But upon an Excom. cap. to the Sheriff, the Sheriff is not to bring him hither, but to keep him in Gaol, and he is not to bring him hither but upon Habeas Corpus; and how can the Court lay hold on one that has no Day in Court, and is not before it? And the Court asked, if the Statute of 5 Eliz. had not been, what Remedy they had? And it was agreed, there was none in that Caſe; but the Statute has made this Difference, for it makes the Proceſs iſſuable in this Court, and returnable here; but does not order the Sheriff to bring the Party in, but to take him and keep him. Holt agreed, If he were taken by Excom. cap. firſt, and brought up here by Habeas Corpus to anſwer an Action in this Court, then he ſhould be turned over to the Marſhal, charged with Excom. cap. But here there is a Proceſs out of this Court, which gives him a Day here, which the Excom. cap. does not; and the Reaſon of that is, becauſe he cannot be in two ſeveral Priſons at once: But here they would not help, but conſider till next Term.

Holt. If a Man be arreſted at the Suit of A. and while he is under Confinement of the Bailiff, he give a Warrant of Attorney to confeſs a Judgment, if there be no Attorney by, it is always taken to be by Dureſs. But when one is in Gaol a good while, and then another that is his Creditor, or ſuppoſed to be ſo, comes to him, and he voluntarily without any Compulſion does confeſs a Judgment to him, that Judgment ſhall ſtand though there be no Attorney. And if one be impriſoned in the King's Bench, and confeſs Judgment or Action to another, it ſhall be good; as if the Declaration be delivered to one in Cuſtody of the Marſhal, and he confeſſes the Action and gives Judgment, though there be no Attorney by, it ſhall ſtand.

Warrant of Attorney, no Attorney by. *Vide poſt.* 139. 5 Mod. 144. 1 Lilly 44.

Taylor & Griffith.

INdictment of Forcible Entry and Detainer, concluded contra Pacem of the late King and preſent Queen, the Entry being in King William's Time, and Detainer in the Queen's Time. Per Holt. The Concluſion is very improper, but there are too many that way to reverſe them all. But it was quaſhed upon the Objection, That it did not appear what Eſtate the Party had, whether Freehold, for Years, or at Will, and ſo the Court could not tell what Execution to award; but

Entry forcible, &c. *Poſt.* 123, 138.

Post. 123, 138.

but if the Eſtate were ſet out, perhaps the Poſſeſſion ſhould be reſtored to one, and the Freehold to another: And here beſides it was not ſaid, That there was a Diſſeiſin of him that had the Freehold, and it was quaſhed.

Thimblethorp & Hardeſty.

Action by Principal of *Furnivals-Inn.*

HE brought an Action as Principal of Furnivals Inn, and declared upon an Inſimul computaſſet with him for ſeveral Sums of Money due to him and the Seniors of the Society. And after Verdict it was moved in Arreſt of Judgment, that it can't be his Debt upon this Promiſe; for by his Declaration, the ſeveral Sums are laid to have been due to him and the Seniors of the Society, and the Promiſe whether expreſſed or implyed, yet ſtill it muſt be a Promiſe to them whoſe Debt it was; therefore they all ought to join in the Action. Here it was agreed, Church-wardens might bring an Action in their Name for the Debt of the Pariſh, for they are a Corporation; but here the Plaintiff is none: And the Principal and Ancients ought to join, not as Principal and Ancients, but as they are natural Perſons. If an Account be made with the Dean of Weſtminſter, for Money due to the Dean and Chapter of Weſtminſter, this is an Account with the Dean and Chapter, and the Action muſt be brought in their Name; that is, in their politick Name. If Plaintiff be Truſtee for the Society of this Houſe, he may ſue in his own Name. And per Cur. A Promiſe to one here, is a Promiſe to all, and all of them muſt join in an Action brought upon that Promiſe, even upon an actual Promiſe. And the Debt upon the Account ſtated, ariſes to ſo many particular Perſons, and they all ought to join in the Action; and though the Defendant be one of them, yet the Promiſe is to all the reſt, excluding himſelf; and all the reſt are Joint-tenants againſt him; and a Note made to one of the Society by another of them, is a Note to all except him that gives it. As if there be twenty Partners, and one of them covenant with all the reſt, he is in that Reſpect ſeveral from them all, and they all joint againſt him; and Judgment arreſted per tot. Cur.

Corporation.

How & Granville.

PER Cur. After Aſſignment of Bail-Bond, if the Defendant put in the ſame Bail that were put in to the Sheriff, Plaintiff may except againſt them; ſecus, if he has not taken an Aſſignment; for then upon Action brought againſt the Bail, they are not held to Bail. Exception to Bail. *Vide Inſt. Leg.* 25.

New Trial denied after View, there being Evidence of both Sides. 2 Salk. 645, 646, 647, 649, 653. *Antea* 53, 64. New Trial. *Vide* 1 Salk. 273. 6 Mod. 22, 222, 242.

Dr. Watſon's *Caſe.* Vide antea 56, *&c.* 1 Salk. 350.

DR. Watſon was brought up, and prayed to be diſcharged for the Fault in the Writ. Holt. The Caſe of the King and Fowler was thoughly conſidered, not only as to the Proceſs with Penalty, but alſo, whether it was not neceſſary, ſince the Court is to award future Proceſs, to know the Cauſe of Excommunication in the Writ? And we then thought it was ſo neceſſary for this Reaſon, becauſe the Chancery now have no Power on the Writ; but that Power they had, is by the Statute of 5 Eliz given to this Court; Therefore, ſince this Court is to award Proceſs; they muſt know that it is Matter of Eccleſiaſtical Conuſance; and there is no other way for them to know that, but by it's appearing on the Writ: For Chancery can't relieve in the Caſe, becauſe the Writ is in this Court: If the Cauſe of Excommunication be not ſufficient, the Party has no Remedy but in this Court; therefore the Statute by neceſſary Conſequence of Law, has made this Court Judges of the Writ of Significavit. And ſo the very Statute does intimate, when it ſays, That in Caſe it be one of the nine Cauſes, we ſhall award Proceſs with Penalty: And how can we do that, if the Cauſe don't appear upon the Writ, and that from the Grounds that he went upon in the Judgment? *Excom. Cap.* *Vide antea* 56. to 62, 82. *&c.* 114, 115. *Significavit.* *Antea* 56, 57

Powell. The Form of the Writ was general before, but ſince the Statute of 9 C. the Proceſs is altered; and ſure the Court muſt know whether you have Juriſdiction below, as before this Statute, they muſt have ſatisfied the Chancery; and after the Writ is once here, the Chancery has no

more Jurisdiction. And Eyre said, the Chancery took it they had Jurisdiction still, for they had quash'd an Excom. cap. there that very Morning, which Holt said, they could not do by Law; and Dr. Watson was discharged, and as many Writs as were return'd were quash'd.

Mandamus. *Vide antea* 37, 83. *Post.* 140, 143.

Mandamus moved for to swear in a Chirurgeon to an Hospital. Holt said, It could not be, for he was but a private Servant; and it was agreed, a Mandamus had gone to swear a Sexton: The Rule was for them to shew Cause.

Habeas Corpus. 1 Salk. 352.

Habeas Corpus can't be after Judgment.

Distress. Recaption.

If one distrain again for the same Rent, the Remedy is Recaption; and if the Sheriff refuse a Replevin, an Action lies against him.

Execution of Goods. 1 Salk. 318.

Venditioni Exponas. 2 Sand. 47, 344, &c. 3 Salk. 149.

Upon Motion of Trigg against the Sheriff of Kent, Holt said, If a Sheriff return Goods levied to such a Value, he must answer for Goods to that Value, and Plaintiff may have a Venditioni exponas; and if he will not sell them, then the way is to have a Distringas to the Coroner; and that is the right Method to lay him by the Heels till he has sold; and sure Debt will lie against him after such a Return, and a Venditioni exponas.

Notice of Trial. Ejectment. *Post.* 150.

In Ejectment, if the Defendant has not regular Notice of Trial, the way is not to confess Lease, Entry, and Ouster, but to oppose Judgment against the casual Ejector.

Administrator. Costs. *Antea* 98.

Administrator shall pay Costs for not going on to Trial.

Certiorari. Assizes. 1 Salk. 144, 150, 151. 3 Salk. 78 2 Hawk. 287.

'Tis unusual to send a Certiorari (to Judges of Assize) Gaol-Delivery &c. without a special Cause.

Domina Regina versus Sewel, *alias* Beaus, at *Nisi Prius*, *coram* Holt *in Com'* Midd.

Evidence. Usury. 1 Sand. 294, 295. 1 Mod. 69. 2 Mod. 307. 3 Mod. 35. Cumberba. 92. 125, 133. 2 Salk. 680.

Defendant indicted for Usury, in taking 9 l. for the Use of 45 l. for a Year, contra formam Statuti. The Case was, the Defendant lent the Prosecutor 45 l. upon a Pledge of Jewels, and it was agreed to pay the said Interest; after, the Prosecutor gave his Bond for the same Money,

ney, and the Bond not being discharged, the Prosecutor was produced as an Evidence, and sworn by Holt de bene esse, as he said; and he said, it was a Question, whether the new Bond were void or not? And he put this Case: A Man makes an usurious Contract, and gives him unlawful Interest, and agrees to give him a Bond for the Principal; and after, by a subsequent Agreement, gives a Bond for the Sum lent to J. S. to whom the Lender owes so much, in Satisfaction of his Debt; this Bond is not voidable by the Statute. If a Man lend Money for the legal Interest, and after a subsequent Agreement is made for more Interest, which is Usury, that will not avoid the first Contract. Vide 2 Mod. & 1 Saund.

1 Sand. 294, 295. 2 Mod. 307. 3 Mod. 35. 2 Salk. 680, &c. Cumberba. 92, 125, 133. 1 Show. 8. 2 Show. 319. 1 Lev. 54. 2 Lev. 7.

Here Holt declared for Law, that where a Man is interested in the Consequence of that which he swears for; if it be so, the Doing of the Act, which he is now Evidence to invalidate or set aside, was a Means to obtain his Liberty from Imprisonment, or an Exemption from Corporal Punishment; he shall be a Witness, as in the Case of Duress, though it be to set aside his own Bond; yet it being given to obtain his Liberty, he shall be a Witness also, where the Nature of the Thing allows him no other Evidence: As if a Woman give a Note or Bond to a Man, to procure her the Love of J. S. by some Spell or Charm; in an Indictment for the Cheat, though it tend to avoid the Note, yet she shall be a Witness. Note, Here it could not be given in Evidence, that the Defendant was a Common Usurer, because he could not be ready to give an Answer to that Matter.

Evidence.

Note.

S. Hill.

S. Hill. 1° Annæ Reg.

In Banco Reginæ.

Coram Holt, *Chief Juſtice*;
Powell,
Powys,
&
Gould,
} *Juſtices:* An. Dom. 1702.

Error in Parliament. *Superſedeas.* *Vide poſt.* 140. and the Caſes there cited *viz.* Cumberba. 129, 199, 206, 211, 456. 1 Salk. 321. 3 Salk. 133. 6 Mod. 130, &c.

JUDGMENT in Debt upon a Bond in the Common Pleas, is affirmed upon Writ of Error here, and a new Writ of Error brought in Parliament. Broderick moved for a Superſedeas of the Execution without putting in Bail; for before the Statute in that Behalf, the Allowance of a Writ of Error was in it ſelf a Superſedeas. And this Caſe he ſaid was neither within the Words or Intent of the Statute; for when the Judgment of the Common Pleas is affirmed here, there is no new Judgment given here for the Debt, but only the former Judgment affirm'd; and if this Judgment ſhould be affirmed before the Lords, they do not award Execution there, but command this Court to do it, and then the Plaintiff will have the ſame Advantage as he would have had, if the Judgment had not been before the Lords.

Opinion.

And Holt C. J. ſaid, the Recognizance entered into upon the Allowance of the Writ of Error in the Common Pleas, goes only to that Writ of Error that is then brought; and it

is true, if the Judgment affirmed here be reverſed by the Lords, it will diſcharge that Recognizance: But in Caſe it be affirmed, here is a Delay of Execution, and Coſts that the Plaintiff is put to, and the Recognizance of the Common Pleas does not reach them. If the Court ſhould erroneouſly affirm the Judgment in the Common Pleas, not only the Judgment of Affirmation given by this Court, but likewiſe the original Judgment of the Common Pleas would be reverſed by the Lords. And this being within the Words of the Statute to entitle the Plaintiff below to Bail upon its Removal up hither, when it is affirmed here, and a Writ of Error is brought before the Lords, that Writ of Error is not only of the Judgment of Affirmation given here, but likewiſe of the Judgment given below; and the Security given is that which makes the Superſedeas of the Writ of Error; for that Statute takes off the Superſedeas, if Security be not put in; and there is no more Reaſon to give Security upon the firſt Judgment than on the ſecond; and how can we take Notice that there is a Recognizance entered into in the Common Pleas, upon the firſt Writ of Error brought? For ſuppoſe it be not ſo, how ſhall we diſcover it? And we are not to preſume it; for 'tis not the Duty of the Court to compel a Security, but what they are to do, is to award Execution if it be not done; but the not putting in Bail, does not hinder the Progreſs of the Writ of Error, but it was only to hinder Delay of Execution; and if there be no Precedents in this Point, the Reaſon is, becauſe of the Rarity of the Caſe. And the whole Court inclined, That it was not a Superſedeas without Bail, but upon the Importunity of Broderick, gave Leave to ſpeak to it again.

Error where it Superſedes. *Vide* Cumberba, 206, 229, 325, 456.

Gravenor & Fenwick.

S. C. *antea* 71. *poſt.* 156. 1 Sal. 258. 2 Salk. 651. Trial.

Affidavits to put off a Trial at Bar, ſet down for the firſt Tueſday in Term, upon Account of the Witneſſes being not likely to be there, denied; for that it was not ſworn Endeavours had been uſed in ſuch convenient Time to have them, that without an unforeſeen Accident they would be at the Trial at the ſet Time.

Church-Repairs and Rates. *Vide antea* 69, 70.

Page came to the Bar, to ſhew Cauſe againſt a Prohibition to a Suit in the Eccleſiaſtical Court of Ely, for a Church-rate, for repairing of the Church and Church Ornaments. The

Church Repairs, &c. See *Antea* 69. 70. 2 Lev. 102, 163, 186, 241. 1 Jon. 89. 1 Mod. 236. 2 Mod. 222. 1 Sal. 164, 5, &c. Cumberba. 132, 298, 344.

Suit did set forth, the Church was out of Repair, &c. and that at a Meeting of the Parishioners, a Rate was made by a Majority of them, that the Plaintiff for Prohibition was an Inhabitant and rated so much. The Suggestion was, That J. S. is seized in Fee of the Manor of Dale within the Parish; that he, and all those whose Estate he has in it, Time out of Mind used to repair an Isle in the Parish-Church, and in Consideration thereof, were discharged of all Rates for Repairing the whole Church, and that the Defendant is Tenant of Part of the Manor.

Exceptions.

1. Exception, That the Libel is for Repair of Church and Church-Ornaments, and the Prescription goes only to the Repair of the Church.

2. The Tendering of such a Plea below and Refusal of it, is no Cause of Prohibition, but rather of Appeal. Vide 1 Bulst. 16.

3. The Prescription is, That all the Tenants of the Manor were discharged, and he makes himself Tenant of Part.

Opinion. *Antea* 69, 70.

Holt. Tho' a Man Time out of Mind repair a Chapel, yet if it be not a Prædial Chapel, having Chapel-Wardens belonging to it, yet it is not Reason to exempt from a Church-Rate to repair; and here if he repairs less than his Proportion amounts to, it may be a Question, if it ought to discharge him? But if he repairs more, or as much, it will be good: But this is not Matter to be determined upon Motion. As to the first Exception, if you have not distinguish'd how much is demanded for Ornament, you have not libelled right; and Prohibition if it goes at all, must go for all. As to the third Exception, If the Tenant of the whole Manor has such an Exemption, Tenant in part shall have it in Proportion. And Rule absolute and declare forthwith; For in Prohibition, we may order the Declaration to be delivered as we please in point of Time.

Domina Regina & Taylor.

Forcible Entry.

INdictment of Forcible Entry upon the Statute of 8 H. 6. c. 9. without saying the Party had been seized and dissetzed by Force, and it was quashed nisi before; and it was urged for Cause, That that need not be expressly laid. Vide Pop. 205.

1 Salk. 260, 261. 1 Hawk. 94. 2. Hawk. 293. 5 Mod. 321, 447. *Antea* 115. *Post.* 138.

Opinion.

Holt. The Case in Popham was upon the Statute of 21 Jac. c. 15. upon which it suffices to say, That that Entry was made upon a Copyholder or Lessee for Years, and that he was expelled; but the present Case is upon the Statute of H. 6. upon which you must always alledge a Freehold and Seisin in some body; and if it be an Entry upon a Lessee for Years, you must say, the Entry was made into the Freehold of A. in the Possession of B. and that so he dissetsed A. and of Necessity there must be a Dissetsin of the Freehold laid; and upon Restitution the Possession is restored to the Lessee, and the Freehold to the other; and on this Statute, Dissetsin is a Term of Art, not to be supplied by any other Word. And Rule absolute per tot. Cur.

1 Sal. 260, 261. 3 Sal. 169. Cumberba. 70.

Seisin.

Parker & Collins.

Amendment of Declarations, &c. *Vid.* Cumberba. 86, 133, 299. 3 Sal. 30, 31. 5 Mod. 17. 1 Sal. 47, 88, &c. 2 Sal. 520. Time. Demurrer. Plea.

THE Placita were Hill. 13 Wil. 3. And the Declaration of Easter-Term against the Defendant in Custod. Marischalli Marischalciæ Dominæ Reginæ. Per Cur. Let it be amended, for it's no Part of the Declaration, but only Style of the Record; and they said, That after Demurrer, the Party has four Days in Term to join or waive, and plead the general Issue.

Stracy & Saunders.

Election. Cumberba. 397, 8.

A Man owes Money by Bond, and also by Award, suppose 20 l. by each, and he pays one 20 l. it shall be upon which of both he pleases; for he, and not the Receivers, is the first Agent. Quære.

Pierce

Pierce & Henriques.

Plea *al. part.* *Vid.* 1 Sal. 94, 179, 180. 2 Sand. 73, 74. 1 Sand. 268, 327, 338. 1 Lev. 48, 127, 298. 2 Lev. 118. Diſcontinuance. 3 Lev. 39, 55. Cumberba. 306, 323. 1 Sal. 4, 94, 179, 186, &c.

Aſſumpſit and two Counts: Non Aſſumpſit as to one, and as to the other it being for 100 l. he pleads Payment of 99 l. which the Defendant received; but pleads nothing to the reſt. Plaintiff replies denying the Payment, and after Demurrer; per Cur. The Plea is well as to the 99 l. for one may plead ſeveral Pleas, as Payment of Part, and a Releaſe as to the reſt, &c. And here it is a Diſcontinuance; for he ſhould have taken Judgment by Nihil Dicit, for ſo much as had not been pleaded to, and plead as to the reſt. But it was agreed here, the Defendant could not plead Non Aſſumpſit in part, and a Releaſe or Payment to the reſt; for that would ſpoil the whole Plea.

And being ſpoke to again, it was held a Diſcontinuance in toto, per Cur. And Holt ſaid, it might be doubted, whether it could be ſo pleaded in an Indeb. Aſſump.

Wood & Branford. *Vide antea* 104.

Infant. Error *Certiorari.* *Antea* 104. 1 Sal. 270. 2 Sand. 212, 213. 1 Mod. 47, 72, 296, &c. 1 Lev. 181, 299. 2 Lev. 38. 239, 299. Amendment.

In Dower; It appeared on Record certified up, this being a Writ of Error, That the Defendant being an Infant, had appeared by Attorney, and this aſſigned for Error. And after in nullo eſt Erratum pleaded, and Demurrer thereupon; it was ſuggeſted, That there was an Admittance of Guardian below, and a Warrant for receiving of the Guardian.

Per Cur. If that be ſo, it is good Cauſe to amend the Record; and as a Precedent was quoted the Caſe of Waldegrave and Lane, 5th of the late King and Queen: And per Cur. After a good Error in Fact alledged, if the Party will not join Iſſue upon it, but plead in nullo eſt Erratum, they admit the Fact true, and it is a good Cauſe of Demurrer. Demurrer.

Chambers

Chambers *verſus* Jennings.

S. C. 2 Salk. 553.

DEclaration on a Prohibition to the Court of the Earl Marſhal to ſtay a Suit there againſt Chambers, ſetting forth that Jennings is a Gentleman born, and dubb'd a Knight by King Charles the ſecond, that the Plaintiff ſpoke theſe Words to, and of him, You a Knight? You are a pitiful Fellow, and an inconſiderable Fellow, to the great Scandal of Gentlemen, and of the Order of Knighthood. And likewiſe to the great Provocation of Jennings to Duels and Breach of Peace. And it appeared on Pleading, that the Queſtion was, &c.

Court of Honour. See Parliament *Caſes*. 58 to 67. 1 Show. 353. 1 Lev. 230. Lutw. 1053. 4 Mod. 128. 1 Sid. 353. 2 Hawk. 9, 10,

1. Whether there were ſuch a Court of Honour in England, as gave Remedy for Words not actionable at Law, tending to the Diſhonour of Knighthood, or of any Body bearing Arms?

Queſtion 1.

2. If the Court of Honour had ſuch a Juriſdiction, whether it ought not in ſuch Caſe to be held before the Conſtable and Marſhal, and not before the Marſhal alone? And the Statute of Richard the Second was likewiſe under Conſideration.

Queſtion 2.

As to the ſecond Point, it was urged, That the Court of Honour hath been conſtantly held before the Earl Marſhal ever ſince the thirteenth Year of H. 8. when the Duke of Buckingham, the then Conſtable, was attainted of High-Treaſon, except it were when a Conſtable was made by hac Vice. *Vide* 4 Inſt. 127. Forteſcue 22, 32 7 H. 4. c. 14. Stamf. *Pleas of the Crown*, 65. 4 Inſt. 124. 1 Inſt. 74. And it was ſaid, that did not follow from theſe Authorities, that the Court muſt be held before the Conſtable and Marſhal in all Caſes. 1 H. 4. Ro. Paten. H. 6. 2. vid. Cambden's Britannia 193, 151. The Earl Marſhal is to ſee Execution done, and yet he is one of the Judges of the Court; and that is like moſt Mayors Courts, where the ſame Perſon is both judicial and miniſterial Officer. 1 Ro. Rep. 89. That the Way to recover Fees for making a Knight, is in the Marſhal's Court by 13 R. 2. The Marſhal has Power where Common Law gives no Remedy, as in point of Precedency. And he quoted a Caſe in that Court, 12 Jac. the Firſt, when there was no Conſtable. 1 Sid. 332. 1 Lev. 320. That as to the Matter of Arms, the Court is held before the Marſhal only; ſo in Matter of Honour. 2 Lev. 133.

Office of Earl-Marſhal, &c. *Vide* Spelman in *verbis Conſtabulario*, & *Mariſchallo*.

Juriſdiction of that Court.

held that Matter of Precedency belongs to the Court of Honour. And tho' all the Statutes that mention this Court take Notice of it, as held before the Conſtable and Marſhal; yet the Reaſon of that is, that all the Statutes taking Notice of it, were made when there was a Conſtable and Marſhal; and the Conſtable being the principal Judge, when there is one, there is great Reaſon to name him; and if the Court had been ſuſpended ſince the Annexion of the Office to the Crown, there would be frequent Application ever ſince for Prohibitions, or Complaints to Parliament; for the Marſhal has exerciſed his Juriſdiction ever ſince, and yet we find no ſuch Complaint: And the Famous Caſe of Sir Francis Michell, deprived by Authority of that Court was quoted, where ſome of the Judges of the Common Law had aſſiſted. There is no Remedy but here or by Duel: If any aſſume to himſelf the Arms of another, or Arms to which he has no Right, he is puniſhable for the ſame in that Court. A Pari, if one revile a Perſon who has Right to bear Arms, there ought to be Remedy againſt him there; and if People find no Remedy at Law for ſuch Words, they will have Recourſe to the Law of Nature, and do themſelves Right by the Sword; to prevent which of late, Actions for Words at Common Law, have of late had much greater Encouragement than Uſual. 4 Co. 20. 3 Lev. 330. Rol. Title Prohibition. 15 R. 2. Mem. 23. In the Time of K. J. 1. For calling a Gentleman a Villain, February 1617. Smith *verſus* Gaddice. Ruſhworth's Collections, 1618. p. 2. f. 1055.

Argument *contra.* See Parliament *Caſes* 58 to 67.

Raymond contra. This is one of the general Courts of the Kingdom, of whoſe Juriſdiction and Original this Court will take Notice: But he affirmed the Juriſdiction of it was ſomewhat dark, there being only obiter Sayings of it to be met with in the Books, but the conſtant Deſcription being, that it is held before the Conſtable and Marſhal is a great Argument that it is not before any other. 48 Ed. 3. 3. 13 R. 2. c. 2. Prin. on 4 Inſt. 62. 1 H. 4. c. 14. Appeal of Matters out of the Realm, to be before Conſtable and Marſhal. 13 H. 4. 4. & 5. Forteſcue c. 32. 37 H. 6. 3. Spelman's Gloſſary. Crompt. 92. Stamf. 75. 1 Inſt. 74. Ruſhw. 1640, 1066 Nalſon 778. It is agreed, that in Matter of Life or Member, they had no Juriſdiction without a Conſtable; and what is the Difference, or the Reaſon of it? Ruſhw. 2 part 107. Liſle verſus Ramſey. Hutton 3. And the Statute of H. 4. does not name them, as giving them a new Juriſdiction. 2. That they have not

not Conuſance of Words; he ſaid the Office of Conſtable at firſt, was but a low one. Vide Lamb. Saxon Law, Here-took. In France, the main Leaders or Generals of Armies. Vide Spelman's Gloſſary verb. Mareſhal. He was an Officer under the Conſtable, as the Groom of the Stables; and his Buſineſs was to ſupervise the other Officers of the Army. 2 Ruſhw. Coll. 1056. Court of Chivalry has no Juriſdiction of Words: Beſides they pretend only to Conuſance of Words, not puniſhable at Common Law; and yet they ſay, the Words in Queſtion are provoking to Duel. Vide Hob. 62, 215, 252. Cro. Eliz. 58. 1 Lev. 55. that one is indictable or bound to good Behaviour for Words, provoking to Duel. *Poſt.* 128. 1 Lev. 107.

Holt, It was made an Argument ſome Years ago, that a Prohibition would not lie out of this Court, to the Court of Honour: Becauſe as was then ſaid, none ever was ſeen to have gone before; and they relyed on the Statute of R. 2. which proves that if they ſhould encroach upon Things, not within their Juriſdiction, there ſhould be a Writ from the Privy Council to reſtrain them. But notwithſtanding this it was adjudged, that in Caſe of Encroachments, Prohibitions would lie, and it was the proper Remedy: For it is the Duty and Buſineſs of this Court to reſtrain all manner of inferior Juriſdiction, and to keep them within their Bounds; and the ſaid Statute was made to give a farther Remedy by Privy Seal from the Council; and the Reaſon of the additional Remedy was; that Thomas Earl of Gloceſter, the then Conſtable, was too great and powerful for the King's Courts to deal with him; and beſides there could not be Application to this Court in Vacation, when they proceed below; and ſo it was held by all the Judges. *Opinio Curiæ.*

Now the firſt Matter here is, concerning the Conſtitution of the Court; and no Doubt formerly it was held before the Conſtable and Marſhal, and ſo all along until the 13th of H. 8. when the then Conſtable was attainted of Treaſon. How then came it to be held before the Marſhal alone, and have you any Precedent before that Time, that it was held before the Marſhal alone? And to make it out by Preſcription, you can't; for the firſt Inſtance you give, is within Time of Memory, and no ancienter than the Court of the Council of York, which obtained by Encroachment only, for firſt it was but a Commiſſion of Oyer and Terminer; yet it after grew in Abundance of other Matter, and all by the great Power Conſtitution of this Court.

Power of the President of the North: And the Court of Request was only by Encroachment, and they acted like Masters in Chancery, and held Conusance of Matters of Law, without any Prescription; and yet it fell at last of it self, without any Act of Parliament; their Process was a Subpœna. And he said, He never knew what sort of Jurisdiction a Court of Honour has, as to Matters arising within England; for the Statute of R. 2. gives them Authority only of Matters arising out of the Realm, and Feats of Arms within the Realm: By which they would have meant Coats of Arms and Escutcheons; and he said, the Ministers of that Court understood this Matter of Arms well, and gave Coats of Arms and kept Pedigrees of Families; and if they find People that assume Arms, to whom Arms do not belong, or at least those they assume belong not to them, their way is to post them up, by what Justice or Law I can't tell; and in this Case, what Satisfaction can they make to the Plaintiff? If they fine the Defendant, shall they enforce the Payment of it by Imprisonment? We have a very known Maxim, that no Court shall imprison, but a Court of Record; and the Court of Honour is none; and the High Commission Court had assumed a strange Authority, more indeed than did belong to it, by the Statute of H. 8. or of Queen Elizabeth, and that they carried their Power so far, by Authority of great Men of the Clergy, that were in the Commission, that it was hard dealing with them in Westminster-Hall; for that Court did assume a Power to imprison, tho' they could not justify it; and he said, It were to be wished the Parliament would give them Jurisdiction of Words, tending to disparage Men of Honour; and such as generally provoke Gentlemen to fight.

1 Salk. 200.

Words Actionable *Antea* 127.

Powell, If they have Jurisdiction of Words concerning Coats of Arms, that is not this Case: But here you say, the Words tend to Breach of Peace, and are provoking to fight a Duel; and if so they are indictable. And now this Term it coming on in the Paper, and none appearing for the Defendant, the Court said, that whatever Colour there be to hold Plea of some Things before the Marshal alone, there was no Pretence to hold Plea of Words; and ordered the Rule for Prohibition to stand, and let them bring Error in Parliament, if they will.

Gery & Hopkins.

UPON a Motion of Mr. Raymond, it was ordered that the Book of Transfer of Stocks, and other Books of the East-India Company, might be produced at a Tryal to be had the next Day at Guild-Hall, or that the Parties might have Copies of what Part of them they pleaded to give in Evidence; it being a Cause between Parties having Stock there, concerning which the Action was brought. And per Cur. There is great Reason for it, for they are Books of a publick Company, and kept for Publick Transactions, in which the Publick are concerned; and the Books are the Title of the Buyers of Stocks, by Act of Parliament: And it was granted.

Books of Transfer allowed as Evidence. *Qr. Inſt. Legal.* 207. 1 Salk. 281, 283, 285. 2 Sal. 555. Yelv. 34. 3 Mod. 259. 5 Mod. 272, 273.

Brown & Gibbons, & *Ux'*.

S. C. 1 Sal. 206.

CASE for Words ſpoke of Wife, whereby Husband loſt his Cuſtomers; and Verdict, and under Forty Shillings Damages; and the Queſtion was, whether there ſhould be more Coſts than Damages? And it was ſaid, this was not Damages for the Words, but for the conſequential Damages; which, as was urged, was not within the Statute; and it was ſaid to have been adjudged, That in an Action brought by a Maſter, for Battery of his Servant; he ſhall not be held lower in Coſts, by Reaſon of the Lowneſs of Damages; and ſo it was ſaid in Action for Slandering a Man's Title; and the Court agreed to the Diverſity, between Action for Words actionable in themſelves, and by Reaſon of conſequential Damage. And here Judgment was entered with a Blank for Coſts, which the Court were offended at, for it could not be filled after.

Scandal Coſts and Damages, &c. Stat. 22, 23. Car. 2. c. 9.

Domina Regina & Whiſtler.

S. C. 2 Salk. 542, 543.

ROLFE and others were convicted ſummarily upon the late Act of Dear-ſtealing; and if the Defendant was illicite & injuſte auxilians & aſſiſtens prefat' Rolfe, &c. in illicita & injuſta occiſione & venatione of the ſaid Deer, viz. perſuadendo & incitando the ſaid Rolfe, &c. to hunt and

Aiders in Deer-ſtealing. *Vide* 1 Salk. 181, 182.

kill the ſaid Deer; and lending them Dogs to hunt and kill the ſaid Deer, and Horſes to carry them away, contra formam Statuti. And whether Whiſtler, as charged, be within the Statute, was the Queſtion.

Opinion. Gould made two Queſtions of the Caſe. 1. Whether if the Words aiding and aſſiſting were totally left out of the Statute, they would be guilty within the Statute? 2. Whether in Caſe they were not, theſe Words would bring them in? The Words of the Statute are, ſuch as are aiding and aſſiſting therein; and he ſaid the Word therein was the ſame there, with thereof or thereunto; for he that lent his Dogs to hunt, is aiding in the Hunting. And this appears from the Preamble, which ſhews the Cauſe of making the Statute, which is, that notwithſtanding the many Laws made againſt unlawful courſing and killing of Deer, That for as much as the Penalties are not ſufficient to deter, divers ſturdy and diſorderly Perſons, who confederate together to commit theſe Diſorders; and if any of them be found guilty, which is rare, they contribute and make the Penalty light upon him that is ſo convicted; therefore for the more effectual Diſcovery of ſuch Perſons; (What Perſons? Such Perſons as do confederate) Be it enacted, &c. And the Word ſuch does couple the Enacting Part to the Preamble. 2 Co. 15. 1 Inſt. 372. 11 Co. Alexander Poulter's Caſe 30 b. 31. a. And here it would be very miſchievous, that the World ſhould know, that the Statute does not extend to Acceſſaries before the Fact: For then the Rich would incite poor and deſperate Fellows to hunt, and ſupply them with Dogs, Horſes, &c. And not be puniſhable within the Statute.

Obj. This is a Penal Law, and therefore to be conſtrued ſtrictly; and Aiding and Aſſiſting therein, muſt be in the very Act of Hunting.

Anſw. Quite otherwiſe; for Aiding and Aſſiſting is properly before the Act done. 12 Co. 18. He that gives Conſent or Aid to a Treſpaſs, is a principal Treſpaſſer; and as much puniſhable, as he that actually commits it. So is Conſent to make clipt Money, High Treaſon, as much as the actual Making. 2 Inſt. 183. upon W. 1. c. 14. Under the Word Aiding, come all they who Counſel, Abet, Plot, Conſent and Encourage the Fact, and are not preſent at the doing of it.

Secondly. Suppoſe theſe Words were not in the Statute, yet the Defendant would be within it; for it is a Treſpaſs, and I take it that there is no Diverſity between the Caſe of Treſpaſs and Felony, as to the Aiding and Aſſiſting; only that in one they are Principals, and the other Acceſſaries only. And when an Act of Parliament makes a new Law, and makes a Crime Felony that was not ſo before, tho' there be not a Word of Acceſſary; yet they ſhall be Felons. Vide Palm. 141. And the Caſe 13 H. 7. 12. upon the Statute of 3 Ed. 1. cap. 20. De Malefactoribus in parcis, which Cauſe, he ſaid, could not be diſtinguiſhed from this Caſe, for that is a very Penal Law; for it inflicts three Years Impriſonment upon the Party, and a Fine to the King, and to find Sureties never to offend more; and for Default of Sureties to abjure the Kingdom, beſides a large Amendment to the Party aggrieved: And yet he that did only command, was adjudged to incur the Penalty, which Caſe he affirmed to run quatuor pedibus with that now in Queſtion. *Poſt.* 133.

Powis. The Conviction good by Virtue of the Words Aiding and Aſſiſting therein in the Statute, and the Statute de Malefactoribus in parcis did not alter the Offence; but left it a Treſpaſs as it was before; and that Statute gave a compleat Remedy to the Caſes to which it did extend; but it only extending to Miſfeazance in ancient Parks and Parks of Right, as appears by 2 Inſt. 199. there did ſtill remain great Defect of Remedy, and no Statute againſt Deer-ſtealing mentions Aiders and Aſſiſters, but that of W. & M. which has the Words now in Queſtion, without which, per Lui, the Defendant could not be convicted: And for the Signification of the Words Aiding and Aſſiſting, he quoted 2 Inſt. 182. 1 Cro. 473. is grounded upon a Statute which has not the Words Aiding and Aſſiſting in it, and if they had, the Perſon who ſtood upon the Ladder, would have been ouſted of his Clergy. And he would make a Difference between Caſes of Felony and Treſpaſs; for Acts of Parliament taking away the Benefit of Clergy in Felony, do not extend to Aiders and Aſſiſters before, but that, he ſaid, was in Favour of Life; but there is no Reaſon for a ſtrict Conſtruction in Treſpaſs: And this Statute, he ſaid, was rather to be called a Remedial then a Penal Law, and concluded that the Conviction was good. *Vide Prox. pag.* Cro. Car. 342.

Pow-

Powell accord. 'Tis objected that this is a Penal Law, and not annexed to the Offence, but to the Person offending under such a Description, and the Aiders and Assisters therein; and the Distinction is taken between Aiders and Assisters therein, and Aiders and Assisters thereunto: He that only lends Dogs, &c. to commit the Fact, is not aiding in the Fact, but to it; so such Person does not come within the Description of the Statute: And he agreed a Man may be Aiding to a Felony, and present at the doing of it, but he affirmed such an Aider would be a principal Felon; but there may be likewise Aiders that are absent, which in Case of Felony, would only be Accessary, and upon this the Distinction is grounded, that one sort are Aiders therein, and the other thereunto.

2. Obj. is, that this is a Penal Law, and for that Reason not ty be carried beyond the Letter of it, by Construction or Equito; which he agreed: But said, That such as lend Dogs or Horses to hunt, are Aiders in the Hunting, as much as Aiders to it, and as much as if they were present at it; because the Offence is Trespass, and all Aiders to or in a Trespass, are equally guilty of it, and all Principals: So whoever would perswade a Man to do a Thing which is a Trespass, and that is proved in Evidence, he shall be a principal Trespasser; or if the Thing to which he perswades be Felony, he shall be Accessary to it. And if a new Felony be made by Act of Parliament, though there be not a Word said of him that perswades to it; yet he shall be an Accessary if he perswaded before the Fact; if at the Time, he shall be principal Felon, if comforting, receiving, &c. after, he shall be Accessary after. And he said the Distinction in the Case of Finch and Evans was very nice; but however not like the present Case, and he quoted the Case of W. 2. c. 34. If a Man ravish a married or any other Woman, he shall have Judgment of Life and Member, and yet what Action can be more Personal and Penal than that? † And yet Aiders and Assisters are Ravishers within the Statute; even a Woman that can't commit the Fact her self, shall be so. And by the Statute of 3 H. 7. c. 4. for stealing of Women, &c. all Aiders and Assisters are Principals by the Statute; yet there may be an Accessary, as he that * receives 'em, after knowing them to be Guilty. And this by Construction of Law. And the Statute of Malefactors in Park, is a Penal Statute, and it is not annexed to any Fact committed, but to all Misfea-

Cro.Car.340.

† *Antea* 102.

* That is, he that receives the Offenders alone, for such as receive the Offenders and the Woman, are Principals, by the very Words of the Statute.

ſors, and yet Aiders before the Fact, are by Conſtruction brought under it. And the firſt Action that I find brought upon that Statute, was 20 Ed. 3. 11. one broke into a Park and reſcued his Cattle, which was a Treſpaſs, and by Conſequence within the Words of the Statute; and adjudged not within the Meaning of it, and that the Treſpaſs meant by the Statute was an unlawful Hunting and Killing of Deer. 50 H. 5. 10. Action upon the ſame Statute and not guilty pleaded; Jury find that the Defendant did break the Park in order to chaſe, but killed no Deer, Declaration being that he broke his Park and killed his Deer, and there he was adjudged to be a Miſdeazor, and Judgment was againſt him upon that Penal Statute. 13 H. 7. 12, & 13. is the next Caſe that I find in the Books upon this Statute, where it was adjudged that the Defendant's Inciting others to hunt, was a Hunting in himſelf; and it is a very ſtrong Caſe upon ſo Penal a Law, as the Statute is, Raſt. Stat. 1 H. 7. c. 5. That if any Perſon in Day-Time, with Vizor upon his Face, or Paint or other Diſguiſe, wrongfully chaſe in the Park of another, every ſuch Perſon ſhall be puniſhed as a Felon: So that it is not bound up to the Offence it ſelf, and there is a Proviſo in that Act to exempt, &c. And in Caſe of Felony, whether an Offence be made Felony, or the Offender made Felon, they that perſwade, incite, &c. would be Acceſſary to a Felony, and why ſhall it not be ſo in Caſe of Miſdemeanor too? And tho' the Caſe of Page and Haywood make a Diſtinction, where Clergy is taken away from the Offence, and where from the Offender, under the Circumſtances deſcribed by the Statute; as in the Caſe of Burglary, that where it is taken away from the Offence, they that are aiding and aſſiſting in the Offence ſhall loſe it; but where from the Perſon offending ſo and ſo, he alone, and not the Acceſſary, ſhall loſe it: And he ſaid, that Diverſity, and alſo the Caſe of Evans and Finch, were in favour of Life. And in the Caſe of Evans and Finch, if they both had got into the Houſe, and one of them ſeeing the Money, had not touched it, but deſired the other to fetch it, would not they both loſe the Clergy? And the Words of the Statute are, that he that enters and takes Goods to the Value of 5 l. ſhall loſe the Benefit of his Clergy; and he ſaid he could ſooner be reconciled to the Caſe of Page *verſus* Haywood, than to that of Evans *verſus* Finch. For upon the Union of the two Nations, the Scots brought in the Faſhion of Daggers, and much Miſchief did ariſe betwixt the Engliſh and them, to avoid which the Statute of Stab-

Antea 131.

bing was made. Suppoſe two Men have a ſudden falling out, and a Stander-by gives his Dagger to one of them, and deſires him to ſtab him, which he does, and the Man dies; I doubt whether they ſhall both loſe the Clergy: And he concluded the Conviction good.

Holt *contra.* Holt contra. I obſerve though my three Brothers agree in one Concluſion, yet they differ in the Premiſſes. Gould ſays, Aiders and Aſſiſters would be within the Statute, tho' there were no Mention of them in it. Powis ſays, It's merely becauſe of the expreſs Words: And I differ from them both in Premiſſes and in Concluſion: Every Body knows, that this being a Penal Law, ought by Equity and Reaſon to be conſtrued according to the Letter of it, and no farther, tho' the Fact that you would bring under be within the Reaſon, and as heinous or more than that which is expreſſed in it. That this Act is Penal is moſt plain, for here is a Penalty of 30 l. Secondly, which is highly Penal, the Defendant is put to a ſummary Trial different from Magna Charta: For it is a fundamental Privilege of Engliſhmen to be tried by Jury, which Privilege has been ſecured to us by our Anceſtors many Hundred Years ago: Then when there is a Penalty inflicted, and a different manner of Trial from Magna Charta inſtituted, and inſtead of being openly tried by his Neighbours in a Court of Juſtice, ſhall be convicted by a ſingle Juſtice of Peace in a private Chamber, upon the Teſtimony of one Witneſs; I fain would know if upon the Conſideration of ſuch a Law, we ought not to adhere to the Letter of the Law, without carrying Words farther than the natural Senſe of them?

And let the Preamble be what it will, and recite what it will, it is not enough to bring them under any Penalty, if there be not Words in the Enacting part of the Statute to do it.

Obj. Obj. Becauſe of the Confederacy mentioned in the Statute, it ſhall take in ſuch as perſwade and incite. &c.

Reſp. Anſw. No, but by Reaſon thereof the Penalty ſhall be greater upon the actual Offenders, and their Trial more ſevere; and I never heard of ſuch a Rule, that becauſe a Preamble of a Statute recites many Particulars, and enacts a Penalty only upon one of them, that the Penalty ſhall be extended to all by Conſtruction. Then the Words of the Statute are Aiders and

Aſſiſters therein, that is aiding and aſſiſting in the Fact; And he that lends Dogs and Horſes to hunt, aids a Man to hunt and kill, but is not thereby aiding in the Hunting and Killing. And the Law makes a great Difference in Framing an Indictment in a Caſe, where one is preſent, abetting and aſſiſting, and where he is aiding and aſſiſting, but abſent at the Time of the Fact committed: If one be preſent, aiding and aſſiſting in Caſe of Felony, he is Principal: As if two Fight, and one ſtands by one of them with his Sword drawn, he contributes to the actual Killing and that is what the Law generally underſtands Aiders and Aſſiſters to be. If an Act takes away the Clergy from one that does ſuch an Act, and from Aiders and Aſſiſters; yet it ſhall not take away Clergy from the Acceſſary: And for this he quoted the Caſe in Dyer 186. where the Difference is taken, between the manner of an Indictment of an Acceſſary before; and that is by aiding and aſſiſting to the Thing; if it be after, it is for aiding and aſſiſting and comforting after the Fact; if preſent, they are ſaid to be aiding and aſſiſting in the Thing.

Obj. This is a Treſpaſs, and in Treſpaſs all are Principals. Obj.

Anſw. It is very true, if the Statute had inflicted this Penalty under the Name and Denomination of a Treſpaſſer, there all that ſhould be perſwading, commanding, or any way contributory before the Fact, tho' abſent, would be within it; ſo if it were after, becauſe they are all by Law Treſpaſſers, and the Puniſhment is laid upon a Treſpaſſer, but not becauſe he is under ſuch and ſuch particular Circumſtances; and ſo is the Statute of Malefactors in Parks, for it lays the Penalty, not becauſe they do Miſchief in a Park in ſuch a particular Manner, but becauſe they are Treſpaſſers there; and the Words of the Statute are not, that ſuch and ſuch as do ſo and ſo ſhall incur a Penalty, as the Words are in our Caſe. And if the Words of the Statute de Malefactoribus in parcis had been, that ſuch as did offend ſo and ſo, ſhould incur ſuch and ſuch a Penalty, none would incur the Penalty, but ſuch as actually had chaſed: And our Statute now lays the Penalty on one particular Perſon, under this particular Circumſtance; and not as he is a Treſpaſſer at large, but as he offends under ſuch Circumſtances, and the Caſe of Evans and Finch is very ſtrong in the Point. 1 Cro. 474. Evans went in at a Window to a Chamber in the Reſp.

the Inner Temple, and took forty Pounds in Money out of it, and all the while the other was upon the Ladder without side, and in View of him that went in; and held, that he that stood upon the Ladder, should have the Benefit of the Clergy upon the Statute of 39 Eliz. c. 15. And there no doubt they both were Principals in the Fact; but because Clergy is only taken away by the Statute from such as enter and take away, and that Finch did not enter, he had his Clergy: Yet if Clergy had been taken away from any that committed Burglary or House-breaking, there he should not have it. For the Statute did not take away Clergy upon Account of the Felony, but upon Account of Felony under these Circumstances of entering into the House and taking away: But in other Cases, Clergy is taken away from the Offence of which he is found Guilty; as in Case of Robbery on the Highway; there all that are Robbers shall lose their Clergy; and one that goes to rob with another, tho' he stand at a Distance from him and take Nothing, yet he is a Robber: But if Clergy were taken away in this Manner, that whoever shall meet a Man on the Highway, assault him so and so, and do rob him, shall lose his Clergy, in that Case an Abettor would not lose his Clergy, if he were not within such a particular Circumstance, and strictly within the Description.

Obj. Obj. The Case of a Rape, whoever shall ravish a Woman, shall lose Life and Member, and Clergy is taken away by the Statute, and the Abettor shall also lose it.

Resp. I Answer, The Reason of that is plain, for there the Act changing that which was Trespass before, into Felony, the very Species of the Offence is altered thereby; the Abettors of that Crime must be Felons, because they were guilty of that Fact which is now Felony: And the Accessaries before and after shall be Felons, because they were aiding, inciting, &c. to a Fact which is Felony. And every Man that procures a Felony to be done, is a Felon: So of a Crime of a higher Nature; as if an Act of Parliament had made a Felony Treason, they that should be Accessaries, shall be now Principals, because the Species of the Offence is altered. And there is a vast Difference between both Cases, for one alters the Nature of the Offence, the other only raises the Penalty, when the Offence is accompanied with such and such Circumstances; and per Lui they that are Procurers of a

Fact, can't be called Aiders and Assisters in it, but may be said to be aiding and assisting to it. And my Brothers have not quoted one Case that warrants their Conclusion: And that he had known the Case of Evans and Finch enquired into, and scan'd since; and that he himself had ordered the Record to be brought to him, and that Judgment is, as it is reported by Cro. And he said, it was an easy Answer to a Case, to say that it was a nice one: But he said, the Authority of it was never impeached, and if it had been in Trespass, he that stood upon the Ladder would have been Principal. But when the Act took away Clergy under such a particular Description and Circumstances, it was quite otherwise. And he said, The Case of Page and Haywood agreed in Point with the Reason of this; and if two quarrel, and a third Person is the Incendiary and puts them on, and so in Truth is the worst of the three, and one of the two stab the other; he that stabs shall lose his Clergy, and he that set him on shall not; and the Reason is, because one is within the Description of the Statute, and the other not; for Clergy is not taken away from the Offence of Manslaughter, but from the Person committing Manslaughter so and so; yet in Truth he that does encourage the other to stab, in Consideration of Law is as much guilty as the other, of the Manslaughter. But upon the Statute of Malefactors in Parks, the Statute does describe the Offence as a common Trespass, and raises the Penalty upon such common Trespass done in a Park: But here the Statute raises the Penalty upon a Person who shall, in a Park where Deer are usually kept, &c. And therefore this being not within the Letter of the Act, ought not to be brought within the Equity of it. And he concluded that the Conviction ought to be quashed; but the Court was against him.

Cro. Car. 340.

Holt, Upon a Motion for a Prohibition to a Suit in Spiritual Court for Tithe Wood. One may prescribe in a non Decimando of Wood, or it is a good Plea that it is for Boughs, Lopping, Germs, &c. of Timber-Trees of 20 Years standing; and if that Plea be denied below, it is good Cause of Prohibition, but if they receive and traverse it, they may try it here. And per Holt, You never are too late for a Prohibition after Sentence in any Case but one, and that is where the Suit is out of the Diocese, upon the Statute 23 H. 8 you come too late after Sentence, because by pleading you own their Jurisdiction.

Prohibition. Tithes of Wood after Sentence. *Post.* 148. 6 Mod. 252. 1 Show. 158, 172. 1 Sid. 65, 332.

S. C. 1 Sal. 148.

Smith *verſus* Croſs.

Certiorari Teſte. Cumberba. 1, 2. 1 Sal. 148, 9.

PER Cur. Whereas a Certiorari iſſued to the Court of Ely, teſted the 12th of March, 11th of the late King, retornable in Eaſter-Term, to certify up all Pleas tunc nuper levat'; and the Plea was levied after the Teſte and before the Retorn. And per Cur. It was well removed; for a Certiorari, as well as a Recordare, ſhall remove all Plaints pending at the Time of their Retorn.

Hardeſty & Goodenough.

Reſtitution. Forcible Entry. Cumberba. 328. 1 Sal. 260. 3 Sal. 170.

INquiſition of a forcible Entry, removed hither by Certiorari, at the Suit of the Defendant; Page moved for a Procedendo before filing it, upon Suggeſtion that the Defendant had got Poſſeſſion of a Houſe, in which there were great Store of periſhable Goods, and that now he would by this means keep it till the Goods would be all ſpoiled. Per Cur. We may award Reſtitution immediately tho' we file it, if the Defendant does not plead three Years quiet Poſſeſſion immediately before the Force, and that his Eſtate does yet continue according to the Statute of 31 Eliz. c. 11. And per Cur. The Party ought to be ready with their Plea in ſuch a Caſe as this; for one may juſtify a forcible Entry, if he were three Years in quiet Poſſeſſion immediately before, and that his Eſtate doth ſtill continue.

Auſtin & Crisby.

Two *Sci. Fac.* of the ſame *Teſte*, but ſeveral Retorns. *Vide antea* 40, 96. 6 Mod. 86. Cumberba. 452, 428. 2 Sal. 599, &c.

EXecutors brought a Sci' Fac' teſted the 22d of October, retornable the 14th of November, and a ſecond Sci' Fac' of the ſame Teſte retornable the 23d of November; ſo by Rule of Court, Defendant had four Days from the Retorn of the ſecond Sci' Fac' to plead, which indeed was all that remained of the Term: They did not plead; the Plaintiff takes out a Fi' Fac' retornable the ſame laſt Day, to warrant a Teſtatum. And per Cur. it was well; for tho' the Defendant has four Days after the Retorn of the ſecond Sci' Fac' to plead, yet that is a Favour to him; when he does not plead, the Judgment is of the Day of the Retorn of the ſecond Sci' Fac'. And he may very well take out a Fi' Fac' after to warrant the Teſtatum; and the Secondary remembred a Caſe, where a Fi' Fac' was re-

retoꝛnable beſoꝛe the Judgment affirmed, and held good in Favour of Execution to warrant a Teſtatum.

Gidden & Drury.

DEfendant being under Arreſt foꝛ a juſt Debt to get his Liberty, conſented to give a Warrant of Attoꝛney to confeſs Judgment to the Plaintiff; and there being no Attoꝛney by, the Plaintiff did really diſcharge, as he pꝛetended, the Bailiffs beſoꝛe the Warrant executed. Upon Examination of the Matter, Holt declared, he would be very well ſatisfied by Affidavits, that the Bailiffs were ſo diſcharged; ſo as if the Defendant had refuſed to execute the Warrant, they would not come again and ſeize on him, and that he would have Reaſon ſo to believe beſoꝛe he would let the Judgment ſtand; and tho' this were Debt foꝛ Money due upon a Moꝛtgage, yet he ſaid there ought to be Bail.

Judgment. Warrant of Attorney. *Vide antea* 2, 94, 115. 1 Sal. 399, 400. 6 Mod. 85, 163.

Bail.

Hopkins & Gery.

HOLT in a Caſe between Hopkins and Gery, declared, If a Banker oꝛ Goldſmith who has many Peoples Money, will refuſe Payment, yet keep his Shop open, and as often as he is arreſted gives Bail, he may by that Means give Pꝛeference of Payment to his Friends, and when he has done, he runs away, yet ſuch Payment ſhall ſtand againſt a Commiſſion of Bankruptcy. And this was pꝛactiſed in the Caſe of Sheppard the Banker, who was almoſt arreſted every Hour in the Day foꝛ ſeveral Days beſoꝛe he went off, and yet gave Bail as often, and paid his Friends, and then went and rendꝛed himſelf in Diſcharge of his Bail. And he put this Caſe, If A. knows B. a Goldſmith, whoſe Notes he has, to be in a declining Condition, and C. to whom A. owes Money, comes to demand it of him, upon which A. aſks him if he will take B's Note in Payment, and he is willing to take it, and A. gives it to him; he ſaid, he doubted if this be not good Payment, becauſe here was not any Artifice oꝛ Surpꝛize uſed. But A. goes to buy Goods of another, and offers ſuch a Note of Payment; and the Party replies, I will take it, if he be a good Man, and the other affirms him to be good, tho' he then knew him to be otherwiſe, that will not be good Payment.

Bankrupt. *Qr.* 1 Sal. 110. 1 Lev. 13, 14, 17. 2 Show. 253, 512. [illegible]eſted. Bail.

Malſo

Mandamus Writ. *Vide poſt.* 143. *antea* 37, 83, 118.

Mulſo moved for a Mandamus to commit Adminiſtration to J. S. Curia. We can't do that, but we may, to grant Adminiſtration to J. S. or next a-kin according to the Statute.

Courtney *Attornat. Cur. & al'.*

Error. Abatement. 5 Mod. 68. 1 Mod. 79. 4 Mod. 314. *Antea* 62.

DEBT upon a Judgment in the Common Pleas pending a Writ of Error, and that Matter pleaded in Abatement.

Superſedeas. See Cumberba. 229, 199, 206, 211, 456. 1 Cro. 300, 286. Yelv. 157. Hob. 72. 6 Mod. 130. 1 Sal. 321. 1 Sid. 44, 143. 240, 320. *Antea* 121. 3 Salk. 133. 2 Mod. 28, 45, 106, 112. 185.

Holt. It's hard a Writ of Error ſhould ſuperſede Execution upon a Judgment, and not ſuperſede an Action to be brought thereupon; for if there be a Judgment againſt a Teſtator who is alſo bound in a Statute, the Executor may bring a Writ of Error, and pay the Statute, notwithſtanding the Judgment be after affirmed. Vide Yelv. 29 Cro. Eliz. 822.

Powell. It has been held in the Exchequer-Chamber, not to be a good Plea, becauſe it is upon another Original, and a collateral Matter; but that the Court would ſhew all manner of Diſcountenance of it, and therefore would not hold the Party to Bail.

Holt. Though it be a new Original, yet it is no collateral Matter, but the Judgment on which the Writ of Error is brought is the Giſt of the Action. And as to the Caſe in the Exchequer-Chamber, he ſaid he had ſpoke to Treby Chief Juſtice about it, and that he had informed him, it had gone off upon another Matter, viz. That the Concluſion of the Plea was ill, for it was pet. Judicium ſi the Party reſponderi debeat till Judgment affirmed, and not pet' Jud' de Billa or Brevi. And the Caſe of King and Tuke was remembred, where it had been held a good Plea in Abatement: and the Court gave no Opinion. Vide Mich. 5 W. & M.

Principal, Intereſt, and Coſts. *Antea* 114. 6 Mod. 11.

Per Cur. Till Bail put in, one is not in Court, to move to bring in Principal, Intereſt, and Coſts.

Holt, I never knew Money brought into Court, and it struck out of the Declaration in Debt upon Articles, though it has been done upon a Bond with Condition in Debt for Rent, and in a Mutuatus est; and he said he had known it done in Replevin, the Distress being for Rent. And the first Motion ever made for bringing Money into Court upon a Mutuatus, had been done by Levinz in Keeling's Time. Note, here it was Debt upon Articles. Money brought into Court. Note.

Blainfield & March.

S. C. 1 Salk. 285.

A Seaman dies in the Voyage: The Captain, according to the Usage among them upon such Occasions, takes all his Goods and sells them at the Mast, and makes an Inventory of them, and of the Rates he sold them at, and delivered it to the Administratrix at his Return, who brings Trover for the Things just as they were mentioned in the Inventory, and recover'd just the Value for which they were sold in Damages. One Item in the Declaration was, that the Intestate had been possessed of duodecim dimid. Thecis de (Spirits) with a Dash as here, (*Anglice*, twelve half Cases. of Spirits) and also fifty Gallons Aquæ callidæ, (*Anglice*, fifty Gallons of Hot-waters.) At the Trial of this Cause before Holt at Guildhall, he held, that this being Trover upon the Possession of the Intestate and not guilty pleaded, that the Defendant can't give in Evidence a Will made and Executors appointed, but that ought to have been pleaded in Abatement; But if Trover had been on the Possession of the Administrator, there, upon not guilty, he might take Advantage of that Matter in Evidence. And if an Executor, bring Trover upon the Possession of his Testator, upon not guilty, he shall not be put to prove himself Executor; Secus if he had brought it upon his own Possession. And he farther held this Usage of Selling Goods of dead Seamen at the Mast to be void. After Verdict it was moved in Arrest of Judgment of Branthwaite, 1. That it is incertain what is meant by Cases. 2. That the Quantity ought to appear. 3. Spirits is of an incertain Sense. 4. It ought to have been put into Latin, since it has a Latin Word, or with a framed Word and an Anglice; for if Words be so incertainly laid, that is not known what is meant by them, it is ill: But if they be insensible Words, no Damages shall

In *Trover*. Evidence or Plea in Abatement. 2 Salk. 654, 655.

Cumberba. 304, 451.

Arrest of Judgment.

be intended to be given for them, and this was agreed to per Cur. And they all held, that Trover will lie for a Case or Tub, because it is an individual Thing; but if one bring Trover for a Tub of Water or of Beer, without shewing how much it contains, they inclined that it was incertain, though it shall be understood to be for the Tub, and the Beer: But it was agreed, it would lie for a Trunk of Linen, for a Library of Books, &c.

See 5 Mod. 181, 324. 1 Lev. 48. 1 Sid. 60, 98. 2 Lutw. 1489. Cumberba. 306. N. Lutw. 478, &c.

Mountague contra. Style 370. Trover by Carrier, and a Trunk of Linen and other Matters; good after Verdict. Action for burning the Defendant's Barn, per quod he hath lost several Goods, & quædam Ornamenta pro Equis; good after Verdict. 1 Keb. 825. 1 Vent. 17. The Rule before put, if Words be insensible, Damages are not given for them; and if they have any certain Sense, then it will be well; and he said, a Case of Brandy or Spirits, was as well known among Seamen, as a Hundred of Fruit or a Bottle of Wine among others. Vide 2 Ro. Rep. 154. for Goods to the Value of 300l. 1 Sid. 98. Trov' pro duobus Plancis Granariis, (Anglice, Planks of a Granary,) good, because confined to a certain Use and Place. Stile 338. for a Library of Books, without saying how many or what Books. Good for a Piece of Brandy. 1 Lev. 303. pro quadam Parcell. Fili, good, 2 Saund. 74. pro decem paribus Tegulorum & Velorum. (Anglice, Curtains and Vallance) 1 Lev. 301. De tribus Struib. Fœni, (Anglice, three Cocks of Hay) 1 Keb. 237. De duoden. fili, (Anglice, a Dozen of Thread) De uno Messuagio, (Anglice, the Sign of the Cross-Keys) Stile 419. Cro. Jac. Wood *versus* Smith, De uno plumbo, &c. for a Sack of Corn.

Cumberba. 306.

Opinio Cur. 1 Salk. 219. 2 Salk. 654. Cumberba. 306.

Holt. One may have Trover for a Piece of Brandy though some be larger than other; and a Library of Books are easily ascertained by the Place they were in, and asking what they were worth in the whole. And he put the Case of Trover of so many Ralis & Palis, (Anglice, Rails and Pales) and though here the Word Gallon was said to have a certain Latin Name, that is Congius, yet Holt said, our Gallons are not the same with that of the Romans: And the Case being moved at another Day upon the Word Spirits which was said was English; whereas by the Statute of H. 6. all Pleadings are to be in Latin; the Court held, that a Case of Spirits was certain enough, and that Spirits with a Dash might be well taken

taken for Spiritibus; and there is the Word Galo galonis, or Galona galonæ, to be met with in Spelman, for an Engliſh Meaſure containing eight Pints, called a Gallon: And per totam Cur. Plaintiff had Judgment. Judgment.

Steward & Eddy.

MAndamus to grant Adminiſtration to the Wife of the Inteſtate or next of Kin, and it was ſhewed, that there was a Will pretended below, and adjudg'd no Will; and an Appeal of that Sentence, which being a Suſpenſion thereof the Rule for the Mandamus was diſcharged, per Cur. *Mandamus* for an Adminiſtration. *Vide antea* 140, &c. 1 Lev. 18. *Inſt. Leg.* 159. *Antea* 140.

Booth *or* Gould & Johnſon.

S. C. 1 Salk. 25.

IN Aſſumpſit, Plaintiff declared, that in Conſideration the Plaintiff's Teſtator did, at the Requeſt of the Defendant, receive as Gueſts into his Houſe ſuch Children and find them neceſſaries, he the Defendant did promiſe to pay the Plaintiff's Teſtator what it ſhould come to. Defendant pleaded the Statute of Limitation ill; and the Plaintiff demurred, and had Judgment in Common Pleas, and Error thereof brought here, and common Error aſſign'd. Broderick for the Plaintiff in Error. The Agreement was to receive ſuch Children, ut Hoſpites, into the Teſtator's Houſe, and to find them neceſſaries; and Averment is, that he received them into the Houſe and found them Neceſſaries, without ſaying that he had received them ut Hoſpites, and the Law does annex ſeveral ſubſtantial Privileges to the Condition of an Hoſpes; ſo that to receive one generally into an Houſe and finding him neceſſaries, is very different from receiving him as Hoſpes, and therefore the Agreement not purſued; and Hoſpes is a diſtinct Thing from Servants, Apprentices, &c. And yet it is aver'd here, it might be, that they were received as Servants or Apprentices; and where one declares upon an expreſs Agreement, one muſt bring himſelf expreſly within it. 2 Leo. 53, 73. 1 Saund. 6, 7. 1 Sid. 309. Yelv. 87, 175. 2 Cro. 245. 1 Jones 441. all upon a Variance from the Agreement. Error. Variance from the Agreement. *Antea.* 87.

Parker contra quoted Poph. 193.

Holt,

Opinio. Holt, C. J. None of your Cases comes up to the Case
Vide 6 Mod. 227, 259, &c. in Question; for the Case of Hargrave and Rogers, 2 Cro. 45. Yelv. 52. was, A. bound himself in a Bond, with a Condition, that a third Person should appear to an Action upon eight Days warning; and that if he were condemned, then he would answer the Condemnation. The third Person appears in an Action without eight Days Notice, and is condemned, that shall not forfeit A's Bond; for he being a third Person, can't do an Action to alter the Terms of A's Agreement; as if A. be bound to B. to pay him 100 l. B. may take any collateral Satisfaction for it: But if the Condition were to pay C. 100 l. there C. shall not receive any collateral Satisfaction to save the Bond; for he can't alter the Terms of an Agreement made between Strangers. And as to the Case in Jones 441. the Consideration is, that the Plaintiff shall procure J. S. to renounce Administration; so there is an Act to be done by J. S. to entitle himself to an Action; for if he does do nothing, though the other renounces Administration he has no Cause of Action; for the Agreement was not to pay so much Money if the other renounced Administration generally, but if J. S. did procure him to do it; so that Case quite differs from this. And as to the Case of St. Catharine's Hospital which you quote out of Leon. the Agreement must have been thus: In Consideration that A. at the special Instance and Request of B. would build a House for B. that then B. would pay him so much Money for it. And in his Declaration he does say, that he did build the House, but does not say he did at the Request of B. and he needed not to do it; for the Agreement was not, that he should build a House when the Defendant did request him, but the Agreement was absolute to build a House, and to that Agreement he was brought at the Request of the Defendant; and he quoted. 2 Cro. 404. 1 Cro. 194. In Consideration that the Plaintiff at the Request of the Defendant would marry the Defendant's Daughter, he promised to give him so much Money. And the Plaintiff in his Declaration avers, that he did marry her, without saying that it was at the Request of the Defendant; and held to be well in it self without any Request or Help of a Verdict. And he put a Case, where the Agreement was, that the Plaintiff should put his Son as an Apprentice to the Defendant for seven Years, and
Vide 6 Mod. 227, 259, 260. that the Defendant should find him Meat, Drink and Cloaths. The Plaintiff brought his Action against the Defendant, with-

without averring he had put his Son to him for seven Years; and held, that the Action did not lie, for there it was Part of the Agreement, that he should put his Son to him, and the Defendant was not to provide for him, if he had not been put to him as an Apprentice for seven Years. Vide 2 Jones. And per Iui, the Case in Yelv. 175. was against all Reason. And if the very Case in Terms were to be adjudged over again, he would be of a contrary Opinion to it; for it was to pay so much Money before the Plaintiff did take his next Journey to London, and the Exception taken, That the Plaintiff had not averred that the Journey mentioned in the Declaration, was the Plaintiff's next Journey after the Agreement; for if it were the next, then by their own Confession, the Action lay; and if it were not the next, than there was another Journey before, and then to the Action well brought. And he put the Case in 2 Saund. 373. Tate & Lewen in Consideration that the Plaintiff's Intestate at the Request of the Defendant, did find him diversa Vestimenta & omnia Materialia adindè spectant', he promised to pay him all that he should reasonably deserve for the same. Plaintiff brings an Action, and avers that he did find diversa Vestimenta & Necessaria præd. and not a Word mentioned of Necessaries, before but only Materialia, and that he deserved so much for them: Yet it was held good. And this was upon a Judgment by Default mov'd in Arrest of Judgment, upon a Return of a Writ of Enquiry of Damages, Vide Stile 163. Johnson and Abington the best reported Case in the whole Book, for it is plainly and sensibly reported: The Agreement was, That in Consideration the Plaintiff would deliver to the Defendant's Son, so much Ware as he should desire, the Defendant promised to pay what they should be worth; and the Plaintiff avers in his Declaration, that he did deliver such Goods to the Defendant's Son, which were received by him, without saying it was at his Desire: And that was held good, without any Respect or Help of a Verdict; for the Acceptance of the Son is Tantamount to a Desire, tho' he never did verbally desire him. So here is an Agreement, That in Consideration that the Plaintiff should take into his House the Defendant's Children to be his Guests, the Defendant would pay him for their Diet what it should be worth; and the Breach assigned is, That he did take them into his House and did diet them, &c. without saying that they were as Hospites: But sure the Thing speaks it self, and they shall be intended to be as Guests, if the contrary don't appear of the other Side. And if the Word Hospes had not at all been in the Agreement,

it would be intended prima facie, That he was to receive them as Guests; yet upon the Evidence that he agreed to take them into his House, and find them Meat and Drink, he could not be nonsuited, and the Averment is full and compleat as can be; and it would be a very foreign Intendment to take them to be Servants or Apprentices, or other than Guests; and if such a Thing were, it ought to have come of the other Side. And per Powell, In this very Case it was held in the Common Pleas, That taking one into his House and finding him with Necessaries, was to receive him as a Guest, as much as if it had been so expressed, for Words import so much; and if it were not so, the Defendant should have come with a Bene & Verum est, and confess the receiving and finding Necessaries, but alledge that they were there as Servants, &c. And Judgment affirmed per tot. Cur.

Judgment affirmed.

Sir Richard Rains *and the Commissary of the Diocese of* Canterbury.

Administration. *Bona notab.* 1 Roll. Abr. 408, 409. 1 Lev. 78. 2 Lev. 86. 3 Mod. 324. 3 Sal. 70, 164.

ONE Rogers a Seaman died beyond Sea: The Place of his Habitation while in England was Sandwich within the Diocese of Canterbury, and he had Bona notabilia in other Dioceses within the Province of Canterbury, and the Commissary of the Diocese commits Administration to the Wife, and a Creditor of the Intestate is set up in the Prerogative Court, to cite in the Woman to have her Administration repealed; and to this Suit, a Prohibition was mov'd for, and a Rule nisi to Day. And now the Judge of the Prerogative Court alledging that this was in Derogation of his Jurisdiction, which he desired to maintain; and it appearing on the very Suggestion, that there were bona notabilia, it was urged, That that was a Confession that the Administration committed by him was void, and none ought to be prohibited to repeal a void Administration.

Qr. the Stat. 4, 5 *Annæ* c. 16. Sect. 27.

Holt. We do not prohibit you from committing Administration, which you may do, if the Administration committed by the Commissary be void as you say; but we prohibit the Repealing of an Administration, which for ought we know is duly committed; and if it be by the Archbishop, Quatenus he is a Metropolitan, though there be no Bona

notabilia, it is good till repealed, and if it be void, he may commit a new Administration without any more ado, and then let the two Administrators contend the Matter between them: But we will not repeal this, because it is in Derogation of your Jurisdiction below; for you your selves would commit it to this Person that now has it. But all the Question is, Whether you or they ought to grant it of Right? And where you both pretend Right, it will be hard to let you be your own Judge; and all depends upon the Constitution of the Province of Canterbury; for if there be such a Usage for them to grant Prerogative Administration, it is hard to hinder them of it, and the Matter being thus, 'tis fit a Prohibition should go, and then we will give Judgment final, and then you may bring Writ of Error, if you please.

And here it was said, That if Administration be committed in a Diocese where there are Bona notabilia, though such Grant be ipso facto void, yet they don't grant a new Administration in the Prerogative Court before they repeal that, and in that Case they shall not be prohibited: But this here is different, being a Question of Right. At last it was proposed as an Expedient, to try the Question, that Sir R. R. should bring Case against the Commissary, for granting a Prerogative Administration to the Prejudice of his Jurisdiction, or that he should bring an Indebitatus Assumpsit for the Fees, as for Money received to his Use. And the last was done by Consent.

Taylor & Rains.

Baron and *Feme.* Marriage-Articles. See Cumberba. 242. *Chancery* Cases 21, 117, 118. Hob. 216. 2 Sid. 58. 2 *Vent.* 19. 1 Show. 91. 2 Show. 247. 1 Salk. 339. 3 Sal. 65. 4 Co. 60. Hob. 216. Hard. 463.

FEME before Marriage had Articles of Settlement made with her intended Husband to this Purpose. She being possessed of Lease for Years, the Articles were, that such Person should have the Profits of the said Term, as the Wife should by Writing under her Hand, or by her last Will, appoint. The Woman the Day before her Marriage makes a Will, devising the Trust of the Term to B. and then marries, and after her Death, the Executor appointed in that Will would prove it in the Spiritual Court, and the Husband moved for a Prohibition, upon Suggestion, that she was a Feme Covert at the Time of her Death, and therefore could not make a Will or Executor. 4 Co. Forse & Hemblinge's Case. And it was agreed now by the Court and Bar, That a Feme Covert

Covert could make no Will, but either as Executrix, or by Consent of her Husband, or of such Goods and Chattels, as by Marriage are not given to the Husband, and that likewise by Consent of the Husband. And it was agreed by the Court, That this Will tho' in Pursuance of a Settlement or Articles before Marriage, was not such a Will of which they had any Jurisdiction below, but it amounted to an Appointment in Equity, who should have the Trust according to the said Articles. And it was farther adjudged, that if one has the Trust of a Term for Years and dies Intestate, his next of Kin should have Administration of it, and Administration may be granted quoad, &c. as well as an Executor may be quoad. And it was likewise declared, that the Way here had been to grant Administration to them to whom she had appointed the Trust, and not to proceed by Way of Probate of Will; and held a Prohibition might go after Sentence in this Case per Cur.

Prohibition after Sentence. *Vide antea* 137. 6 Mod, 152. 1 Show. 158, 172. 1 Sid. 65. 332. Win. 8.

Hart & Longfield.

There were several Counts; and Demurrers to some, and Issues taken upon others. And one to which there was a Demurrer was this; the Plaintiff declared, That whereas such a Day and Year the Defendant was indebted to him in such a Sum, for nourishing Edward Longfield at the Request and Instance of the Defendant, he the Defendant did promise to pay him. There was also a Quantum meruit for nourishing the said Edward Longfield for the same Time.

Declaration. Demurrer to Part, and Issue to Part. 1 Sal. 218, 219.

The first Exception was, That an Indebitatus Assumpsit did not lie in the Case, & Vid. Mo. 701. Cro. Ca. 107, 194. A. desired B. to be Attorney for J. S. and undertook to pay him his Fees, and such Fees as he should give to Counsel. And adjudged, That an Indeb. would not lie against A. 2 Vent. 36.

Exception 1.

Second Exception was, That the first Declaration being an Indebit' for nourishing of Edward Longfield for such a Time, there is likewise a Quantum meruit for the same nourishing which is contradictory, that there should be one Agreement to pay so much, and another to pay a Sum incertain, and both stand.

Exception 2. 1 Sal. 213.

Holt. There can't be two Agreements, and both ſtand for the ſame Thing at the ſame Time; for in ſuch Caſe, the laſt would deſtroy the firſt, and the laſt would only ſtand; but the Way had been to aver them to be different Children; and that is the right way, when a Quantum Meruit and Indebitatus is brought for the ſame Thing; for here you ought to multiply Edward Longfield as often as you multiply your Declaration. But as to the other Objection, Can't A. be indebted to B. for doing good to C? for if A. ſhould ſay to B. Give ſuch a Quantity of Goods to C. upon my Account, and I will pay you, or make J. S. a Cart, and I will pay you for it; ſure an Indebitatus will lie againſt him (A.) in that Caſe, and the Sale properly is to him upon whoſe Requeſt it is given, and not to him to whom it is given: But an Indebitatus will not lie for being an Attorney to a third Perſon, becauſe in that Caſe his being an Attorney on Record, is what entitles him to Debt; and therefore, if another do Promiſe to pay, yet he, for whom he is an Attorney on Record, is not diſcharged; and therefore the other can't in that Caſe be liable to an Indebitatus. And in the Caſe of the Cloth put before, no Action lies againſt him to whom it is delivered, but only againſt him upon whoſe Requeſt it is ſold. And the Court directed the Plaintiff to enter a Non Pros. upon all but the firſt, and take Judgment upon that, and ſo it was done.

Opinio.

Vide Antea 106.

Note.

Judgment.

Domina Regina & Pigeonry.

INdictment, for that he did put Quoddam Venenum, (Anglice, Antimony) into a Cup of Beer, and gave it to J. S.

Poiſon. See 2 Hawk. 313. Hale's P. C. 216, 218. 4 Co. 446. 9 Co. 81. Kebl. 52, 53.

1ſt Exception was, That Venenum is Latin for the generical Word, Poiſon; but not for any Species of it, as this is; but this Exception was over-ruled upon the Caſe in Hard. 361.

The 2d Exception was, That he was called by the Addition of Alchymiſta, which was none at all. But the Court would not quaſh it, having a freſh Memory of a foul Practice not long before by intoxicating Phyſick.

Sylveſter's *Caſe*.

Alien Enemy pleaded. Demurrer. *Vide* 6 Co. 47. 7 Co. 16, 17, &c. Cro. *Eliz.* 142, 683. 1 Roll. Abr. 195. 1 Danv. 325. Concluſion of the Writ.

HE was a French Refugee; and to an Action brought by him, it was pleaded in Abatement, That he was an Alien Enemy born, under the Ligeance of the French King, then in War with the Queen; and to this there was a Demurrer. And per Cur. The Plea is good; for tho' he be a poor Refugee, and under the Queen's Protection, which does enable him to ſue, yet whether his Protection be ſpecial, or general as by Proclamations, he ought to plead it. And per Cur. If a Writ be abateable in its ſelf, as being for a wrong Man, Defendant may ſay Petit. Jud. de Billa, becauſe there the Action is ill conceived; but where the Writ is well conceived, but bad for Miſnomer, Defendant can't conclude ſo. And if an Alien Enemy come into England without the Queen's Protection, he ſhall be ſeized and impriſoned by the Law of England, and he ſhall have no Advantage of the Law of England, nor for any Wrong done to him here; but if he has a general or a ſpecial Protection, it ought to come of his Side in Pleading. Per Cur.

Judgment againſt caſual Ejector. *Antea* 118.

Per Cur. To have Judgment ſigned againſt a caſual Ejector ſtand, all Things muſt be very fair of the Plaintiff's Side, for the Defendant loſes his Poſſeſſion by a fictitious Proceeding.

Domina Regina & King.

Indictment of Forgery. *Latin.* *Vide* 1 Hawk. 183, 184, 187. 2 Hawk. 287. 2 Levinz. 111, 221. 3 Leon. 170. 3 Sal. 171, 172. 1 Sal. 342, 371, 375. Exception 1.

AN Indictment of Forgery removed up out of London, and demurred to here. The Caption was, That per Sacramentum of the Jury by the Names proborum & legalium hominum, qui pro Domina Regina pro corpore Com. præd. triat. jurat. & onerat. exiſtentes præſentat. exiſtit, quod the Defendant, &c. falſo & malitioſe, &c. quodd. ſcriptum Obligatorium fabricavit & contrafecit. And ſeveral Exceptions were taken.

1. To the Caption, there being no Verb to the Nominative qui triat. jurat. & onerat. exiſtentes; and ſo it was ſaid to be Nonſenſe.

2. Exception was, That the Crime charged was the Forging falsly, whereas it could be no Crime, if it was not truly forged. Except. 2.

2. If it were a Forgery, it could not be Scriptum Obligator. for a forged Deed is not Obligatory; therefore it should be for forging quodd. Scriptum, purporting a Writing Obligatory. Except. 3.

4. Exception, That a Forgery to the Prejudice of Nobody can't be a Crime, and the pretended Bond could be to Nobody's Prejudice; for it was a Bond to the Sheriff of London, for the Appearance of a Person under Arrest a die Purificationis in octavis Diebus, and there is no such Day, and therefore the Bond is not according to the Statute, ideo void; and by Consequence the Forgery no Crime, because no Prejudice to any. Except. 4. 1 Sal. 375.

But it was resolved by the Court, 1. That this Indictment is to be considered as if it were an Indictment of High Treason; and if it were such, it would be good notwithstanding the Caption, for that was no Incertainty in the Charge. *Opinio Curiæ.*

And per Holt, What Matter is it whether a Man be hanged by good or bad Latin, and he could shew worse Latin than this in many Writs, as in the Writ of Adjournment, which runs thus, Rex Justiciar. suis ad Placita coram nobis, &c.

And as to the 2d, The falso fabricavit is as much as to say, That he being a false and malicious Man, did Forge; and not that the Forgery was a true Forgery, but the Thing forged was not true, but false.

And to the 3d, That it could not be Obligatorium if it was forged, it is not in Truth and Reality binding, but in Shew and Appearance it is; and that is enough: So it is an Obligation though a false one.

To the 4th, It was held first, that the Octavis Diebus may be well understood for the Octave of the, &c. Besides, these Bonds are not meerly void by the Statute, but only voidable; and therefore you must plead the special Matter, and not non est Factum: And you may say, That a forged Bond binds No-

No-body, (as in Truth it does not) and infer from thence, that it is no Crime to forge. And the Queen had Judgment, and King ſtood in the Pillory; though the Caſe of the King and Queen verſ. Throwbridge, Trin. 6. W. & M. was quoted, where Judgment had been reverſed upon a Writ of Error for want of a Nominative Caſe to the Verb. And here the Caption wanted a Verb to a Nominative Caſe.

Vide S. C. Cumberba. 307. 1 Salk. 371.

Brook & Biſhop.

Arreſt of Judgment.

TReſpaſs for breaking the Plaintiff's Cloſe, and entering into it, treading his Graſs, and cutting ſo many Trees to the Quantity of ten Cart-loads, and carrying them away on ſuch a Day, Tranſgreſſionem præd' continuando, from ſuch a Time to ſuch a Time. And after Verdict for the Plaintiff, it was moved in Arreſt of Judgment, that Damages were entire, and Part of the Treſpaſs did not lie in a Continuando, and yet Damages were given for that too. And though it were objected, If it could not be continued, no Damage could be given in Reſpect of according to Butler and Hodges's Caſe; yet under this Continuando ſeveral new Acts of Treſpaſs might be given in Evidence, and ſo Damages recovered for them.

Entire Damages, &c. *Poſt.* 154, *ibid.*

Opinio.

Per Cur. The right way in Treſpaſs for repeated Acts of Treſpaſs would be, that on ſuch a Day, and Diverſis aliis diebus & vicibus, between ſuch a Day and ſuch a Day, the Defendant did ſo and ſo. Vide 20. H. 6. But in this Caſe the Continuando is impoſſible, and therefore no Damages could be given for it, and the only Miſchief poſſible would be that of giving other Acts of Treſpaſs in Evidence by Pretence of it: But that ought not to be ſuffered, and therefore not to be intended.

Continuando. 2 Salk. 638. 3 Sal. 359. 6 Mod. 38. Cumberba. 193, 377, 427, 433. 5 Mod. 178. 2 Mod. 253.

Another Exception was, That the Declaration was generally of Eaſter-Term, and yet it appeared that the Treſpaſs was committed after the 21ſt of April, which was the Quinden. Paſch. But per Cur. That Term was adjourned by Proclamation to the ſecond Return, which was the 29th. All Declarations ſhall refer to that; and here the Plaintiff had Judgment.

Term adjourned. *Antea* 1.

Judgment.

Domina Regina & Foxworthy.

HE was attainted of Murder, for the Murder of one who had come in Aid of the Conſtable to arreſt him upon a Warrant. And having obtained his Pardon, he was brought to the Bar to plead; and it being read, the Word Attinctur' was not in. Pardon of Murder amended. See 2 Hawk. 398.

Whereupon Holt ſaid, He would conſider before he would allow it, upon which he was remanded; and at another Time the Pardon being amended, and Attinctur' put in, he was brought up, and the Pardon allowed, which was upon Condition that within ſuch a Time he would repair on board one of the Queen's Ships, and ſerve three Years in the Weſt Indies on board it. *Attinctur'.*

And Dee moved for Leave to charge him with an Action in the Cuſtody of the Marſhal: But for that if he could not pay the Debt or find Bail, the Pardon might be thereby fruſtrated the Court would not grant Leave.

And it was agreed, That if in this Caſe after the Allowance of the Pardon he had broke the Peace, he might notwithſtanding the Pardon, be detained for that Offence to the Deſtruction of his Pardon; and in ſuch Caſe he would be brought up here again, and asked, What he had to ſay why Sentence ſhould not paſs? And if he pleaded the Pardon, the Attorney General would reply the Condition and Breach, &c. Note.

Robinſon & Walker.

S. C. 1 Sal. 393.

IN Covenant the Plaintiff declared, That the Defendant and J. S. did convenire pro ſe & quolibet eorum, &c. That they or either of them would lade ſuch a Ship at ſuch a Place, and pay the Plaintiff for the Freight, &c. And the Defendant pleaded in Abatement, that the other Covenanter was in full Life, not named in the Writ. And it was agreed by all, That Obligamus nos & utrumque noſtrum, was joint and ſeveral. Covenant. *Vide* 2 Co. 10. 5 Co. 53, 119, *&c. prox. pag.*

Nota Diversity. *Vide* 2 Co. 10. 5 Co. 53, 119, 242. Dyer 69. 19, 310. 3 Leon. 260

But Holt declared, he thought there might be a Diversity between A. and B. conveniunt & quilibet eorum convenit, and A. & B. conveniunt pro se & quolibet eorum; for in the first quilibet eorum convenit expressly serves the Lien, but pro quolibet eorum seems to go to the Thing to be none; that is, that they both or either of them would do it. And one may covenant, that he or A. will do such a Thing; so if two covenant that they or one of them shall do such a Thing, that is a joint Covenant only; and the Word conveniunt, and not pro quolibet eorum, makes the Lien. But reliqua Cur. contra. And no Difference between this and the Case of Obligamus nos & utrumque nostrum. And Judgment quod respondeat ulterius.

Judgment.

S. C. 1 Sal. 24.

Cutting & Williams.

Error.

ERROR of a Judgment in Com' Banc' several Counts below, and one of them was upon the Custom of Merchants, declaring upon a Note given by the Defendant to the Plaintiff, promising to pay him so much Money and several Damages, but one Judgment for the Plaintiff below for the several Damages; and now it was assigned for Error, That the Count upon the Custom of Merchants was void; and therefore there being one entire Judgment, all was void, and Judgment ought to be reversed in toto. And the Case of Martin and Clerk was quoted as an Authority in Point.

Entire Damages. *Antea* 152. Hob. 6. Cro. Car. 339. Cro. Jac. 343. 1 Roll. R. 24. Allein 75. 2 Danv. 457, 458, &c.

Note here, Both the Damages were cast up together, and Judgment for them, with a Quæ in toto se attingunt to so much, that is, quod recuperet damna sua prædict. assess. quæ in toto se attingunt to so much, which Total comprehends both the Damages: But to maintain this, that is, that Judgment might only be reversed in part, the Case of Jacob and Mills in Hob. 6. Cro. Car. 349. were urged, Mo. 708. same Case in Effect. But of the other Side was quoted the Case in Cro. Jac. 424. A Judgment in Point to the contrary four Years after, where the Judgments are distinct and upon distinct Laws; as in Dower, where the Judgment for Recovery of the Dower is by Common Law, and to recover Damages by the Statute of Marlbridge, or in a Quare Impedit; for there is Judgment for the Church at Common Law, and for Damages by the Statute; and in that Case,

Judg-

Judgment may ſtand for one, and be reverſed for the other. Aleyn 74. 1 Ro. Ab. 775. pl. 4. Action upon ſeveral Promiſes, and ſeveral Damages aſſeſſed, and one Judgment for both; and upon a Writ of Error it appeared, that an Action did not lie for one of them, and therefore Judgment reverſed in toto. 1 Keb. 232. The Caſe in Hob. 6. is denied to be Law, and ſo was the Caſe of Bernard and Bernard. M. 22. Ca. 2. in B. R. 2 Keb. Stile 121, 125. Aſſault and Battery againſt three, one whereof was an Infant, and all of them appeared by Attorney and Judgment againſt all; and it was reverſed in toto, becauſe the Infant appeared by Attorney. 3 Keb. 192, 213. 1 Vent. 27, 39. 2 Keb. 506, 535. 2 Saund. 379. The Way had been to enter a Remittitur for that which is not maintainable, and take Judgment for the reſt.

Holt. It has been held as you ſay in the Caſe of Jacob and Mills, but certainly ever ſince the Courts have been of a contrary Opinion. And there are but two Judgments in the Books, that favour that Opinion of reverſing Judgment in part; and I remember to have heard it debated here many Years ago, and the Court then were of Opinion, that it would be bad in the whole; for the whole Judgment is wrong, for it is for more Damages than ſhould have been recovered, and not for ſo much Damage upon one Promiſe, and ſo much upon another Promiſe; for if it were ſo, it might perhaps be ſeveral Judgments, and in Conſequence one might be reverſed without the other: But the Judgment here is to recover Damna præd. which are the whole Damages.

Opinio Cur. Hob. 6. Cro. Jac. 343. 1 Roll. R. 24.

And Powell ſaid, he had known the Caſe of Jacob and Mills denied to be Law many a Time, and that there are twenty Reſolutions to the contrary; that is, if a Remittitur be not entered for Part, that it willbe bad for all; for the Judgment is of the whole: And they were all of Opinion, if one of the Declarations were ſuch, on which no Damages ought to be recovered, it would be bad.

Allein. 75. Hob. 6. Cro. Car. 339. *Remittitur.*

And per Holt. As to that Point, he had propoſed it to all the Judges, and that they were all of Opinion, That a Declaration upon the Cuſtom of Merchants upon a Note, ſubſcribed by the Defendant to the Plaintiff for ſo much Money, or promiſing ſo much Money, was void; for it tended to make a Note amount to a Specialty. And Judgment ſuper inde was reverſed in toto. Per. tot. Cur.

Cuſtoms of Merchants. *Vide antea* 86.

Owen

Owen & Atkinſon.

Amendment of the *Niſi prius* Roll. *Vide antea* 49, 102, 123, 124.

AFTER Plea pleaded, and Replication and Rejoinder to Part, and Iſſue, Notice of Trial with Proviſo as to the other, and Rule ſerved to make up the Iſſue, to carry it down to Trial; and the Niſi prius Roll being engroſſed in Parchment, but all the Proceedings above continuing in Paper, the Plaintiff had Leave to amend upon Payment of Coſts. Note here, the Record of Niſi prius was made up, tho' the Record above was not; and that was ſaid to be done frequently, and it is never denied to amend upon Payment of Coſts, while Things continue in Paper: Note alſo, a Caſe can't be carried down to Trial by Proviſo, till the Iſſue is made up: And therefore the Defendant ought to ſerve a Rule upon the Plaintiff, to make up the Iſſue.

Grovenor & Fenwick.

S. C. 1 Sal. 258. 2 Sal. 650. *Antea* 70, 121. New Trial denied after Trial at Bar. *Affidavit.* 5 Mod. 88, 350. 6 Mod. 18. 22, 307.

AFTER a Trial at Bar, and Verdict for Leſſees in Ejectment, a new Trial was moved for, upon the Merits of the Caſe, and alſo upon an Affidavit brought into Court containing in Subſtance, that the Defendant's Witneſſes were kept back by a Report ſpread in Holland, where they were in their Way to England; that the Witneſſes that were already come over, had been laid by the Heels; but the Affidavit did not name any who had ſpread the Report, or that it was by the Agents or Perſons employed by Fenwick. And though the Court were diſſatisfied with the Verdict, upon ſeveral Reaſons, one whereof was that the Trial laſted about ſixteen Hours, and Abundance of Evidence were given on both ſides, yet the Jury were agreed on their Verdict in half an Hour's Time. Yet the Court would not grant a new Trial: And the Caſe of Gay and Croſs heretofore was remembred; for the Court declared, that after a Trial at Bar they would not eaſily grant a new Trial, more eſpecially in Ejectment, where the firſt Verdict is not peremptory; and where there is no foul Practice made appear in the Jury, or Party for whom the Verdict was; as keeping back of Witneſſes, &c. in which Caſes alone it was diſcretionary in the Court to grant it. And here they begged Leave to mend their Affidavit, which was oppoſed for this Reaſon; that now they had learnt of the

Court, what would do their Buſineſs, it would be dangerous to let them in to ſwear it: To which Holt ſaid, That it was frequent in Chancery, after a Witneſs had ſworn before a Maſter, to examine him again viva Voce in Court: But Serjeant Powis replied, that it was no frequent Thing ſo to do; for in all his Time, he had known it done but twice. And Powell declared his Diſlike of mending Affidavits, where the Party knew before what was neceſſary, and had not ſworn it.

Cooper *and the Hundred of* Baſingſtoke.

S. C. 2 Sal. 215.

IN an Action againſt the Hundred upon the Statute of Winchester, of Hue and Cry, a ſpecial Verdict was found at the Aſſizes to this Effect, That the Plaintiff was travelling in the Highway, within the Hundred of Michel, Devon; that thereupon he was there aſſaulted, and ſet upon by ſeveral Malefactors to him unknown, who took Poſſeſſion of him, and carried him into a Coppice hard by the ſaid Highways, in the Hundred of Baſingſtoke, and there did rob him: The Queſtion was, Whether the Hundred of Baſingſtoke be chargeable with this Robbery? And this Caſe was argued ſeveral Times at the Bar.

Hue and Cry. Taking in one Hundred and Robbing in another, Action lies where the Robbery was.

For Actions on the ſaid Statute of *Winton*, *Vide* 287. 4 Mod.

3 Sal. 184. 1 Show. 60. 5 Mod. 150, 160, 263. 2 Sal. 613, 614. 3 Mod. 258, 383. 2 Sand. 379, 380, 423. and the Caſes there cited.

Opinio Curiæ.

And now this Term, the Ch. J. Holt declared the unanimous Opinion of the Court, that the Hundred of Baſingſtoke is chargeable. It has been endeavoured to maintain, that this Robbery was committed in the Hundred of M. but it is moſt plain upon the Words of the Verdict, that it was wholly committed in the Hundred of B. for without all Queſtion if there had been two Counties, as they are two Hundreds, and he had been taken in one County and carried into the other, and there robbed, the Robbers muſt have been tried, where the Robbery was committed: Now then if the Robbery be committed in the Hundred of B. by the expreſs Words of the Statute it is chargeable, ſo that the Hundred where the Robbery is committed, ſhall be liable to make Satisfaction for the Robbery: Now it is impoſſible in this Caſe to make the Robbery committed in the Hundred of B. to be a Robbery from the Time of the Aſſault, which was in the Hundred of M. for there is no manner of Reaſon to make a Relation in this Caſe; for it is no way like the

Case of Murder; where the Stroke is on one Day, and the Death on the other; there to some Purposes there is Relation on the first Day, but not to all Purposes; It has Relation to make all the Lands the Party had at the Time of the Stroke given escheat, and to forfeit his Estate for Life to the King, but to other collateral Purposes it has not any such Relation: For if a Man be indicted, for that he gave a mortal Stroke to A. on such a Day, whereof he languished till such a Day; and so the Jury does say, that the Party indicted did murder the Party slain on the Day of the Stroke given, it will be bad; but they may conclude he killed him on the Day of his Death. 4 Co. 41. In this Case there is no Robbery committed till the Plaintiff is in the Hundred of B. for there the Taking away is, which is the Fact that makes the Hundred chargeable: Besides in the Case before put of the Relation; If A. give a mortal Wound to B. on the 3d of March suppose, whereof the Party dies the last of March, between these two Days C. has received and comforted A. or if a Constable had him in his Custody, and suffered him to escape between the two Days, C. should not be accessary to the Felony, nor the Constable guilty of the Escape of a Felon. Vide 11 H. 4. 49. Pl. 401. The Pardon of all Offences and Misdemeanors after the Stroke, and before the Death, pardons the Murder that follows: That is, Suppose Pardon be of all Offences committed by him before the 10th of March, that pardons the Stroke, and by Consequence the Murder that ensues by the Death of the Party; but in our Case, there is not any Colour for a Relation: For the Assault is not the immediate and efficient Cause of the Robbery, but is only the Occasion or Cause sine qua non of it; therefore there is no Necessity of a Relation to it; and if there be no Relation, then of Necessity that Hundred must be liable, where the Fact is committed, and that is the Hundred of B.

See 1 Hawk. 79, 80. 2 Hawk. 180, 181, 320.

Hale's P. C. 54. 1 Co. 99. 4 Co. 41, 42, 47. 5 Co. 2. pt. 39.

This is not a new Case, but has been determined already. Hutton Dean's Case, A. is assaulted in one Hundred, and flies into another Hundred, still pursued by the Robbers in Pursuance of the Assault, he is there taken and robbed; and there is as much Reason to make this Robbery relate to the first Assault, as there is in our Case; and there it is held that the Hundred in which he was robbed, should be only charged, that is, the Hundred in which the actual Taking away was.

And the Caſe in Goldsb. allows this to be Law: Thieves came upon a Carrier and ſeized on him and his Horſes, and drove his Horſes into another Hundred, and there they rifled his Waggon; and the Hundred where the Rifling was, was not chargeable, becauſe it was a compleat Robbery, by taking the Carrier and the Horſes into their Poſſeſſion; and the Rifling after does not make it a greater Robbery than it was before; but if the Carrier had been left in Poſſeſſion of his Waggon and Horſes, and only obliged to lead into that Place, and there the Goods were taken from him, there the Place where the Goods had been actually taken from him, had been charged. But the true Reaſon why the Hundred of B. ſtands charged is this; It is to be known that the Hundred is not charged becauſe they did not prevent the Robbery, but becauſe they have not taken the Malefactors after; for let the Miſchief be ever ſo great, if they apprehend the Malefactors within forty Days, as the Law ſtands now, heretofore within half a Year, they ſhall not be charged; then here is no Obligation on the Hundred of Michel, Devon; for there was no Robbery committed there, and the Robbery and Charge does not come upon the Hundred, till it be compleated and conſummate, and they fail of taking the Robbers within the Time limited; and for that Default they are charged, and not becauſe of any Robbery committed; and the Hundred is not bound to purſue a Man for an Aſſault, nor for a Battery even to Death, nor ſhall they incur any Forfeitures for not apprehending ſuch Offenders; and in this Cauſe, there was nothing done in the Hundred of M. but the Aſſault; and if there be no Obligation on the Hundred of M. to take the Robbers, then of Neceſſity the Hundred of B. muſt do it, becauſe the one or the other muſt. Q. 1 Goldsb. 155, 156. 2 Goldsb. 290.

Obj. Suppoſe an Aſſault be made in one Hundred by Day, and the Party is carried into another Hundred, and kept till Night, and then is there robbed in the Night-Time; it is not reaſonable in that Caſe, that the Hundred where the Robbery is committed, ſhould be charged, becauſe the Robbery is by Night. Obj.

Anſw. The Remedy fails there, becauſe there is no Reaſon to charge the Hundred where the Robbery was committed, becauſe it was by Night: So if he be taken in the Highway by Reſp.

Day,

2. Cro. Car. 267. 1 Hawk. 202. Day, and carried into a dwelling House within the Hundred, and there robbed, the Action fails, because the Hundred is not answerable for Robberies committed in a dwelling House; but if he had been carried from the Highway, into an empty Waste House and there robbed, I will not deliver any Opinion how that would have been: And he said they were all of Opinion the Hundred should be liable for a Robbery committed in a private Way. And per tot' Cur. Judic' pro Quer'.

Judgment.

2

FINIS.

A TABLE OF THE Principal Matters.

For

F.

K.

L.

FINIS.