MODERN CASES,

ARGUED and *ADJUDGED*

IN THE

COURT

OF

Queen's Bench

AT

WESTMINSTER,

IN

The Second and Third Years of Queen *ANNE*, in the Time when Sir *John Holt* ſate Chief Juſtice there.

With Two TABLES: The Firſt, Of the *Names* of the *Caſes*: And the Other, Of the ſpecial *Matter* therein contained.

By a careful Hand.

The Third Edition.

Review'd and Corrected, and many Thouſand New and Proper References added. By *W. B.* Eſq;

In the *SAVOY*:

Printed by E. and R. Nutt, and R. Gosling, (Aſſigns of *E. Sayer*, Eſq;) for B. Lintot, R. Gosling, W. Mears, T. Woodward, F. Clay, J. Peele, and D. Browne. MDCCXXXIII.

THE

PREFACE

TO THE

READERS.

IT is not to be doubted, but that, upon a ſerious Peruſal, theſe Reports, *now preſented to you, will appear to be taken with great Care and Solidity, ſeveral eminent Perſons of diſtinguiſhing Judgments in Matters of this Nature having recommended and encouraged this Undertaking: The Author ſeems to be a ſtudious and obſerving* Gentleman, *who was attendant at the Bar many Years, and had Time and Ability ſufficient for ſuch a Performance.*

I will only firſt obſerve, That theſe enſuing Caſes *were lately argued and adjudged in the* Queen's Bench, *and never printed before; ſo as there are no Contemporary Reports yet extant: And it is a good Obſervation of my Lord* Coke, That latter Reſolutions and Judgments are the ſureſt, and therefore beſt to ſeaſon Students in ſettling their Judgment. *And for that Purpoſe, I obſerve here are ſome Reſolutions, which either explode or correct former Reſolutions, as being Opinions wavering and not well digeſted, or not fully agreeable to the Rule and Reaſon of the Law.*

In ſhort, Theſe were taken when my Lord Chief Juſtice Holt, *the great Maſter of Experience of the Practice of that Court, ſat there.*

But for that it is known, that Prefacers extravagant Recommendations of Books are very ſuſpicious, and thereupon the Readers not finding them anſwerable to the Præ-encomiums, *their over-rais'd Expectations become pall'd, and they throw them aſide with Slight and Indignation; therefore theſe* Caſes, *as argued and reſolved, are wholly ſubmitted to your reſpective Judgments.* Valete.

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DE

Term. S. Michaelis.

Anno 2 Annæ, in B. R.

Staple *verſus* Heydon.

S. C. 1 Salk. 173, 216. 2 Salk. 579.

The Caſe.

THE Plaintiff S. brings Treſpaſs againſt J. H. and G. Fowler, for that they on the 31ſt of May, in the 13th Year of the late King William, broke his Cloſe, called the Wharf in Stepney in Middleſex, and threw down a Perch of Rails therein ſtanding: And alſo, for that on the 7th of July following, they entered into the ſame Wharf, and committed the like Treſpaſs.

Non. Cul. Hob. 66. Juſtification. 2 Mod. 143. *See* Carth. 75, 176, 281. Skin. 228. 664. Salk. 407, &c. 517. Sir M. Hale's Notes on F. N. B. 86. K.

The Defendant G. F. as to all, pleads Not Guilty: But J. H. as to the Treſpaſs laid on the 31ſt of May, pleads Not Guilty as to the Force, and juſtifies the Entry, and throwing down the Rails; for that long before one Edw. G. was poſſeſſed by Vertue of a certain Leaſe for eighty Years then to come, and yet unexpired, of the ſaid Wharf, and alſo of a Yard next adjoining thereunto; and that for the neceſſary Uſe of the ſaid Yard, he had and uſed a Way over the ſaid Wharf to a certain Stairs on the River Thames, which was thereunto contiguous, there to take Water, &c. and being ſo poſſeſſed, he on ſuch a Day and Year, which was prior to the Time laid in the Treſpaſs, demiſed the ſaid Yard (inter alia) to the Defendant J. H. for a Term of Years yet unexpired, with all lawful Ways, &c. thereunto belonging: By Vertue whereof he entered, and was poſſeſſed, &c. whereby he was entitled to the ſaid Way: That the Plaintiff obſtructed it with Rails; ſo he coming to uſe it, could not paſs; and that he requeſted the Plaintiff to open the Rails, which he refuſed; ſo he juſtified the throwing them down, and pleads directly in the ſame Manner to the other Treſpaſs laid on the 7th of July; and avers, That at the ſeveral Times he had no other Way to the ſaid Stairs and River Thames than by and through the ſaid Wharf.

Plaintiff, as to the Plea to the firſt Treſpaſs, replies, That the Defendant J. H. had another convenienter Way to the River Thames than through the ſaid Wharf, and thereupon they are at Iſſue; and upon the Plea to the Treſpaſs on the Seventh of July he demurs, Ideo fiat Jurat', to try the Iſſues, and aſſeſs contingent Damages upon the Demurrer. Both Defendants make Default at Niſi prius; which being recorded, the Inqueſt is awarded by Default, and G. Fowler is found guilty of the Treſpaſs on the 31ſt of May, but acquitted of that on the 7th of July; and J. H. is acquitted of the Treſpaſs on the 31ſt of May as to the Force, but the Jury found as to the reſt, that he had no other Way to the ſaid Stairs and River Thames than through the ſaid Wharf, and aſſeſs Damages upon the Demurrer, and acquit him of the Treſpaſs on the 7th of July.

Hob. 66.

In this Caſe ſeveral Points were moved, and reſolved by the Court:

1. *Repleader.* If a Repleader ought to be in this Caſe.

Q. 1. Whether a Repleader ſhould be in this Caſe, there being, as was ſaid, an immaterial Iſſue joined? And the Court held clearly the Iſſue was impertinent; but as to Repleaders in general, The Court held,

When a Repleader ſhall be upon an immaterial Iſſue. Poſt 102. Carth. 371. Vide Doctr. pl. 311.

1. That a Repleader is to be awarded when ſuch an Iſſue is joined, as the Court after Trial thereof cannot give a Judgment, as being impertinent or uncertain, and not determining the Right. 22 H. 6. 16. Vide 1 Lev. 32. 1 Keb. 23, 39, 89.

2. That before the Statute of Jeofails, if ſuch an Iſſue were joined, the Court before Trial might award a Repleader. 2 Salk. 579. 1 Salk. 216. Vide 3 Keb. 664.

Where the Amendment muſt begin as to Repleader. * 5 E. 4. 8. 19 E. 4. 1. Vide Dyer 117, 118.

3. When a Repleader is awarded, the * Amendment muſt begin where the Plea, which makes the Iſſue bad, begins be faulty; and therefore if one makes himſelf a bad Title to his Declaration, to which there is a bad Bar, and thereupon a bad Replication on which there is Iſſue, there the Repleader muſt be awarded and entred on Record; and the Plaintiff ſhall declare de Novo, &c. But if the Bar be good, or the Plea be good, and the Replication bad, and Iſſue thereupon, there a Repleader will be only as to Replication; but if Bar and Replication be both bad, and a Repleader is awarded, it muſt be as to both. Vide 3 Keb. 664.

Error.

4. If the Court award a Repleader where it ought not to have been, or deny it when it ought to be, it is Error. 2 Salk. 579. Vide Poſt 102.

No Coſts on Award of Repleader.

5. That upon Award of Repleader, there muſt be no Coſts, becauſe it is a Judgment of the Court upon the Pleading; but upon Amendment of a Plea in Paper, there muſt be Coſts.

General Rule of Repleader

6. That upon a general Rule for Repleader, without any Direction from the Court from what they ſhould begin the Repleader, it muſt begin from the firſt Fault which occaſioned the bad Pleading commenced; for the Judgment is quod partes replacitent. 2 Salk. 579.

7. That the Pleadings in this Case were such as a Repleader would be awarded upon at the Common Law; for the Defendant having insisted upon a Title to a Way by Grant, his Averment, That he had no other Way, was immaterial, and by Consequence the Issue thereupon impertinent; besides, there was no Issue at all joined, for the Plaintiff's Affirmative does not meet with the Defendant's Negative. Averment immaterial, and the Issue impertinent. Carth. 371.

8. That though a Repleader should have been at Common Law in this Case, this Motion having been made before Trial, and it being doubtful whether a Verdict would not help it by the Statute of Jeofails, the Court said it would be just in them not to grant a Repleader till after Verdict; for they said they might indeed grant a Repleader before Verdict at Common Law, but they were not bound to do it. So note the Diversity since the Statute; for though it were reasonable to award a Repleader before Verdict at Common Law, where the Pleading appeared such on which no Judgment could be after Verdict; yet since the Statute, when a Verdict may cure immaterial or informal Issues, it may not be proper to do it. Repleader by Common Law, and when grantable. Aid by Statute Law.

9. After the Trial, the Court held, That this Issue was such on which no Judgment could be; for the Defendant pleaded, That he had no other Way to the Stairs and River Thames. The Plaintiff replies, That he had another Way to the Thames; and the Jury found no other Way to the said Stairs and River Thames; so in Truth there was no Issue joined. Vide 2 Lev. 135. Acc. 12. 2 Saund. 318, 319.

10. That in this Case there could be no Repleader, for the Parties were quite out of Court by the Default.

N. B. Per 40 Ed. 3. 15. If a Jury do not find Assets to a certain Value, the Verdict is insufficient, and a Repleader shall be granted, and the Issue tried by another Inquest. Vide Cro. Eliz. 318, 883. Repleader after Verdict.

2dly. In Reference to the Way claimed, these Points were agreed on by all, viz. 2. Way claimed. Post 149, 163. Carth. 451. Points agreed.

1. That a Man cannot claim a Way over my Ground from one Part thereof to another; but from one Part of his own Ground to another, he may claim a Way over my Ground.

2. A Stranger may have a Way over another's Soil three Manner of Ways, viz. For Necessity, by Grant, and by Prescription; For Necessity; as if A. has an Acre of Ground surrounded by Ground of B. A. for Necessity has a Way over a convenient Part of B.'s Ground to his own Soil, as a necessary Incident to his Ground: So if A. grant a Piece of Land which is surrounded by Land of the Vendor, he grants a Way as a necessary Incident therewith. 2 Rol. Abr. 60. Post 149. Vide 2 Cro. 170. Way 1. For Necessity.

3. If one be seized of Black-acre and White-acre, and uses a Way over White-acre from Black-acre to a Mill, River, &c. and he grants Black-acre to B. with all Ways, Easements, &c. the Grantee shall have the same Convenience that the Grantor had, when he had Black-acre: So if A. has two Acres of Land, and has a Way from them over another's Soil, and grants one of them with all Ways, the Grantee shall have the same Way that the Grantor had: But there 2. By Grant. 2 Cro. 121, 122, 170. 3 Lev. 305.

the Grantee in making Title muſt alledge ſuch an Eſtate in the Grantor as is traverſable, and not only ſay, that the Grantor was poſſeſſed of the Place, to which, &c. for a Term of Years; for there the Poſſeſſion would be traverſable materially.

3. By Preſcription. Noy. 9. Farſl. 55.

If a Way of Neceſſity be claimed, it is a good Plea to ſay, the Party has another Way; but Secus where a Way is claimed by Grant or Preſcription.

The Way of Pleading a particular Eſtate.

4. The Way of Pleading in this Caſe had been to ſhew, that ſuch a one was ſeized in Fee of the Place to which, &c. and being ſo ſeized was intitled to a Way, and ſhew how, and that he granted to the Leſſor, &c. who alſo granted it to him, &c. For when one ſhews a particular Eſtate, he muſt ſettle the Fee in Somebody.

A Way of Neceſſity.

5. It was agreed, That by Grant of a Houſe to which there is a Way of Neceſſity, without more, the Grantee ſhall have the Way as well as if it were ſpecially mentioned in the Grant. 2 Cro. 190 & 170. Vide Hob. 234, 295, & ante.

3d Point.

It was reſolved, That if the Plaintiff had demurred to the Defendant's Plea, without Doubt he ſhould have had Judgment. For reſolv'd [Vide Rigeway's Caſe] That after a Demurrer a Repleader ſhall not be, becauſe the Parties by mutual Aſſent have put themſelves on the Judgment of the Court. Li. 3. 52. Vide Doctr. plac. 311. ſed vide poſt 102, & 3 Lev. 440 contr.

4th Point. If aided here by the Stat.

Upon the Point, whether the Matter were now cured after Verdict by the Statute of Jeofails, theſe Points were agreed:

1. If a Jury find a Point in Iſſue, and a ſuperfluous Matter over and above, that ſhall not vitiate the Verdict.

2. That in this Caſe the Jury found nothing that was put in Iſſue; for they do not find that either he had no other Way, or had another Way to the Thames; but that he had no other Way to the Stairs and Thames, which might well be, and yet he might have another Way to the Thames.

5th Point. Diverſity. As to Defaults after Iſſue, &c. in Real Actions. 1 Lev. 105. 1 Mod. 248, 249. 2 Show. 424. Vide 1 Salk. 216, 217. 1 Bulſt. 160, 161. Vide 2 Cro. 36. 1 Vent. 60. 2 Saund. 45. 1 Jo. 412, 413. 1 Cro. 517.

As to Defaults after Iſſue, the Court took a Diverſity between a Real and Perſonal Action; for in a Real Action, if a Tenant make Default, the Demandant may, if he pleaſe, waive the Benefit of it, and proceed by further Proceſs againſt him; as if the Tenant make Default on the Original, the Demandant ſhall have a * Grand Cape; and if the Tenant do not ſave his Default, the Demandant, if he inſiſts upon it, ſhall have Judgment final upon the firſt Default, (i. e. at the Return of the Grand Cape) but he may, if he pleaſe, releaſe the Default, and continue further Proceſs againſt him: In like manner of a Default after Appearance, the Demandant ſhall have a Petit Cape, &c. and if the Tenant do not ſave his Default, he may have Judgment upon the Default; or if he will waive that Advantage, he may, and proceed by further Proceſs. If in a Real Action the Tenant make Default at Niſi prius, the Default is never recorded, but only the Poſtea marked; and the Demandant, if he will, ſhall have a Petit Cape, and Judgment thereupon, if the Default

See 2 Inſt. 80.

* *See* 1 Lev. 105. That Judgment ought not to be given on a Default in real Actions, but that a *Grand Cape* ought to iſſue on a Default before Appearance, and a *Petit Cape* if the Default be after Appearance.

be not saved; or else he may waive the Default, and continue with further Process. But in case of a Personal Action, a Default at the Trial is always recorded, and there is no further Process in Law to bring the Defendant into Court upon Release of the Default. And antiently at every Continuance-day the Parties were demandable; and if the Defendant did not appear, or were not essoin'd, his Default was recorded, and Judgment given against him thereupon: But by the Statute of Marlbridge, c. 13. and Westm. 2. c. 27. after Issue join'd in a Personal Action, the Defendant shall have but one Essoin and one Default; and if the Default be upon the Venire fac', then it is recorded, and a Distringas shall go against the Jur' ad triand', and against the Defendant, to receive his Judgment; but if he comes in at the Day of Nisi prius, he saves his Default; but if he does not, the Default is peremptory, and final Judgment shall be given thereupon. And it is to be observed, That this one Essoin and one Default that the Statutes give, must be at the first Continuance after the Issue; for if the Defendant should appear at the first Continuance, viz. at the Venire fac', he shall neither be essoined, or have a Default saved at the Return of the Distringas; but Judgment peremptory shall be given on such Default. 2 Inst. 217.

Personal Actions.

1 Cro. 511. Essoins in a Personal Action.

Default peremptory.

But if the Defendant imparl to a Day in a Personal Action, and does not appear at the Day, Judgment final shall be given against him; for the Default is peremptory to him, and there is no Process to bring him into Court again. Vide 38 H. 6. 33. In Debt, the Defendant pleads in Abatement to the Writ, to which the Plaintiff imparls, and at the Day given the Defendant makes Default: Judgment final is upon the Default, tho' the Plea was only in Abatement. 18 E. 4. 7. In Trespass, the Defendant demurred, and made Default at the Day given, and Judgment final. In Debt upon an Obligation, the Defendant pleads a Release, and after Demurrer Day is given, and Default is made by the Defendant at the Day; Judgment final shall be given. Vide 1 H. 7. 11. In Trespass Defendant imparls, and makes Default at the Day, Judgment final shall be given: So in Debt, 11 H. 7. 5. and the Case in 2 Cro. 357. was remembred, where a Judgment in an inferior Court was reversed for this Error; that the Defendant being essoined, and making Default at the Day given by Essoin, they gave a further Day when it should be a Judgment by Default.

Imparlance, and Default in a Personal Action.

Abatement in Debt.

Demurrer in Trespass, &c.

Judgment final.

So now, what stuck with the Court was, Whether Judgment should be given upon the Demurrer against the Defendant, or upon the Default? That is, Whether he being out of Court as to one Issue by the Default, he could be present in Court as to the Issue in Law upon the Demurrer, so that the Court might give Judgment thereupon? And as to this Point, the Case was, A Defendant in two several Trespasses pleads an ill Plea to one; on which the Plaintiff demurs, and joins Issue upon the other, and makes Default at the Day of Nisi prius; whereupon the Inquest is taken by Default as to the Issue, and contingent Damages upon the Demurrer. And Ward, for the Plaintiff, argued, That Judgment ought to be upon the Demurrer.

Whether here Judgment should be upon the Demurrer, or upon the Default.

1. This

Diverſity as to Defaults of the Defendants.

1. This is not ſuch a Default on which Judgment can be given; and he took this Diverſity, That where-ever in a real Action the Default is ſaveable, ſo that Grand or Petit Cape ſhall go, there in a perſonal Action a Default is not peremptory; but there is indeed a proper Proceſs to iſſue, and bring the Party into Court. As for the Purpoſe, in a real Action after Imparlance Prece Partium, or upon Eſſoin, if the Party having choſe his Day fail thereupon, peremptory Judgment ſhall be thereupon, and the Lands ſeized; and in that Caſe, Judgment would be likewiſe peremptory in a perſonal Action; but if the Default were upon the Return of a Proceſs, which is ſaveable in a real Action, there Judgment peremptory ought not to be in a perſonal Action, becauſe there the Day is not taken or choſen by the Party, but given to him by the Court; and it ſeems but reaſonable he ſhould be more ſeverely uſed upon his Default at his own Day, than at a Dies datus by the Court.

As to Default of Plaintiff, &c.

But this is only in Reference to Defendants; but in Caſe of Plaintiffs, they are in many Caſes demandable at Day given to purſue their Writ: But in Caſe of Defendants, upon Default at a Day given before Plea pleaded, there ſhall be no Judgment peremptory. Vide 7 H. 6. 19, 41. 19 H. 8. 6.

In Trepaſs the Defendant appeared upon the Exigent, and Day is given over to another Term, at which the Defendant makes Default; and per Cur. The Plaintiff can only have Proceſs Ad reſpond', and if he fail thereat, then three Capias's and Exigent as before; and he quoted 20 Ed. 3. 12. 2 H. 4. 1. pl. 3. 2 H. 4. 4. 11 H. 4. 31, 32. 20 H. 6. 44. Jud. Reg. 1. a, b.

Breve ad audiendum Judicium.

The Writ of Ad audiend' Judicium was of great Uſe then, tho' now altogether diſuſed:

37 H. 6. 29. gives an Account of it, that formerly, when a Demurrer was joined in a real or perſonal Action, this Writ uſed to go to bring the Parties in to hear Judgment; but now the Courſe is, that he attend at his Peril. 4 H. 6. 29. That the Defendant is not demandable on Demurrer, but the Plaintiff is only to appear and pray his Judgment. Juſt as upon a Writ of Enquiry of Damages, the Defendant has no Day in Bank; and in the Common Pleas, neither Plaintiff nor Defendant have a Day given them, but the Plaintiff is to attend for his Judgment. Cro. Eliz. 75, 144.

Yelv. 97. 11 Co. 6. b.

But the Plaintiff has a Day by Courſe of B. R. Yelv. 97. 1 Rol. Abr. 486. Now here, tho' there be but one Ve. fa. to try the Iſſue, and inquire of the contingent Damages; yet theſe are as two diſtinct Matters; for antiently the Courſe was not to put both together; but that is new, and for Eaſe and Diſpatch; and here the Jury might have been diſcharged of the Iſſue, and yet inquire of the Damages as an Inqueſt of Office. 16 Ed. 4. 1. 2 Inſt. 440.

Here are two diſtinct Matters in the *Ve. fa.*

How if Judgment were to be upon the Default.

2. He inſiſted on it, That if Judgment were to be upon the Default, it muſt have been given at the Niſi prius, and that being not done, and the Default being for the Plaintiff's Advantage, he might waive

or releaſe it, and quoted 42 Ed. 3. 1. and the Defendant upon a Writ of Error can never take Advantage of the Matter. Vide 2 Saund. 46.

Darnel contra. Where-ever there is a Demurrer in any perſonal Action, and the Defendant makes Default at the Day, the Demurrer is waived. F. Default 59. 38 H. 6. 33. In perſonal Actions, if the Parties are at Iſſue or Demurrer, and after Defendant makes Default, Judgment ſhall be upon the Default, and the Demurrer is waived. Bro. Default 58. 39 H. 6. 16. and continued to 18. Bro. Default 73. Fitz. Jour 33. Proceſs 147. 45 Ed. 3. 3. And as to the Objection, That if Judgment were to be given on the Default, it ſhould have been immediately. Anſwer: All that the Judges of Niſi prius could do was, to record the Default.

Demurrer waived by Default in a perſonal Action.

Powell Juſtice. I do not find but the Parties are demandable, both in Caſe of Day given upon Demurrer, and upon Iſſue joined; but after Iſſue, Inqueſt may be taken by Default. But in Debt, ſuppoſe the Defendant comes in upon the Exigent, and the Plaintiff, as he may, prays a Day; there it being at Day, had on Prayer of the Plaintiff before Count, if Defendant makes Default, Proceſs ſhall go to bring him in; but if the Plaintiff had counted, and before Iſſue the Defendant had made Default, if Plaintiff will demand him, he may have Judgment upon the Default; and I take it to be the ſame upon Demurrer where Day is given, at which the Defendant makes Default; for there Judgment final ſhall be, and no Proceſs Ad audiend' Judic'. Vide 18 Ed. 4. 7. And the Book of 20 H. 6. 44. is miſtaken by Fitz. for the Book is full, that Judgment muſt be upon the Default. 44 Ed. 3. 1. After Demurrer in a perſonal Action, that Proceſs ſhould go Ad audiend' Judic'; but before Demurrer or Iſſue joined, if Day be given after Pleading, a Default will be peremptory, and Judgment final upon Default; but the Uſage now is not to demand them.

When Inqueſt may be taken by Default, before Count or after, &c.

The Modern Uſage.

It is very hard to make a Default at a Day given by the Court on Demurrer peremptory; but here is an Iſſue as to Part, and a Demurrer as to the other Part, and a Ve. fa. to try the Iſſue, and inquire of Damages. And Day is given with a Niſi prius, which Day of Niſi prius is in Truth but to try the Iſſue, and inquire of Damages, but the Day on the Demurrer is Ad audiend' Judic'; ſo that in Truth the Day given Ad triand' exit', &c. has nothing to do with the Day of Demurrer, and it is not neceſſary that the Defendant ſhould have a Day on the Writ of Inquiry; ſo that the Day Ad audiend' Judic' in this Caſe is the Day of Bank, and the Default at Niſi prius is only to that to which the Defendant had a Day there, that is, to try the Iſſue, and the taking the Inqueſt by Default is a Waiver of taking Advantage of Judgment by Default.

Iſſue to Part, and Demurrer to Part. Co. Lit. 71, 72. Inſt. Leg. 567, &c. 2 Saund. 13.

Nor do I know where the Plaintiff may in a perſonal Action take Advantage of a Default upon the Inqueſt; but where the Defendant pleads a Releaſe or Acquittance, and at Iſſue makes Default, there indeed he may pray Judgment upon the Default, or that Inqueſt be taken by Default; but after he takes Inqueſt by Default, he is too

Quod Holt conceſſit.

late

Vide Stat. 8 & 9 W. 3. c. 10. 2 Lilly 43. 38.

late to pray Judgment by Default, for his taking the Inquest is a Waiver of the Judgment by Default; and Judgment must be upon the Verdict, and not upon the Default; that being waived by Prayer of Inquest. Upon an Issue of Non est factum, you cannot take a Judgment by Default.

Holt. The Question first is, Whether if Default be in a personal Action after Declaration, and Day given over, either by Imparlance or any other Day; whether, I say, this be so peremptory that Judgment final ought to be upon that Default? And I think in Case of Imparlance, whether to a Day in the same Term, or another, Judgment final ought to be. 18 Ed. 4. 7. 36 H. 6. 19. & 19 H. 6. are full in the Point, without taking any Difference.

Two Defaults in Action real, and but one in Action personal.

Now then upon Demurrer, because Parties are at Issue in Judgment of Court, suppose it had been in real Action, and Cur' adv. vult. Defendant makes Default, Petit Cape must go, and he does not save his Default; shall not Judgment final be given upon the Default? If it be so when there is a Demurrer in a real Action, is it not much stronger in Demurrer in a personal Action? And it is not less peremptory upon Demurrer than Imparlance? For if Default be after Demurrer on Day given in the same Term, it is peremptory; that is, if the Party does not come at such a Day in the same Term, it is a Departure in Despite of the Court; and there in real Action no Petit Cape shall go, but Judgment final shall be on the Demurrer, and not upon the Default; so that if the Book of H. 6. be Law, as sure it is, Judgment is as much to be given upon Default in personal Actions as in real; only that there must be two Defaults in a real Action, and but one in a personal one.

Where Day is given, *Prece Partium* before Declaration, &c.

19 H. 8. 16. If the Party comes in upon Process in a personal Action, or upon Cepi Corpus, or Exigent, and Day is given Prece Partium, that is, by Consent of Parties, at which Day Default is made, no Judgment can be given. Why? Because there is no Declaration. But if it were after Declaration, and at the Day Default had been, it were peremptory. So is the Case of 7 H. 6. 19. 41. One in Custody of the Marshal upon a Præmunire, is charged by Bill in Nature of an Appeal of Mayhem, and Day is by Consent of Parties; at which there was a Default: There could not be Judgment final, because, tho' he had been charged in Custody of the Marshal, yet he never had been in Court; but if the Default there had been upon an Imparlance, it had been peremptory, and final Judgment had been thereupon.

Appeal.

Annuity. Co. Lit. 144. b.

Indeed in Annuity, which, tho' personal, yet partakes of the Nature of a real Action, (for there is final Judgment given to recover an Inheritance, and the Process in Annuity therefore imitates that of a real Action) after Default there shall be a Distringas ad audiend' Judic' to afford the Defendant an Opportunity to save his Default; because tho' the Recovery shall charge the Person only, yet it may be of an Inheritance. So in a Secta ad Molendin', if Defendant make Default, there shall be a Distringas to give him Liberty to save his Default; for that also follows the Nature of a real Action, as being of Freehold or Inheritance. F. N. B. 123. D.

Secta ad Molendinum.

Ay,

Ay, but this is like an Enquiry of Damages. 1. If Judgment be against a Defendant, and an Enquiry of Damages, he has no Day given him thereupon, and therefore he can make no Default; for the Court have already given their Judgment against him, and he thereby is quite out of Court, and the Enquiry is only to ascertain the Damages. But where there is both Issue and Demurrer, and before Judgment on the Demurrer a Ve. fa. goes to try Issue, and inquire of Damages, whereupon Defendant has Day, on which he makes Default; Is not that a Default to the Day of Demurrer as well as of Issue? For though they be in Truth different, viz. one the Day of Nisi prius, and the other the Day in Bank; yet in Consideration of Law they are the same. If there be two Defendants who plead severally, one of them demurs, and Judgment is given against him before Issue joined with the other, then he against whom the Judgment passed has no Day in Court, yet the Plaintiff may continue Process against the other; but if in that Case the Issue were to be tried before Judgment, then the Defendant who demurred has a Day, and that is the same that the other has by the Nisi prius; which by Law is the same with the Day in Bank. A Default in a real Action at the Day of Nisi prius is the same as at a Day in Bank, and as fatal; for they are not to be severed. And why not so in a personal Action? And it is incident to the Trial of the Issue, to inquire of the Damages upon the other Issue in Law. So if the Day of Nisi prius be the same with the Day in Bank, the two have the same Day; but here, though it be one Defendant, yet you would have him be out of Court as to Issue, by Reason of Default at Nisi prius, and in Court upon the Demurrer in the Day in Bank; that is, in and out of Court the same Day.

Diversity where only Enquiry of Damages, and where both Issue and Demurrer.

If there be Default after Demurrer joined, Judgment shall be upon the Default, or upon the Demurrer; and when Continuance is given, the Appearance of both Parties are entered at the Continuance-day, and antiently they used to demand the Parties; so then they lay at Lurch for one another; but now these are Things of Course.

Judgment upon Default after Demurrer joined, &c.

And whereas my Brother Powell affirms, that there can be no Day on the Demurrer but the Day in Bank: I would suppose there are two Defendants, one pleads to Demurrer, and the other pleads to Issue, and Ve. fa. goes to try the Issue, and inquire of contingent Damages; before the Day of Nisi prius and Puis darrein continuance, a Release is made by the Plaintiff to the Defendant that demurred; Can he plead it at Nisi prius? And if he fails in doing it, Can he plead it in Bank at Day there? And Powell subito allowed he might plead it at Nisi prius, but not in Bank; but after seemed to doubt, Whether after Demurrer a Plea Puis darrein continuance could be pleaded?

Vide Hob. 81.

Vide Post 102.

If at a Day given upon a Writ of Error Defendant makes Default, the Writ of Error may go on, and the Judgment be affirmed; because it is no new Judgment that is given for the Defendant, who is now out of Court by his Default, but only his former Judgment affirmed and ratified: But in that Case it

A Man out of Court may have Judgment againſt him, tho' not for him.

were hard to give the Defendant Coſts upon the Statute: So if a Defendant make Default, Plaintiff may have Judgment; for a Man that is out of Court may have a Judgment given againſt him, tho' not for him: And he wiſhed the Defendant's Counſel to take Care how they made Default; for after Default, tho' the Plaintiff could not prove his Declaration, ſo as Verdict could be for him; yet it were very hard to give the Defendant a Judgment, for he was out of Court.

If the Defendant confeſſes the Treſpaſs, but offers good Matter, if well pleaded. Vide Hob. 69. 1 Salk. 173.

Hard to hold the Defendant to his Confeſſion.

Aliter, Where the Matter confeſſed would not bar the Plaintiff.

At another Day another Point ſtirred in this Caſe, was, Whether Judgment might not be given againſt the Defendant upon the Iſſue, tho' looked upon as immaterial, and a Jeofail? Becauſe the Defendant confeſſed the Treſpaſs in his Plea, and made no good Juſtification: So (as was urged) Judgment ought to be given againſt him by Confeſſion. And herein Ch. J. Holt took a Diverſity; If one confeſs the Cauſe of Action, but pleads Matter, which, if well pleaded, would bar the Plaintiff, there it were hard to hold the Defendant to ſuch Confeſſion, and give Judgment againſt him; as here the Defendant indeed confeſſes the Treſpaſs, but offers ſuch Matter, as, if true and well pleaded, would juſtify him: But where the Fact is confeſſed, and ſuch Matter of Juſtification offered, which, tho' never ſo true and well pleaded, would not bar the Plaintiff; there Judgment may be upon the Confeſſion; as in an Action for Words for calling the Plaintiff a Thief; Defendant juſtifies, for that the Plaintiff received a Thief, and pleads it ill; there Judgment may be upon the Confeſſion, for that Matter could not have been ſo pleaded, as to have juſtified the Words.

Two Defendants ſever in Pleas, &c. ſo as there can be no Repleader.

In the further Debate of this Caſe, the Court held, That if there be two Defendants who ſever in Pleas, and one is found guilty, and an Iſſue not helped by the Statute of Jeofails is tried for the other, who having made Default, is out of Court; ſo as there can be no Repleader, and of Conſequence the Judgment muſt be to quaſh the Writ or Bill, it neceſſarily ſhall be abated thereby as to the other; for tho' one Defendant may be acquitted in Part, and condemned in Part of a Treſpaſs, or one of two condemned, and the other acquitted, yet the Writ cannot abate as to one, and ſubſiſt as to the other; and as to Treſpaſs againſt two, when the Acquittal or Diſcharge of one ſhall diſcharge the other. Vide 2 Cro. 134. Treſpaſs againſt two for taking Gun and Dagger, one juſtifies the Taking in his own Defence, being aſſaulted by the Plaintiff, the other pleads Not Guilty, and is found guilty, and Damages againſt him, and the other Iſſue is found for the Defendant; there Judgment ſhall be againſt him that is found guilty, for the other's Plea does not deſtroy the Plaintiff's Title for good and all: But if Treſpaſs be againſt two for taking the Plaintiff's Goods; and one pleads Not Guilty, and is found guilty, and the other juſtifies the Taking by Gift, &c. and his Plea is found true; there, foraſmuch as the Defendant's Plea entirely deſtroyed the Plaintiff's Cauſe of Action, he ſhall have Judgment againſt neither.

When the Acquittal of one Treſpaſſer ſhall diſcharge the other. Hob. 54.

Where one of the Defendant's Plea entirely deſtroys the Plaintiff's Action.

But the laſt Day of Hillary Term following, the whole Court declared, That they were of Opinion, that the Iſſue was helped by the Statute of Jeofails, and for ſo much gave Judgment for the Defendant; and as to the Demurrer, gave Judgment for the Plaintiff without any Reaſon. Vide 2 Saund. 318, 319. 2 Keb. 750, 769, 789, 825.

Per Cur'. This Iſſue helped by the Statute of *Jeofails.*

Domina Regina *verſus* Foxby. Vide poſt 178, 213, 239.

A Woman was convicted upon an Indictment for being a common Scold; and Mountague, in Trinity Term before, moved in Arreſt of Judgment, That the Indictment was, That ſhe was Communis Calumniatrix, which is not the Latin Word for a Scold, but Rixatrix; and upon this Exception, Judgment was arreſted this Term. Vide 2 Rol. Abr. 79. K. & Fareſl. 52. Blackerby's Caſes 217.

In an Indictment, *Calumniatrix* for *Rixatrix.* Vide poſt 178, 213, 239, 311. Judgment arreſted.

Note; The Puniſhment of a Scold is Ducking; and Holt, when the Exception was firſt made, ſaid, It were better Ducking in a Trinity than in a Michaelmas Term.

Note; One cannot move to ſtay Proceedings upon a Bond upon Payment of Principal, Intereſt and Coſts, till Bail be put in; for till then the Parties are not in Court. (But ſee the late Act for Amendment of the Law, 4 & 5 Ann. cap. 16.) Vide Fareſl. 114, 140. Poſt 25, 60, 101, &c.

Bail before Motion, to ſtay Proceedings.

Trantor *verſus* Watſon.

S. C. 1 Salk. 35. Vide poſt 25, 79, 162, &c.

A Captain of a Ship was taken in his Homeward Voyage from Jamaica by a French Privateer, and being under Capture, compounds for the Ship's Ranſom with the Frenchman, ſends the Ship home, and goes himſelf with the Captain into France for his Security: After the Ship arrived here, and the Goods had paid Cuſtom, and were brought from on Board, and put into Trantor's Cuſtody, the Defendant ſeized them by Proceſs of the Admiralty to force an Appearance in quadam Cauſa Salvagii; and Brotherick before Appearance moved for a Prohibition, and cited Captain Sand's Caſe in King William's Time, where after great Deliberation the Court granted a Prohibition before Appearance: But Holt ſaid, That that Caſe was nothing like this, for that was a Proceſs in Nature of an Embargo on a Ship from going to the Eaſt Indies, grounded upon Letters Patent of King Charles II. to the Eaſt India Company, and the Seizure there was the ultimate End of that Proceſs, and it was not to anſwer why they did go, but to ſtop them from going; but the Proceſs here is to force an Appearance: But at laſt the Court ordered him to give Notice within a Day or two, and Things to ſtay till then. And at another Day Darnell moved to diſcharge the Rule, and ſaid, This was a Caſe of Salvage; and as the Maſter has Power to pawn the Ship upon extraordinary Occaſion, ſo he may in this Caſe ſubject Part of the Ship and Cargo to ſave the Whole; ſo the whole Queſtion will be, Whether the Court of Admiralty can compel Payment of this Compoſition? For if they have Conuzance of that Matter, the Executing

If Prohibition lies before Appearance, to ſtay Proceſs of the Admiralty *in quadam Cauſa Salvagii.* 1 Salk. 35.

Capt. *Sand's* Caſe cited. 3 Lev. 351. 4 Mod. 176.

Rule to ſtay a Day or two, and a Motion to diſcharge it.

Whether the Admiralty may compel Payment, &c?

cuting the Process on Land will not vitiate it, if they have original Jurisdiction: As if a Ship be taken as Prize, and condemned, and the Goods sold; and after the first Owner sues the Vendee for the Goods, he may sue him in the Admiralty; so in Case of Piracy; for the Question will be Piracy or Prize. Cro. Eliz. 685. 2 Saund. 259. 1 Sid. 320. 2 Lev. 25. 1 Lev. 243. 1 Vent. 173, 174, 308.

Argument for Prohibition before Appearance.

Brotherick insisted upon these Things: 1. That his coming before Appearance could not be objected to, for the Process was a Seizure of the Goods in order to a Condemnation, if by such a Time Security be not given to answer for the Goods in Case they be condemned; and suppose the Owner of the Goods live at Jamaica, and their Process is to forfeit the Goods if Appearance be not in three Days, would not this Court grant a Prohibition in that Case? 2. It is too weighty a Point for the Admiralty to determine, Whether the Master may ransom the Ship from Captors? And this is what will open a Way to Cowardice, and Cheating of Owners. 3. Tho' the Captain may on Occasion hypothecate the Ship, he cannot hypothecate the Goods. 4. In Cases of Hypothecation, the Party to whom it is made, and not the Party who does hypothecate, sues.

If the Master may ransom from Captors.

If he may hypothecate both Ship and Goods. Vide Post 79.

Ch. J. Holt. The Master has Care of the Ship, and all the Goods on Board it; and here he being under Capture in an Enemy's Hands, and no Hopes of a Retaking, the Question is, Whether a Master under these Circumstances may not compound for a Ransom, as well as he may throw Goods over-board in Case of a Tempest? As to the Mischief objected, That such Compositions prevent Retaking; it is true, a Ship retaken upon fresh Pursuit, tho' after a Week's Time, shall be the first Owners: But, alas! a Retaking is so foreign a Supposition as deserves but little Consideration. If he then has a Power to ransome the Goods, the Question next will be, Whether he may retain them as his Security? It may be not; or if he might, and parts with them once, probably he cannot retake them; as in Case of Freight, he may detain them till paid; but if once he suffers them out of his Possession, he may not retake them: Then the Question will come to this, Whether in case it appears to us that this Process of theirs be illegal? as suppose here, instead of attaching the Goods in the Ship, they had attached Cows or Horses, or Houshold-Goods, to compel an Appearance in this Case? And I doubt whether they can attach any other Goods to enforce an Appearance, but the very Goods they proceed against: If we be then of Opinion that they cannot attach other Goods, or that they cannot retake these Goods, suppose in the Hands of a Vendee, ought we not, I say, in such Case, though we rarely do it, grant a Prohibition?

Whether the Master may not compound for a Ransom, as well as throw Goods overboard. Vide 1 Salk. 33,34,35,424. Post 79, 162. 1 Sid. 418. 1 Vent. 32. 1 Lev. 267. Vide Hob. 12, 42, 115. 8 Co. 147.

Copy of a Libel upon a Motion.

Powell. Regularly when one moves for a Prohibition, he ought to have a Copy of the Libel; and if in any Case the Admiralty can issue Process against Goods, it is hard to suppose this an illegal Process; and without we do so, we cannot prohibit them: The Process is to seize the Ship and Goods there, &c. in quadam Causa Salvagii;

and Execution is ſuggeſted to be of the Goods after they were taken out of the Ship, in the Hands of another Perſon: And if a Ship be hypothecated, in whoſe Hands ſoever it comes, it is liable; therefore if Goods may be hypothecated, it will be the ſame; and if you have good Cauſe of Prohibition, giving Security will not hurt you; and if the Execution be what Proceſs does not warrant, you have your Remedy againſt the Officer.

The next Day Dr. Lane, a Civilian, came to maintain their Proceſs; and ſaid, That Redemption is a Species of Salvage, which is to reſcue by Force, or redeem by Money. He ſaid, The Maſter of a Ship repreſents the Owner and Freightors; and if he has Suſpicion, may detain the Goods for his Freight: But it is objected, if once he parted with them, he cannot by Proceſs retake: But we ſay he may; for in this Caſe he has not only ſingle Poſſeſſion, but alſo an Hypothycation of the Goods: This is a Caſe of Redemption of Goods in the Power of an Enemy, whereof in ſome Reſpect they had a Property, and might by the Law of Nations ſink and deſtroy them; ſo that this Redemption is a prudent new buying of the Goods for the Advantage of the Freightors, by one that by the Law and Cuſtom of Nations (for it is not by the Rhodian or Civil Law) ought to redeem for the Convenience of Merchants, and Advancement of Trade; and here the Maſter has actually paid the Compoſition by his Body, which he ſubjects to Captivity till it be paid; ſo that he thereby gains a Right and Intereſt in the Goods as in Goods hypothecated to him, which Right follows them in whoſe Hands ſoever they go.

Argument for to maintain the Proceſs and the Redemption, and a Retaking the Goods, &c.

By Law and Cuſtom of Nations.

Here the Court interrupted him, and ſaid, The Merits of the Cauſe was not before them, before Appearance and Pleading; and it ſeems very reaſonable, that a Maſter compounding for Goods under theſe Circumſtances, ſhould be ſatisfied by the Owners, &c. and it is ſo in Caſe of Pirates; a fortiori, it ought to be in Caſe of Capture by lawful Enemies; beſides, we are upon a Proceſs before Libel; and if the Proceſs be unlawful, you have a double Remedy by Law, viz. Treſpaſs or Replevin. And the Caſe of Captain Sands was an Action upon the Statute after the Ship was ſtay'd; and it is too early for us upon Motion before Appearance or Libel, to determine the Right of their Proceſs; and a Citation is a Suit within the Statute, for which Action lies againſt them upon the Statute, if they have not Juriſdiction of the Matter.

Before Appearance, &c. Cauſe is not before the Court.

1 Salk. 31. 3 Lev. 351. 4 Mod. 176.

Powell Juſtice added; This was only a bare Proceſs againſt Ship and Goods in Cauſa Salvagii, and we will not diſpute the Legality of it upon Motion, ſince you have your proper Remedy, if it be illegal. And ſo per tot' Cur', the Rule was diſcharged. For other Matters touching the Admiralty, &c. vide poſt 25, 79, 162, 238. Carth. 26, 32, 166, 294, 398, 423, 474, 518. Skin. 59, 93, 230, 334, 361, &c.

Rule diſcharged *per Cur'*.

Bangley

Bangley *verſus* Titcombe.

As to Special Bail, and Notice in Trover, &c. Vide 1 Salk. 98, 99, 102. Vide 2 Salk. 608.

NOte; There muſt be Special Bail in Trover: Exception was to Bail, and new Bail put in, and new Exception to them, but no Notice thereof; If Notice be neceſſary, was the Doubt in Practice: And another Doubt was, if the ſame Bail taken by the Sheriff be put into Action, if they may be excepted againſt.

Dillon *verſus* Browne.

Upon Warrant to confeſs Judgment, and an Agreement to ſtay Execution for a Year. Vide Poſt 16, 288. 1 Salk. 258, 322.

BRowne gave a Warrant of Attorney to Dillon to confeſs a Judgment to him, and after Execution ſued out thereupon, it was moved to be ſet aſide for Irregularity; upon Suggeſtion, that it was agreed between the Parties at the Execution thereof, that no Execution ſhould be taken out till a Year after. The Court did reflect upon a Gentleman at the Bar, who was ſaid to be adviſed with in the Tranſaction, becauſe the Agreement was not by Deed; but the Plaintiff inſiſted on it, that he had ſtay'd a Year, for the Warrant was in a long Vacation, and the Judgment was entred as of Trinity Term before, and the Execution was not executed till after Trinity Term following: So the Plaintiff had waited a Year from the Judgment entered; but the Court was not agreed, Whether in ſuch Caſe the Year was to be reckoned from the Date of the Judgment, or of the Warrant? And the Matter of Fact being referred to Mr. Clerke, he reported, That there was no ſuch Agreement made at the Time of the Warrant given, ſo the Execution ſtood. But Quære, If in this Caſe Execution be delayed till after the Year, a Sci. fa. be not neceſſary, notwithſtanding the Parol Agreement? Vide Salk. 322. that it is neceſſary, tho' Execution be ſtay'd by Injunction. and vide ibid. 258. and Fareſl. 64, 65, & poſt 288.

Q. How the Year to be reckon'd.

Joſe *verſus* Mills.

S. C. 2 Salk. 640.

Treſpaſs for taking Cows at *D.* and other his Goods. *Non Cul'* to Part, and juſtifies for the Reſidue.

IN Treſpaſs for taking away two Cows, and ſeveral Loads of Wheat, out of the Plaintiff's Cloſe in Dale, ac etiam for taking away ſeveral other Things de Bonis propriis of the Plaintiff, ibidem ſimiliter invent'. Defendant pleads Not Guilty as to the two Cows, and pleads a ſpecial Plea to the Reſidue; to which the Plaintiff demurs: Iſſue being firſt tried, the Defendant is found Not Guilty, and contingent Damages entirely aſſeſſed upon the Demurrer: And in Michaelmas was Twelve-month, when Branthwaite found the Court againſt him upon the Demurrer, he took this Exception, That Damages were entirely aſſeſſed; and yet for ſome of the Things, viz. the Loads of Wheat, they did not appear to be his Goods; for the Words de Bonis propriis of the Plaintiff, ſhall only go to ſuch Things as are after the ac etiam; for the Goods in the firſt Clauſe are ſufficiently deſcribed by giving them a Venue; and though there be but one Cepit for both, that will not alter the Caſe; for one Verb may as congruouſly govern both Clauſes when the Property of the Goods belongs to ſeveral Perſons as when to one, ſo that the Verb does not

diſtribute the Words de Bonis of the Plaintiff; and if the Fact were, that the Goods mentioned in the firſt Clauſe had been the Goods of a Stranger, this had been a good Declaration; and for Authorities he quoted 2 Saund. 379. where the Plaintiff declared upon the Statute of Hue and Cry, that certain Perſons, to him unknown, did aſſault him, and took 10 l. of the Goods of him the Plaintiff, and ſeveral other Goods in particular out of his Poſſeſſion took; and held he ſhould recover for no more than what he expreſly laid to be his Goods, and that what he did not lay to be his own, ſhould be underſtood to be the Goods of a Stranger. 2 Lev. 156. Quare Clauſum fregit of the Plaintiff, and twenty Load of Hay ibid' invent' took away: After Verdict, Judgment arreſted, becauſe not laid that the Hay was the Plaintiff's. 3 Bulſt. 303. 3 Keb. 524.

He ſhall recover for no more than his own Goods.

Ward contra quoted 2 Rol. Abr. 250. pl. 7. Treſpaſs quare Defendant apud Dale Clauſum ſuum fregit & intravit & ſolum Querentis adtunc & ibidem effodit & mille carectat. ſoli ad Valenc. 10 l. & 100 Pecias Maremii ipſius Quer' ad Valenc' 200 l. adtunc & ibidem inventas cepit: Held that ipſius Querentis ſhould go to carect. ſoli, as well as to Pecias Maremii; and he quoted the Writ in the Regiſter, quare liberam Warennam of Plaintiff fregit & Cuniculos cepit, without ſaying ſuos, or in ea, 43 Ed. 3. 13. Mo. 691. Cro. Eliz. 568. Trover for 40 s. in Money in a certain Purſe, as for his proper Goods, without ſaying the Purſe was his; yet after intire Damages, and the Exception moved in Arreſt of Judgment, Plaintiff had Judgment; which laſt Caſe the Court immediately agreed to be Law; for the Purſe ſhall neceſſarily be intended to be his whoſe the Money was: And tho' the Chief Juſtice held the Exception fatal, yet the reſt would be adviſed; and the Caſe being ſtirred again in Trinity Term, all the Court held the Exception fatal, and ſaid the Caſe was no more than this: Plaintiff in Treſpaſs declares, That the Defendant took away two Cows from his Land in Dale, and alſo two Horſes of the Goods of the Plaintiff from the ſaid Dale; ſo that laying a Venue for the taking of the two Cows cloſes up the Sentence, and interrupts it, being coupled with the 2d Sentence, or the Matter of Deſcription which follows; and the Plea does not confeſs them to be the Goods of the Plaintiff, for that only juſtifies the Taking; which might well be, tho' they were the Cattle of a Stranger, and relied on Raym. 395. & 2 Lev. 156. And the Caſe of 2 Rol. Abr. 250. was agreed for good Law, but not like this, for there was but one Venue for both; and then the Queſtion was, Whether the Judgment ſhould be for the Defendant for all, in which Caſe he muſt have full Coſts, or only for Defendant upon the Iſſue, and a Nil capiat per Billam upon the whole Demurrer, ſo as the Plaintiff ſhould not be finally barred, but might begin de novo? For if it were not for the Intirety of Damages upon the Demurrer, the Defendant ſhould have Judgment for what was ill declared, and the Plaintiff for the reſt; and now this Term the Court gave Judgment final for the Defendant upon the Iſſue; and as to the whole Demurrer, Nil capiat per Billam quia Narratio præd. minus ſufficiens, &c. that is, ſuch a Judgment as is upon an Arreſt of Judgment.

Vide 11 Co. 116, 117.

Per Cur'. The Exception held fatal.

Vide Hob. 82.

2 Cro. 46, 47. Yelv. 36.

3 Bulſt. 303. Vide 2 Lev. 20.

Judgment upon an Attorney's appearing without a Warrant. Poſt 42, 86. Vide 1 Salk. 86. S. C. 88. 5 Mod. 205. Poſt 73. Saunders *verſus* Melhuiſh.

If an able and reſponſible Attorney appear for another without a Warrant, and Judgment is againſt him, Judgment ſhall ſtand, and the Party ſhall be put to his Action againſt the Attorney; but if the Attorney be a Beggar, or in a ſuſpicious Condition, the Court will ſet aſide the Judgment.

Holderſtaffe *verſus* Saunders.

Motion for an Attachment againſt an Attorney for procuring one to be turned out of quiet Poſſeſſion. Poſt 73. Vide Savil 31.

SErjeant Hooper moved for an Attachment againſt an Attorney and ſome more, who had got one in quiet Poſſeſſion turned out, thus: He got one to come upon the Land, who aſſumed the Name of the Tenant in Poſſeſſion, and owned himſelf to be the Man, and got the common Affidavit of Service to him by the borrowed Name, as Tenant in Poſſeſſion, having delivered a Declaration to him before, and thereupon got Judgment againſt the caſual Ejector, and turned the Tenant, who was wholly ignorant of all, out of Poſſeſſion. Upon Affidavit of this Matter, all the Accomplices were ordered to attend; for tho' the Court looked upon it as a very great Offence, they would not at firſt grant an Attachment; but ſaid, that it being in a criminal Matter, if Endeavours were uſed to ſerve them with the Rule, and they could not be found, upon Affidavit of that Matter, they would grant an Attachment, without requiring perſonal Service. Then Serjeant Hooper inſiſted to have it Part of the Rule, That they ſhould not move for an Injunction in Chancery in the mean Time, for that would hinder the further Inquiry of this Practice: But the Court ſaid, they could not do that, for that were to ſend an Injunction into Chancery; but ſaid, when the Court had a Hank over a Man, and he came for a Favour to the Court, they often refuſe to grant him that, without he conſented not to go into Chancery; and that if after ſuch Conſent he would go, they would ſend an Attachment againſt him for Contempt.

Practice of the Court, if an Offender crave for a Favour.

If the Chancery ſhould grant an Injunction in the mean Time.

And Ch. J. Holt ſaid, Sure Chancery would not grant an Injunction in a criminal Matter under Examination in this Court; and if they did, this Court would break it, and protect any that would proceed in Contempt of it; and he ſaid he thought that a Copy of theſe Affidavits upon which the Rule was made here, and an Oath of their being a true Copy, ought to be Ground ſufficient to ſtay the Chancery from granting an Injunction.

Attachment of Privilege by Marſhal. Confeſſing an Indictment.

In an Attachment of Privilege by the Marſhal, he ſhall have no Attorney, becauſe preſent in Court.

A Clerk in Court may confeſs an Indictment for his Client. Ante 14.

Corniſh

Corniſh *verſus* Marks.

Vide 1 Salk. 115. Fareſl. 10. 1 Lev. 1. 1 Mod. 8. Poſtea 105. Common Bail for Feme Covert.

IF Feme Covert be arreſted, let Cauſe of Action be what it will, ſhe ſhall be diſcharged upon common Bail; but if the Husband be arreſted, he ſhall not be diſcharged by giving Bail for himſelf, without giving of it for his Wife likewiſe.

The Queen *verſus* Bothell (*or* Portet.)

S. C. 1 Salk. 149. vide ib. 150. & poſt 33, 40, 43, 61, 83. Attorney General moved for a *Procedendo* upon a Conviction, removed by *Certiorari* upon an Indictment before Juſtices of the Peace, upon the Stat. 14 Car. 2. for abuſing a Cuſtom houſe Officer.

DEfendant was convicted upon an Indictment before Juſtices of the Peace, and not being preſent, no Judgment could be given, but a Capias pro fine awarded; and then he by a Certiorari removed up the Conviction, and the Attorney General moved for a Procedendo: 1ſt, Becauſe he ſaid, Certiorari's uſually went to remove Indictments, &c. before Trial, but not to remove Convictions; for the Conſequence of that would be miſchievous, that this Court, which having not tried the Cauſe, could not be truly apprized of its Nature, ſhould ſet the Fine, which ought by Law to bear ſome Proportion to quantitat' delicti: But Brotherick firſt ſaid, It was very frequent to remove Convictions before Judgment, and that in this Caſe there could be no Inconvenience in Point of ſetting the Fine; for it being upon 14 Car. 2. --- the Fine is aſcertained thereby, viz. a Year's Impriſonment, &c.

Vide 1 Vent. 33, 171. 1 Sid. 419. *Certiorari* where Error doth not lie, &c. 1 Cro. 314, 377. Courſe of the Crown-Office to remove Judgments in Attainder. 1 Salk. 150. *Procedendo* granted. 2 Sid. 32. Indictment *contra form' Statut'.*

Ch. J. Holt. Certiorari goes every Day to remove Convictions, of which Writ of Error doth not lie, for that is the Party's only Remedy, and the Reaſon regularly why Convictions are removed by Certiorari; but Certiorari's have alſo gone where Writ of Error would have lain, to remove a Conviction, as to plead a Pardon, or other ſpecial Reaſon: And he remembred a Caſe in Chief Juſtice Scrogg's Time, where a Certiorari was ſent out of this Court to remove a Conviction upon an Indictment before Judges of Aſſize, and that the Court gave Judgment: It was for Words, and there a Writ of Error would have lain; for where-ever a Conviction is upon an Indictment, a Writ of Error will lie thereof: And he ſaid, The Courſe of the Crown-Office was to remove Judgments of Attainder, &c. by Certiorari, and being a Writ of Error Coram nobis; and ſo it was in the Caſe of Mr. Hambden, and ſeveral others: But here being no ſuch ſpecial Reaſon in this Caſe, let Procedendo go. And here the Court ſaid, That where a Statute takes Notice of a Common Offence, and adds a further Penalty, an Indictment thereupon may well be laid to be contra form' Stat'. And where the Act gives Juſtices Power generally to determine a Matter at the Seſſions, it muſt be according to Law, and as a Court. Vide 1 Vent. 33, 39, 171.

Poſt 275. Miſtakes in filing Records rectified.

In the Caſe of the Queen and Warden of the Fleet, the Record of Iſſue and Pleading coming hither in Hill. 11. W. 3. was through Miſtake put upon the File of Michaelmas Term, but ordered to be put on the right File, the Miſtake appearing plain to the Court: And Powell quoted two Caſes where Venires were to wrong Records, but ſet right by the Court. Vide the Caſe of the Queen and Tutchin. Poſt 164, 268.

White's *Caſe*.

Where a *Mandamus* ought to go to reſtore to an Office, &c. 5 Mod. 404, 452. 1 Vent. 82, 331. Remedy if a private Office and a Freehold. Poſtea 82.

DEE moved for a Mandamus to reſtore White to the Place of Clerk to the Company of Butchers in London; it being alledged, That this was a Charter-Office, in which the Party had a Freehold; and quoted the Caſe of an Attorney of an inferior Court, where it goes. But Holt, Ch. J. That Caſe differs; 1. Office of Attorney concerns the Publick, for it is for Adminiſtration of Juſtice. 2. He has no other Remedy, but yours is altogether Private; and if it be a Freehold, you may have an Aſſize or Caſe; and Mandamus ought not to go where the Office is private, or Party may have an Aſſize; indeed it has gone for Regiſter in an Eccleſiaſtical Court, but againſt my Will.

Vide 2 Salk. 457, 645, & 650. Poſt 57. 1 Mod. 1. Rule of Notice of Trial where Iſſue is join'd four Terms, and no Proceedings by the Plaintiff.

Notice how to be reckoned.

When ſuch Notice is countermanded.

Note; It is a Rule of the Court, That if Iſſue be joined four Terms, and no Proceedings thereupon by the Plaintiff, there ought to be a Term's Notice before Trial: And a Caſe happened, that Iſſue was joined in Trinity Term, and Notice of Trial in Hillary Term; but after countermanded, and a new Notice in Trinity Term after, and the Iſſue tried at the Aſſizes; and it was now moved to ſet aſide the Verdict as irregularly obtained: And the firſt Queſtion was, Whether the Term of which Iſſue was joined ſhould be reckoned one of the four Terms? For if it ſhould, this Trial were irregular; in caſe the Notice in Hillary Term were not to be looked upon as a Proceeding, then the Trial had been irregular, and as ſuch ought to be ſet aſide: And per Clericos omnes, The Term of which the Iſſue is joined, is not to be reckoned one of the four Terms; and per eoſdem, Notice of Trial any Time within the Year, though after countermanded, is ſufficient Proceedings to bring the Plaintiff out of the Rule; for the End of the Rule is, That the Defendant ſhould be put in mind of the Cauſe, which a Notice, though countermanded, does. It was alſo held by Court and Clerks, that the right and antient Courſe was, That if the Aſſizes happened within fourteen Days after Term, fourteen Days Notice was not requiſite; but where it could be, it ought to be; that is, where the Aſſizes did not happen within fourteen Days; but it was agreed now, they uſed to give but eight Days Notice of Trial, though the Cauſe lay ever ſo remote; which the Court ſaid was very miſchievous, and therefore it was ordered to obſerve the old Rule.

Antient Rule of fourteen Days Notice to be obſerved.

If a Cauſe ſleeps four Terms before Iſſue joined, &c.

If a Cauſe ſleeps four Terms before Iſſue joined, there muſt be a Term's Notice before Judgment can be ſigned: If after Iſſue joined, there muſt be like Notice before Trial; but to make the Notice regular within the four Terms, it muſt be within the laſt Term ſedente Cur'. Vide Aſhwin and Corbit's Caſe, 2 Salk. 650, & poſt 57.

Crowder *verſus* Oldfield.

S. C. 1 Salk. 170, 364, 365.

UPON a Writ of Erroꝛ from the Common B. the Caſe was this: The Plaintiff in Caſe, foꝛ hindꝛing him of his Common, declaꝛed, That he was ſeized of a Meſſuage, and ten Acres of Land, cum pertin' in N. in Com' Ebor', Parcel of the Manoꝛ of N. in the ſame County, and that he held them by Copy of Court-Roll of that Manoꝛ as a cuſtomary Tenant in Fee-ſimple, accoꝛding to the Cuſtom of the ſaid Manoꝛ; and that he the Plaintiff had, and ought to have, &c. and all the cuſtomary Tenants of his ſaid Tenement, with the Appuꝛtenances, by the afoꝛeſaid Cuſtom, præd' a tempoꝛe cujus, &c. uſed and appꝛoved, had and ought to have a Common of Paſture in a certain Paſture oꝛ Mooꝛ called W. Paꝛcel of the ſaid Manoꝛ, and containing foꝛty Acres in N. præd', foꝛ all his commonable Cattle upon the ſaid cuſtomary Tenement, levant and couchant, &c. as appuꝛtenant to his ſaid Tenement; that the Defendant at ſuch a Time, with Intent to depꝛive him of his ſaid Common, did encloſe Paꝛcel of the ſaid Place, &c. Not Guilty: Veꝛdict foꝛ the Plaintiff, and Judgment aꝛreſted in Common Bench: 1. Becauſe he made a Title by Cuſtom, and did not ſhew that he was a Copyholder; foꝛ he did not ſhew he held ad voluntat' Domini.

Error in Caſe by a cuſtomary Tenant, for incloſing the Common. 9 Skin. 406.

Cuſtom. Carth. 432. Vide ib. 83, 270. Poſt 63.

Non Cul', Verdict *pro Quer'*, and Judgment aꝛreſted.

Lutwyche junioꝛ, foꝛ the Plaintiff in Erroꝛ; That none can claim Common by Cuſtom generally, but a Copyholder; and he ought in making Title to ſhew his Eſtate to be a Copyhold, that is, demiſed and demiſable, and held ad voluntatem Domini, &c. 4 Co. 31. But this is an Action upon the Caſe againſt a Stranger, and upon the Poſſeſſion. 2. It is after Veꝛdict; the laying a Cuſtom is in this Caſe only an Inducement to the Action, and Inducements need only be ſet out in Subſtance, foꝛ the Wꝛong done to our Poſſeſſion is the Giſt of the Action: And he quoted 1 Cꝛo. 137, 575. 2 Cꝛo. 43. 3 Cꝛo. 419. 1 Vent. 319, 275. & Mich. 7 W. & M. Stroud & Bird. And though it be laid by Way of Cuſtom, and ill as ſuch, it may be well by Pꝛeſcꝛiption, accoꝛding to Hob. 86. Owen 109. In Caſe, the Plaintiff declaꝛed that B. demiſed him all his Faiꝛs foꝛ twenty-one Yeaꝛs, that the Defendant hindꝛed him of taking his Toll; and though it was excepted, that he had not laid any Title to B. yet becauſe it was upon the Poſſeſſion, in which the Right did not come in Queſtion, Plaintiff had Judgment.

Claim of Common by Cuſtom. Vide Co. 60. Carth. 432.

Inducement to an Action on the Caſe. 4 Mod. 418. Vide poſt 21, 313.

Narr' upon the Poſſeſſion.

2 Lev. 193. Caſe foꝛ Diſturbance of a Seat in the Church, without ſaying it was an antient one, and the Exception oveꝛ-ruled, becauſe againſt a Wꝛong-doeꝛ upon the Poſſeſſion.

2 Jo. 227. 1 Lev. 277. 3 Cꝛo. 335. Caſe was foꝛ Diſturbance in an Office, to which the Plaintiff made a Special Title, and the Jury found a Title vaꝛiant; yet Plaintiff had Judgment, becauſe the Title was not materiał.

Supplied by Verdict. 2 Salk. 459, 460. Post 313, 314.

Verdict will supply whatever must of Necessity have been proved at the Trial; and quoted Roswell and Pryor's Case, Trin. 10. W. in Nusance for stopping of Lights, it was not said to have been an antient Messuage, yet held well after Verdict: Besides, the Locus ad quem here is laid to be Parcel of the Manor, which the Freehold is not, and Copyhold is; for the Services whereby the Freehold is holden, is that which is Part of the Manor, and not the Freehold itself; and for this he quoted Mich. 9. of the late King William, Winter versus Lowdurr, Br. Maner' 2. 2 Vent. 18. Vide Raym. 101. 2 Keb. 410, 493, 504.

2 Salk. 437.

That the Tenant has made himself a Freeholder.

1 Cro. 185. 229.

Parker contra. This Case has been three Times solemnly argued in Com' Banc', and the whole Court unanimous in their Opinion against the Plaintiff; for as he has made his Case, he has a Freehold in the Locus ad quem, for Tenant of Land secundum cons' Manerii, shall be understood a Freeholder: 2 Vent. 143, 144. 9 H. 6. 29. 4 Co. 31. b. Foiston's Case, 2 Leon. 29. Vaugh. 253.

And that the Verdict cannot help it.

Then Verdict cannot help it; for where the Title is inconsistent, Verdict cannot mend it; and the Question here is, Whether a Tenant of a Freehold, holden of a Manor, may by Custom have Common in Parcel of the Manor? 1 Cro. 418, 419. 3 Cro. 180.

The Question in the Case. Post 5 Mod. 244, 378. 1 Inst. 58.

Holt Ch. J. The Question first is, Whether we shall understand this customary Estate, as pleaded, to be a Copyhold Estate? Of Right you should not only have shewed, that it was by Custom held at the Will of the Lord, but also demised and demisable by him to hold of him, &c. Indeed, you say, it is Part of the Manor, which is a kind of an Implication that it is a Copyhold; and take it so, you have gone, in making Title, by Way of a Que Estate, that all the customary Tenants of that Messuage, &c. used to have Common there; and that is a good Way of prescribing, though it be not the usual Way; then you say you ought to have it, as belonging to the Land; but if it be look'd upon as a Copyhold, it is not so, but it belongs to it as it is a Copyhold Estate; and if the Copyhold be infranchised, there is an End of the Common: So that it being alledged by Custom, it is not a Common belonging to the Land, but to the State of the Land. Vide Yelv. 189, 119. Massam versus Hunter, Cro. Jac. 253. and Abundance of other Books; but a Copyholder may have Common as appendant to the Land.

Hob. 86, 286. 1 Jo. 276, 287.

If Copyholder of one Manor has Common in Waste of another Manor, then he must prescribe in the Name of his Lord, and say, that the Lord of that Manor, whereof he is Copyholder, used, Time out of Mind, to have Common for him and his Copyholders; and there Infranchisement of Copyhold does not extinguish the Common, but it is a derivative Right which the Copyholder has: So if this be taken as appendant to Land, Infranchisement will not extinguish it, so your Declaration is repugnant, for you have averred it to be Parcel of the Manor, and so by Implication a Copyhold; and then your Title you shew is very bad, and such as a Copyholder cannot make; for you should have shewed that Custom of the Manor was, that every Copyholder of this Tenement, or of the Manor in general, used to have Common, &c.

The Declaration repugnant. Hob. 86.

What the Plaintiff should have shewed, &c.

Powell, who had been of Com' Banc' when Judgment was there given, agreed, That one may declare in an Action for Damages upon his Poſſeſſion, without any further Title againſt a Wrong-doer; and he agreed the Caſe of Burt and Stroud upon a Legitime poſſeſſionat', for Hindrance of Common, and good, becauſe againſt a Stranger and Wrong-doer; but againſt the Owner of Soil, you muſt make Title, and ſo in Bar and Avowry; but where you need not ſhew any Title, if you go about it, and ſhew an ill or repugnant one, it is at your Peril: Here your Title is, that you are a cuſtomary Tenant of a cuſtomary Tenement, Parcel of a Manor; and it's true, after Verdict that will be taken to be a Copyhold; and if ſo, you are gone that Way; for you make Title to the Common, as belonging to the Land; whereas it ſhould be, as to the Eſtate: And the whole Court was clear to affirm the Judgment; but at the Importunity of the Counſel, they gave Leave to ſpeak to it again. Adjournatur.

How one may declare in Caſe upon his Poſſeſſion againſt a Wrong-doer, &c. 4 Mod. 418.

But if the Plaintiff ſhew an ill Title, when he need not ſhew any, it is at his Peril.

Adjournatur.

Mayor of Wincheſter *verſus* Wilks.

S. C. 1 Salk. 203. Vide ib. 193. 11 Co. 53. 1 Leon. 262. Pal. 1, 2, &c.

IT was an Action upon the Caſe againſt him for uſing the Trade of a Woollen-draper, within the Corporation, contra the Cuſtom thereof; which was, That none who had not ſerved ſeven Years to a Trade, or had been free of the Guild of Merchants, ſhould uſe it within the Corporation.

Note; It was not grounded upon any By-Law, or for any Penalty.

Caſe for uſing the Trade of a Woollen-draper, contrary to Cuſtom.

Verdict pro Plaintiff, and Motion in Arreſt of Judgment, that ſuch Action did not lie; and Cro. Eliz. 803. and the Caſe of the Corporation of Totneſs were cited upon the Point; but the Poſtea being not put in, the Court ordered them to ſtay till it came in, and then to have it put in Paper, and ſolemnly debated: For Ch. J. Holt ſaid, It was a Point not determined, whether ſuch a Cuſtom were good, tho' many Corporations did pretend to it: And he ſaid, Some Corporations pretended to a Right by Cuſtom to exclude Foreigners, but he thought they could not ſupport it. And in Paſch. 4 Reg. Judgment was ſtayed upon Faults in the Declaration, and the Court declined ſaying any Thing upon the Merits, which they ſaid was a Queſtion of great Conſequence.

Vid. 2 Lev. 33. Verdict *pro Quer'*, and Motion to arreſt Judgment.

Such Cuſtom is a Point not yet determined.

Judgment ſtayed for Faults in Narration.

Hotherſhell *verſus* Bows.

Vide poſt 301.

DEfendant in Cuſtody upon mean Proceſs having eſcaped, was taken upon a Warrant by Vertue of the late Act of Parliament; and Raymond moved, That upon bringing the Money into Court, he ſhould be ſet at Liberty; but the Court ſaid, They could not do it. And upon this Occaſion Mr. Clerke ſaid, That if a Man comes upon a Hab' Corpus, and the Plaintiff does not declare in two Terms, the Defendant ſhall be diſcharged upon filing of common Bail, without any Rules; and if one come in upon Hab' Corpus, tho' he after put in Bail; if it be not at the Return of the Proceſs, he can't give Rules, but

One eſcapes upon mean Proceſs, and is retaken by an Eſcape Warrant. Declaring againſt one that comes in by *Hab' Corpus*, &c. 2 Salk. 552.

must

must wait two Terms; and then, if there be no Declaration, shall be discharged upon common Bail, without Costs; whereas if he had put in Bail at the Return of the Process, he might spur them on by Rules; or if the Plaintiff had without Rules passed two Terms without declaring, he should pay Costs: And the Court said, The Rules were very hard upon one in Custody; and they said, It was not the Intent of the Act to make escaping Prisoners pay the Debt right or wrong, or to lie in Jail for ever: And therefore ordered Mr. Clarke to draw up a Rule, That in Case a Plaintiff did not declare in two Terms, that he should be Non pros'd, and thereupon the Defendant discharged.

Rules. Costs. Intent of the Act against Escapers. Vide post 63, 95, 154. New Rule made.

Note; If Declaration be delivered of Hillary Term, and Rules of Pleading given, if Defendant does not plead before the Essoin-day of Easter Term, Plaintiff may sign Judgment for want of a Plea; but if the Plaintiff in that Case has not given Rules in Hillary Term, he must give them in Easter Term before he can sign Judgment. Vide post 33, 153.

Rules upon a Narr' delivered in Hillary Term. Vide 1 Salk. 219. 2 Salk. 514, 515, 518.

Per Holt, Ch. J. After a second Verdict of the same Side, it is not fit to grant a new Trial, because the Judge did not like the Verdict; but if there were any Practice used in obtaining it, it is otherwise.

If a new Trial after second Verdict on the same Side. Vide 2 Salk. 649.

Per Holt, Ch. J. If a Bond be of twenty Years standing, and no Demand proved thereon, or good Cause of so long Forbearance shewn, upon a solvit ad Diem, I shall intend it paid; à fortiori, upon a Note, if it be any considerable Sum.

Post 242. Bond or Note of 20 Years standing.

Warren & Fuzz.

PER Cur'. A new Trial ought not to be granted for want of Evidence, which the Party might have had at Trial, and had not; but if it be proved that Endeavours have been used, but prevented by some unforeseen Accident; as Sickness of the Witness, &c. it may be good Cause of new Trial. See the Case of Ford versus Tilly. 2 Salk. 653. Faresl. 156, 157.

Cause of a new Trial for want of Evidence. Vide post 222, 224.

Noell and Gray.

ONE, who had been discharged upon the Act of poor Prisoners, gave Bail to an Action of Debt upon a Bond with which he was charged in Prison, and confess'd the Action, and that Execution might go against his Goods, &c. Plaintiff takes Execution against the Goods, and likewise sues the Bail, who surrender their Principal in Discharge; and this appearing upon Motion, the Court said, That Bail were actually discharged by the Pleading and Judgment, and ordered him to bring the Record of the Judgment into Court; whereupon he was taken in Execution, and that they thereupon would discharge him.

Bail discharged upon poor Prisoners confessing the Action, &c. Vide post 301. Prisoner also discharged after a Surrender. Vide 1 Salk. 345. 2 Salk. 521.

Baker *verſus* Pierce.

S. C. 2 Salk. 695.

CASE verſus Pierce for theſe Words, You ſtole my Box-Wood, and I will prove it: And now Darnell moved in Arreſt of Judgment, That the Words were not actionable; for he urged that theſe Words, You ſtole my Wood, and you ſtole my Timber, were the ſame: You are a Thief, and ſtole my Timber: You are a Thief, and ſtole my Corn, Hops, Apples, not actionable: For where Words charge one either with Treſpaſs or Felony, if there be not other Words that ſhew the Charge to be Felony, the beſt Senſe ſhall be taken: So if it be, You ſtole my Timber out of my Yard, Hops out of my Bag, Corn out of my Yard, &c. it will not bear Action: Hob. 331. Hutton 38. I charge you with Felony for taking Money out of *J. S.*'s Pocket, not actionable, becauſe it might be without a felonious Intent. But Holt, Ch. J. condemned that Authority: Beſides, he quoted Hutton 113. Thou art a Thief, and haſt couzened my Couſin of his Land, not actionable; tho' it was ſaid, the ſubſequent Words were accumulative, and there all the aforeſaid Caſes are agreed not to be actionable: Suppoſe the Words were, You have ſtolen my Coppice-wood, will they ſay Action would lie? For it might be Coppices cut, and carried away with one entire Act: So here; for it is not what the Party meant here, but the neceſſary Import of the Words that are to be conſidered.

Caſe for Words, *You ſtole my Box-Wood*, &c.

Motion in Arreſt of Judgment, as not being actionable.

Vide poſt 104.

1 Jo. 11.

All. 11. con. Pop. 211.

Vide Hob. 305.

Brotherick contra. You have ſtolen my Timber, is actionable, for it muſt be felled and ſevered from the Stock before it is Timber. Yelv. 152. Noy 114. And he remembred the old Verſe of Arbor dum creſcit, Lignum dum creſcere neſcit. 1 Rol. Abr. 70. pl. 47, 48. Theſe Words, Thou haſt ſtolen my Wood, and I will charge you with Felony. March 211. 2 Cro. 116. and Hob. 77. Thou art a Thief, and thou haſt ſtolen a Tree, not actionable; for a Diverſity is taken by the Court between a Tree, for that ſhould be underſtood ſtanding; but if it be felled, it is Wood. Style 9. Præcipe does lie of Boſcum; but it cannot be ſaid, One ſtole an Acre of Wood; and if it were not a Thing of which Felony could have been committed, we could not have a Verdict. Vide 2 Cro. Low verſus Saunders, upon Demurrer.

You have ſtolen my Timber, actionable, and why. 2 Cro. 66. con.

Cro. Jac. 166.

Ch. J. Holt, The Verdict ſignifies nothing in the Caſe, and there are contemporary Authorities that differ from my Brother Darnell's. Suppoſe he had ſaid, He has ſtolen my Underwood?

The Verdict here ſignifies nothing.

Powell. Underwood and Coppice-wood will be taken for Wood ſtanding.

And Ch. J. Holt ſaid, The Opinions of later Times have been in many Inſtances different from thoſe of former Days in relation to Words, for formerly there has been a Difference taken between ſaying,

Thou

Vide Hob. 331. 2 Cro. 114.

Thou art a Thief, and haſt ſtolen my Wood, and, Thou art a Thief, for thou haſt ſtolen my Wood; and Judgments have gone both Ways: But later Opinions make no Difference, if the Words be ſpoke at the ſame Time; and theſe are ſcrambling Things that have gone backwards and forwards, and the idle People in the Country that privately cut and carry away Coppice-wood, are in common Parlance called Wood-ſtealers. And I have heard my Lord Hale and Juſtice Twiſden ſay, That they knew no ſet Rule for Actions for Words, but that all Words ſtood upon their own Feet: To ſay, a Man has the Pox, is not actionable; but to ſay he has it, and got it by a Yellow-hair'd Wench in Moorfields, has been adjudged actionable; which later Words do not carry a violent Intendment that the Speaker meant the French Pox, but the Senſe leads more that Way than to another. And he ſaid, that Stealing and feloniouſly Stealing was not the ſame; for in common Parlance Stealing did not always import Felony; as to cut and carry away Furze is a Stealing, but not a felonious Taking. But Powell ſaid, he always took it, that, ex vi Termini, Stealing did import Felony, and the ſaid Inſtance put by my Lord was properly Treſpaſs, and not Stealing. And at another Day, per tot' Cur', the Plaintiff had Judgment, for all the later Authorities ran clear for him. And Holt ſaid, it was not worth while to be learned on that Subject, but ſaid, that for his Part, where-ever Words did tend to take away a Man's Reputation, he would encourage Actions for them, becauſe ſo doing would contribute much to the Preſervation of the Peace.

1 Mod. 22. 1 Lev. 280. 1 Sid. 432. 1 Vent. 50. 1 Cro. 509, 510.

Hob. 117, 268. 1 Jo. 68.

Vide Hob. 77.

2 Cro. 674, 166. 40 ac. 2 Cro. 66. Cont.

Wood *verſus* Shepherd.

When to move in Arreſt of Judgment. Vide 1 Salk. 77, 78. 2 Salk. 431. Poſt 143.

Ch. J. Holt. ONE ſhould not move in Arreſt of Judgment till the Poſtea be brought in, and the Defendant ſhould give Rule upon the Poſtea, which is in itſelf a Notice to bring it in; and it is againſt the antient Courſe of the Court to make a Rule for ſtaying of Judgment till the Poſtea be brought in. By the Courſe of the Common Pleas, the Clerk of the Aſſize keeps it till the Days for moving in Arreſt of Judgment be paſt, and the Notice is given him, and he has his Fee 6s. 8d. for attending with it, and the Clerk of Aſſize ought to deliver the Poſtea to none but to the Clerk in Court; and Notice to the Clerk in Court is good Notice.

Time to except againſt Bail after Notice. Vide 1 Salk. 97, 98.

Note; There are 20 Days to except againſt Bail after Notice, and Bail cannot be juſtified before a Judge in his Chamber, except it be by Conſent, or for Neceſſity in Vacation; but in the later Caſe, they ought to be juſtified again in Term; and upon that the Defendant is compelled to accept a Declaration to go to Trial at the Aſſizes, if it be an iſſuable Term. And upon putting in Bail, it is not enough to give Notice of their being put in, but it ought to be of their Names, Places of Abode, and Trade or Vocation, that Plaintiff may know how to enquire after them. And after Exception to Bail, there is

no ſet Time to juſtify or exchange them for better, but it muſt be in convenient Time.

Butler *verſus* Rolfe.

Per Cur. There ought not to be a Stay of Proceedings upon the Bail-Bond upon bringing Principal, Intereſt, and Coſts into Court after Notice of Trial, without it be brought within ſuch Time as Plaintiff may not be delayed of Trial. See before, fo. 11. and poſt, 29, 60, 101, 532. Salk. 583, 597. Fareſl. 114, 140, 141.

Time of bringing in Principal, Intereſt, and Coſts.

Queen *verſus* Mayor of Thetford.

Vide 2 Salk. 429, 434.

Upon Affidavit, that he had been ſerved with a Mandamus on the 2d of July before, and made no Return, Stone moved for an Attachment againſt him, or at leaſt to have the Alias returnable peremptorily. Cur. It is Matter diſcretionary in the Court to let People run the Line out, and we may make the Alias returnable immediate, and for Contempt thereon, grant an Attachment; or if we ſee Occaſion, we may make the firſt Writ returnable, and we may make them returnable de Die in Diem, or we may give ſhort Returns; as a Mandamus returnable in a Week, and Alias in four Days after, and a Pluries with like ſhort Return.

Upon a Motion for an Attachment, &c. about returning a *Mandamus*.

2 Salk. 434.

Per Cur. If the Perſon be ever ſo innocent, yet if there were a probable Cauſe of Proſecution, Action for malicious Proſecution will not lie; for it muſt be direct Malice, without any Colour of Cauſe, that will ſupport ſuch an Action. Vide 1 Salk. 14, 15, 21. 5 Mod. 394, 405. 1 Vent. 86. Carthew 416.

Action for malicious Proſecution. Vide poſtea 216, 261.

Ewer *verſus* Jones.

Vide 2 Salk. 415, 424. 1 Salk. 31. Ante 11.

DEE moved for a Prohibition to the Court of Admiralty to ſtay a Suit there for Seamens Wages. The Contract was upon Land, and the Suggeſtion was, That they pleaded the Statute of Limitations, and that the Admiralty rejected their Plea; and having obtained a Rule Niſi before, it was now offered againſt it, That wherever the Common Law Courts allow the Admiralty Juriſdiction, they ought not to prohibit them, and here they have Juriſdiction, as in caſe of Hypothecation, and Sentence in Admiralty beyond Sea ſhall be executed by Admiralty here. Hob---Bernard and Brigg, Suit to ſeize a Ship for Piracy done by the Mariners; and tho' they may ſue at Common Law in this Caſe, yet it is hard to make them do it; for it were in Effect to give away their Right; for at Common Law the Suits muſt be all ſeveral, whereas they may all join in the Admiralty, and ſo by an eaſy Contribution maintain and carry on the Suit; and beſides, they may ſue the Ship there, which they can't do at Common Law; and the Statute of Limitation enumerates the Actions it does limit, and they are all Suits at Common Law: It is no Bar to a Suit in Equity upon a Truſt, nor for a Legacy, nor

For a Prohibition to the Admiralty to a Suit concerning Seamens Wages, upon pleading Statute of *Limitations*. 2 Salk. 424. 1 Salk. 34, 35. Poſt 79, & 424, 240, 309. 1 Vent. 146, 343. Raym. 3. 2 Rol. Ab. 350. p. 10. 3 Mod. 244. Carth. 166, 518.

upon a Rationabili Parte Bonorum; and the Reason given for the later Case is, because it is not a Common Law Proceeding, but according to a particular Custom, and a Fortiori, when the Proceeding is by the Civil Law. Mar. 139, 132. Hutt. 109.

Vide 1 Salk. 33. 2 Salk. 426. Winch 8.

To this it was answered, That it was an Indulgence to suffer Seamen to sue in Admiralty for Wages; for in King Ed. III.'s Time Prohibitions have gone. And it was first agreed, that for Suit upon a Contract super altum Mare, no Prohibition should go upon their Refusal of Plea of Statute of Limitations; but this was Matter strictly conizable at Common Law only, in which Case this Plea had been good: And is it not hard by Indulgence to them to have Defendant barred of his just Plea: And this was what stuck with the Court, and they said, this being a Statute barring of Right, ought to be taken strictly.

See now the St. 4 & 5 Annæ, cap. 16.

Property bound by Sentence in Admiralty. Raym. 473. 2 Show. 232. Vide 1 Vent. 32. 2 Keb. 511, 610. 1 Sid. 418. 1 Lev. 243, 267.

Cur. Without doubt a Sentence in the Admiralty, where they have Jurisdiction, binds the Property; and the Chief Justice remember'd the Case of Hughes and Cornelius: France and Holland were at War, and the French took a French Ship as a Dutch one, and the Ship being sentenc'd as Prize, was sold by Vertue of the Capture; and the first Owner brought an Action of Trover, and the Sentence was given in Evidence, and upon Special Verdict held, the Property was altered by the Sentence. But to the Point in Question, if the Statute had been well pleaded, they all seemed to incline a Prohibition ought to go upon Refusal of it. But as it was here pleaded, it was ill, viz. That it did appear by the Libel, that the Suit was six Years after the Cause of Action, which was ill; for the Time on which it is laid is not material, and therefore the Defendant ought not by his Plea to hold the Plaintiff to the immaterial Time, but to plead directly that no Suit had been within six Years after Cause of Action accrued; and if, notwithstanding a Matter ill pleaded by you, they go on, why should we prohibit them? Nor shall we rather think that they rejected your Plea as not at all allowable by their Law as to its Matter, than because it was bad in Substance, as to the legal Manner of Pleading it. They also agreed, That if they refuse a Plea, which by their Law is a good Plea, it will be Reason to appeal, but not to prohibit them: And the Rule was discharged.

The Statute ill pleaded.

From what Time Duty to Seamen arises. 3 Lev. 60.

Note; In case of Seamen, the Duty does not arise from the Contract, but from the Service done; and therefore, tho' the Contract were above six Years, and any Part of the Service within that Time, it's out of the Statute: And if a Man be beyond Sea at the Time the Debt accrues, he may plead it by way of Replication to the Defendant's Bar of the Statute. Vide Stat. 4 & 5 Annæ, cap. 16. §. 18, 19, 20.

Debt lies for Money devised out of Lands. Vide 2 Salk. 419.

Per Holt, Ch. Ju. If Money be devised out of Lands, sure the Devisee may have Debt against the Owner of the Land for the Money upon the Statute of 32 H. 8. of Wills; for where-ever a Statute enacts any Thing, or prohibits any Thing, for the Advantage of any Person,

ſon, that Perſon ſhall have Remedy to recover the Advantage given him, or to have Satisfaction for the Injury done him contrary to Law, by the ſame Statute; for it would be a fine Thing to make a Law by which one has a Right, but no Remedy but in Equity; and the Action muſt be againſt the Tertenant.

Kingſdale *verſus* Mann.

S. C. 1 Salk. 321.

POſſeſſion was delivered by Hab' fac. poſſeſſ. about nine a-clock in the Morning, and towards ſix a-clock at Night the Plaintiff was forcibly turn'd out of Poſſeſſion; and this Matter being ſet forth by Affidavits, the Court held, That upon an Habere fac' Poſſeſſ. it is not a compleat Execution, till the Sheriff or his Bailiffs deliver the Poſſeſſion to the Party, and are gone away; That if immediately after ſuch Execution the Defendant turns him out of Poſſeſſion, it would be a Diſturbance of the Execution, for which an Attachment ought to go: But here they doubted, whether, after ſo many Hours Diſtance, it could be look'd upon as a Diſturbance of Execution; and therefore the Rule was, to ſhew Cauſe why an Attachment ſhould not go: And Powell quoted a Caſe in the Common Pleas, where, upon an Entry upon the Plaintiff the ſame Day he had Execution, the Court granted a new Habere fac. Poſſeſſ. To which Ch. J. Holt anſwered, So they might, if the firſt Executions were not returned, otherwiſe not. Quod Curia conceſſit.

When Execution is compleat upon an *Habere fac' poſſeſſ.* Vide poſtea 115.

Vide poſtea 115, 298.

Longvill and Hundred of Thiſtleworth.

S. C. 2 Salk. 498.

THE Defendants appeared, and took a Declaration in Trinity Term; and the Attornies of both Sides diſcourſing about the Original, the Plaintiff's Attorney told the Defendant's Attorney the Original was filed; but he had a Copy of it, whereof he gave the Defendant's Attorney a Copy, who pleads in Abatement; and after a Reſpond' Ouſter awarded by the Court, he gives the Plaintiff's Attorney a Plea, ſetting forth an Oyer of the Original therein. And the Queſtion was, Whether the Plaintiff ſhould be obliged to receive this Plea, all this having been tranſacted in one Term?

Plea in Abatement, and *Reſpond' Ouſter.*

Quære, If the Plaintiff ought to receive this Plea.

Ward for the Plaintiff. After Plea, the Party can never be intitled to pray Oyer of the Writ. In Dower you cannot do it after View. Indeed if they had demanded Oyer, tho' they had no Right to it, and we had granted it to them, they might perhaps take Advantage of it.

Oyer of Writs. Vide Fareſl. 9. 3 Lev. 50. 5 Co. 74, 76. poſt 122.

Mountague contra. One may have two Sorts of Pleas to abate the Writ: 1. To the Action of it: 2. That tho' it be well as to the Action of it, yet it may be faulty in its Frame, for Want of legal Form, or Agreeableneſs with the Regiſter; and therefore, tho' we firſt plead to Action of the Writ, and that be judged againſt us,

Two Sorts of Pleas to abate the Writ.

Demurrer after *Oyer*, yet but one Dilatory.

why can't we have Oyer of the Writ, in order to plead to it for a Fault in it self, or demur to it? And after a Plea in Abatement, Defendant may demur generally: Quod Cur' conceſſit; for the Demurrer then is in chief; and he did agree the Rule to be, That one ſhould plead but one Dilatory; but he inſiſted upon it much, that being in the ſame Term, they might crave Oyer of the Writ ſpecially in order to plead in Bar, or demur: And now Holt, Ch. Juſt. hæſitabat, for theſe Reaſons: 1. He agreed, That after Imparlance one could not demand Oyer; for Imparlance is always unto another Term. 2. He agreed, That after Plea in Abatement one could not have Oyer even in the ſame Term, to plead another Dilatory. But what ſtuck with him was, whether this being in the ſame Term, they might not crave Oyer in order to demur to the Count, and ſhew Variance between it and the Writ, or have it on Record before the Court in order to move it in Arreſt of Judgment, or to take Advantage of it upon Writ of Error, without being put to the Charge of a Certiorari? And he ſaid, That after Plea in Abatement to a Bond, you may have Oyer; and if you inſiſt upon it, you muſt enter your Prayer of it on Record, and they ſhall counterplead or demur to your Prayer; that if we give Judgment againſt you, you may have your Writ of Error; for though granting Oyer where it ought not to be, is no Error, yet denying it, it is: And Darnell quoted the Caſe of London and Bury, where the Plaintiff was forc'd to counterplead the Oyer: But at another Day, per tot' Cur', There ſhall be no Oyer after a Plea in Abatement; for the true Reaſon of Oyer is, that the Defendant may demur, and ſhew ſome Cauſe as a Variance between it and the Regiſter, &c. and that amounts to a Plea in Abatement, or to plead ſome Matter in Abatement: Vid. Co. Ent. 320. That after Plea in Abatement over-ruled, Defendant has no more to do with the Original; and as to what occur'd to the Chief Juſtice, that it might furniſh with Matter in Arreſt of Judgment, the Court all agreed now, ſuch Motions were not Acts on Record, but are in nature of Informations to the Court, as from amicus Cur', to prevent erroneous Judgments.

No *Oyer* after Imparlance, &c. Lane 39. 2 Lev. 142.

Oyer and Plea in Abatement after general Imparlance.

If after Abatement to a Bond.

2 Lev. 144.

Per Cur', No *Oyer* after Plea in Abatement, and why. Vide 1 Salk. 7. and poſt 225.

That a Plea to a Bond for Miſnomer muſt be before *Oyer*, for by *Oyer* you admit the Name. Vide Hob. 162.

Vid. poſtea. Of ancient and modern Demands of *Oyer*, and Grant thereof.

Powell, Juſtice, in this Caſe ſaid, That formerly all Demands of Oyer were in Court, as it is now in Caſe of Appeal; but that now it is demanded and granted between the Attornies, and where there ought to be Oyer, one is not bound to plead without it: And if one Attorney in time demands Oyer of the other, and he tells him the Writ is filed, and that he may take it, it is well; but ſure he cannot without ſuch Conſent enter a Demand, and a giving of Oyer; for if Attornies be admitted ſo to do, they will ſet forth the Matter falſly; which though it could not enſnare the other Side, becauſe they may produce the right Writ, &c. and have it entred, yet it would be very tedious and inconvenient; as if a Deed be pleaded, it remains in Court all that Term, yet one cannot go to the Officer, and take Oyer of it without Leave of Court, or of the Attorney; and the very Form of Pleading ſhews it muſt be upon Demand, and Oyer of a Writ is in order to object to it; and after you have pleaded your Dilatory

Oyer of a Deed.

without Oyer, to what Purpose should you have it now: It cannot be to plead it in Bar; and to plead a Dilatory it cannot be, because that would be to let you plead a Dilatory after Dilatory; and to assign a Variance between the Writ and Count would be a Dilatory. So per tot' Cur', they were denied the Oyer,

Oyer denied *per tot' Cur'*.

Per Cur'. It has been settled here on Debate, That Money ought not to be brought into Court to have it struck out of the Declaration, where an Executor is Plaintiff; but you may plead a Tender, and touts temps prist'.

Where Money ought not to be brought into Court, &c. Vide ante 11. 25, &c. 2 Salk. 583, 596, 597. S. C. 1 Salk. 130.

Buller *versus* Crips.

A Note was in this Form: I promise to pay *J. S.* or Order, the Sum of 100*l.* on Account of Wine had from him. J. S. indorses this Note to another; the Indorsee brings an Action against him that drew this Note, and declares upon the Custom of Merchants, as upon a Bill of Exchange; and a Motion was in Arrest of Judgment upon the Authority of Martin and Clarke's Case.

Action by an Indorsee upon a Note to pay to *J. S.* or Order, &c. Motion in Arrest of Judgment.

But Brotherick would distinguish this Case from that; for there the Party to whom the Note was originally made, brought the Action, but here it is by Indorsee; and he that gave this Note, did by the Tenor thereof make it assignable or negotiable by the Words [or Order] which amounts to a Promise, or Undertaking, to pay it to any whom he should appoint, and the Indorsement is an Appointment to the Plaintiff.

Distinction taken.

Ch. J. Holt. I remember when Actions upon Inland Bills of Exchange did first begin; and there they laid a particular Custom between London and Bristol, and it was an Action against the Acceptor, the Defendant's Counsel would put them to prove the Custom; at which Hale, who tried it, laugh'd and said, They had a hopeful Case on't: And in my Lord North's Time it was said, That the Custom in that Case was Part of the Common Law of England, and the Actions since became frequent as the Trade of the Nation did increase; and all the Difference between Foreign and Inland Bills is, That Foreign Bills must be protested before a Publick Notary, before the Drawer may be charged; but Inland Bills need no Protest: And the Notes in question are only an Invention of the Goldsmiths in Lombard-street, who had a mind to make a Law to bind all those that did deal with them; and sure to allow such Note to carry any Lien with it, were to turn a Piece of Paper, which is in Law but Evidence of a Parol Contract, into a Specialty, and besides, it would impower one to assign that to another, which he could not have himself; for since he to whom this Note was made could not have this Action, how can his Assignee have it: And these Notes are not in the nature of a Bill of Exchange; for the Reason of the Custom of Bills of Exchange is for the Expedition of Trade, and it's Safety; and likewise it hinders Exportation of Money out of the Realm: He said, If Indorsee had

When Actions upon Inland Bills of Exchange first began. Vide 5 Mod. 13.

Difference between Foreign and Inland Bills. Vide post 81.

These Notes are not in nature of Bills of Exchange Vide 2 Salk. 442. 1 Salk. 24, 129.

What Actions lye on 1 Lev. 298. Farefl 45, 152.

Bills of Exchange, and how brought, and against whom, vide Hard. 487. 1 Mod. 285. 2 Keb. 334, 695. 2 Vent. 307. 1 Keb. 592, 636. 1 Vent. 45, 152. 1 Salk. 24, 124 to 133.

Vide 1 Salk. 124 to 133.

had brought this Action against Indorſor, it might peradventure lie; for the Indorſement may be ſaid to be tantamount to a drawing a new Bill for ſo much as the Note is for, upon the Perſon that gave the Note; or he may ſue the firſt Drawer in the Name of the Indorſor, and convert the Money when recovered to his own Uſe; for the Indorſement amounts at leaſt to an Agreement, that Indorſee ſhould ſue for Money in the Name of Indorſor, and receive it to his own Uſe; and beſides, it is a good Authority to the original Drawer to pay the Money to Indorſee. And Powel, Juſtice, cited one Caſe, where a Plantiff had Judgment upon a Declaration of this Kind in the Common Pleas; and that my Lord Treby was very earneſt for it, as a mighty Conveniency for Trade; but that when they had conſidered well the Reaſons why it was doubted here, they began to doubt too: And the whole Court ſeemed clear for ſtaying Judgment. And at another Day the Chief Juſtice declared, That he had deſired to ſpeak with two of the moſt famous Merchants in London, to be informed of the mighty ill Conſequences that was pretended would enſue by obſtructing this Courſe; and that they had told him, It was very frequent with them to make ſuch Notes, and that they looked upon them as Bills of Exchange, and that they had been uſed for a Matter of 30 Years; and that not only Notes, but Bonds for Money, were tranſfer'd frequently, and endorſed as Bills of Exchange. Indeed, I agree a Bill of Exchange may be made between two Perſons without a third; and if there be ſuch a Neceſſity of dealing that way, why do not Dealers uſe that way which is legal? and may be this: As, if A. has Money to lodge in B.'s Hands, and would have a negotiable Note for it, it's only ſaying thus; Mr. *B.* pay me, or Order, ſo much Money Value to your ſelf; and ſigning this, and B. accepting it: Or he may take the common Note, and ſay thus; For Value to your ſelf, pay me (or Indorſe) ſo much; and good: And the Court at laſt took the Vacation to conſider of it.

It ſeems Indorſee might bring an Action in the Indorſor's Name. *Bromwich* & *Lade's* Caſe. Vide Noy's MS. 278. Vide 3 Lev. 299. 3 Mod. 86. *Dubitatur in Com' B.* Merchant informs the Ch. J. concerning theſe Notes, &c. That a Bill of Exchange may be made between two Perſons, and how. *Cur. adviſare vult.*

Domina Regina *verſus* Tracy.

S. C. poſt, 114, 178, 169.

TRacy, a Juſtice of Peace of Middleſex, was indicted; for that he, together with T. and F. by Pretence of a certain Warrant in Writing, ſuppoſed to be ſigned and ſealed by Sir S. L. Recorder of London, did arreſt J. M. and brought him before J. C. a Juſtice of Peace of Middleſex, licet the Warrant was not directed to any of them, and licet it were forged and counterfeit to Tracy's Knowledge; and that Tracy, when M. was before the Juſtice of Peace, perſwaded him to refuſe to bail him, though the Fault being a Misdemeanour, were in it's Nature bailable; and that when J. M. was committed by the Juſtice, Tracy and the other two, at the Perſwaſions and Inſtance of Tracy, did extort divers Sums of Money from him.

Indictment againſt a Juſtice of Peace *& al'*, for arreſting *M.* upon a pretended Warrant knowing it to be forged, &c. Fareſl. 99. Vide poſt 90.

The Jury acquit the Defendant of the Forgery, or knowing that the Warrant was forged, and find him guilty of all the reſt. And now it was moved in Arreſt of Judgment by Welld and Parker.

Defendant acquitted as to knowing the Warrant was forged, but found guilty of the reſt.

1. That

1. That the Verdict was contradictory, for it acquitted him of that which was the Foundation of all that whereof he is found guilty; for the Charge is, That he did so and so by vertue of a certain forged Warrant; and if the Warrant be not forged, the rest either is no Crime, or rather it's another Offence than what the Defendant is charged with; for to get one taken up upon a real Warrant not directed to him, and to do whatever is charged here thereupon, is another Offence than is described here: Therefore Defendant is acquitted of the Offence wherewith he is charged, and found guilty of another.

Moved in Arrest of Judgment, that the Verdict was contradictory and why.

2. Objection was, That it was laid, that he prevailed with the Justice of Peace to refuse Bail, and it was not laid that any Bail was offered.

Object. As to prevailing with the Justice to refuse Bail, &c.

3. It's not directly said, That the Justice did commit him; but only, that when he did commit him, Tracy did so and so to him; and it may be he never was committed for ought appears here.

4. They ought to shew the Certainty of the Sums taken, and for what they were taken, otherwise the Defendant may not know what Answer to make.

Obj. As to the Execution of Money, &c.

5. As to some Part of the Charge, they charge him as Accessary; when it being Trespass, they all are Principals, and ought to be charged as such.

And upon the first Objection, a Case of Indictment against the Players of Drury-Lane was cited; where the Indictment was for building a Scandalous House for Acting of prophane and lewd Plays, and that they acted such Plays: Yet though they could prove the Acting of immoral Plays; yet because they could not prove the building, the Defendants were acquitted.

To the 1st it was answered, That though the Indictment did not alledge the Warrant to have been forged, but only under a [licet] by way of Aggravation, and not by way of Description; and though Warrant be not forged, yet the Facts charged upon the Defendants are criminal, as to perswade one by wicked and false Insinuations to refuse Bail, to have cruelly used him in Gaol, and by Duress to extort Money of him.

Resp. 1. That Forgery was only as Aggravation, &c. 1 Vent. 12, 234, 362. Raym. 118, 176. Hob. 205, 266. 2 Keb. 473, 476.

As to the 2d Objection, That it was not said, Bail was offered; it was said, every Refusal must be of an Offer, and Refusal could not possibly be without an Offer.

3. That it was not said, That he did commit him: It was answered, That the Commitment there was not charged as a Crime, but only to serve as an Inducement to the Extortion, which is directly charged; and what comes under an Inducement, need not that Preciseness.

Holt. Ch. Just. As to 1st, the Question is, Whether the Forgery be the Ground-work, or whether it be an unnecessary Addition put in only for Aggravation: For if it be Matter of Description, the Objection is of Weight.

Resp. Ch. Ju. That the two first Objections were of Weight.

As

As to 2d Objection, That no Bail were offered; it is true, a Justice of Peace is not bound to ask for Bail if they be not offered him, and therefore the Objection seems of Weight, and something has been offer'd, that a Verdict would influence the Case; but it does not, for in criminal Matters the Jury is only charged to inquire of Matters as they are alledged.

1 Vent. 19. Vide postea. 4 Co. 41, 48. 9 Co. 66. Noy 41, 32. Plow. 85, 86. 1 Ro. Ab. 79. 80.

3. That he could not procure if it were not actually done: That is true, but that is but Argumentative; and Indictments ought to be positive and direct.

4. As to the Execution, the Crime does not consist in the Quantum of the Money extorted, but in taking any at all.

Principal and Accessary.

5. You object, That he is not in some Things charged as Principal. It is to be known, that a Fact which would make one Accessary in Felony, in Treason and Trespass makes him a Principal; and sure one may lay the Matter either Way, viz. making him Principal or laying it special, as it will appear upon Evidence. In Treason, all are Principals, and if upon the Statute of 25 Ed. 3. one conspires the Death of the Queen, and is committed to Prison for the same, one procures him to escape, or harbours him after such Time as he knows him charged with Treason, or to have committed Treason, you may indict him upon the special Matter: That A. committed Treason, that B. knew of it, and received him; and yet this is not one of the Treasons mentioned by that Statute, but it is so by necessary Consequence of Law. As if a Thing be made Felony, all Accessaries before and after are Felons in Consequence; and if an Offence which is Felony be made Treason, they that would have been Accessaries before, shall now be Principals.

That the Facts may be laid specially in Declarations, and is the best Way. See Carthew 113, 216, 4, 382, 403, 404.

Powel. Sure the Fact might be laid specially in Trespass; for Indictments need not be like other Pleadings, according to the Construction of Law upon the Matter; and so it may be in case of Treason, and it was the Case of Abingdon and Gardner in Gunpowder Plot: And in ancient Indictments of Murder upon Malice in Law, the Malice in Law used to be specially laid; but since, it has been agreed, that it may be generally, Ex Malitia: And, I think, in the principal Case, it is more prudent and safe to draw the Indictment upon the special Matter; for otherwise it might be difficult to persuade the Lay Gens, that procuring, Inciting, Commanding, &c. would make one a Principal. And as to the two first Exceptions, he agreed with the Chief Justice; but he doubted whether, if an Indictment charges one to have procured a Crime to be done, it need be directly alledged that it was done: As if the Indictment were for maliciously procuring one to be indicted of Felony, whether it need be directly averred that he was indicted, because the Word procuravit necessarily seems to import it; and not only that he procured ad faciend', as you would have it, that is, to consent and agree to do it. And as to the Incertainty of the Sums extorted, an Indictment for Engrossing magn. Quantit. Frumenti was held good; and where you insist, that the Warrant being true and real, the Arrest was lawful, and that falso & malitiose are only Pepper and Vinegar, which will not determine any Act to an ill Sense; sure

Whether the Crime charged need to be directly alledged to be done.

ſure it is hard to maintain that falſo & malitioſe are only Pepper and Vinegar, for thoſe Words diſcover the evil Root from which the Fact ſprung. And Ch. J. Holt ſaid, That Ex Malitia præcogitata, in an Indictment for killing a Man, was ſuch Sauce as would cut his Throat; and tho' it be admitted that the Warrant being true, the Arreſt was lawful, yet that arreſting a Man upon a true Warrant, and procuring the Refuſal of Bail when tender'd, as the Fact appear'd, and following the Party into Gaol, and extorting Money from him there by Dureſs and Threats of Iron, was ſuch a complicated Offence as deſerved an Indictment; and that the ſubſequent Tort made the original Act illegal, as being an Abuſe of legal Proceſs. And at another Day Ch. J. Holt declared, That they were all of Opinion, that they could not give Judgment upon the Indictment; that it was too incertain, and one complicated Offence; that it did not appear by it that any Bail had been offer'd, or what Sum, or that any certain Sum was extorted: But they only gave Judgment to quaſh the Indictment, and not for the Defendant, whom they ordered to enter into a new Recognizance to appear to a new Indictment.

Vide 1 Vent. 12, 18, 23, 25.

What tho' the Warrant was true, and the Arreſt lawful.

Per Cur', They could not give Judgment for Incertainty, *ante* 32.

Indictment quaſh'd, and Defendant to appear to a new one.

Wiat *qui tam verſus* Ayland.

S. C. 1 Salk. 324. Vide 2 Salk. 682.

IT was a Declaration of Michaelmas Term generally, which Prima Facie is to be intended to be of the firſt Day of the Term, and the Fact was laid to be on the 15th of November after, ſo the Action brought of their own ſhewing before Cauſe. Per Cur'. If upon Examination it does appear, that the Declaration was after the 15th, it ſhall be ſet right, as if the Bail was filed after the 15th, or the Bill of Middleſex taken out, and ſo it was referr'd to the Maſter to examine. They all agreed, it could not be amended by any Statute of Jeofail; but if Bail were filed, after the 15th of November, that would be a good Warrant for a Memorandum of the Day that Declaration was of, for none is in Cuſtod' Mar' till Bail filed.

2 Saund. 169.

Upon Narr' Fact ſeem'd to be laid before Cauſe.

But if Declar' was after, that it ſhould be ſet right, &c.

1 Vent. 135. Vid. 2 Lev. 13. Hob. 73. 2 Lev. 176.

Note, At laſt Parties agreed to waive Execution, and go to Trial again.

Touching Declarations, &c. See Carth. 113, 117, 216, 382, 40 , &c.

Poſt. 129.

The Queen *verſus* Bothell.

Vide 1 Salk. 149. *ante* 17.

IF one bring a Certiorari to remove an Indictment, and does not give Bail to try it according to the Statute, it is no Superſedeas; and a Record once filed in this Court, is never ſent back: Though Brotherick at the Bar ſaid, it might be ſent back the ſame Term. Vide poſtea 40, 43, 83, 61.

Bail upon a *Certiorari* to remove an Indictment, &c.

Squire *verſus* Grevell.

S. C. 1 Salk. 74.

ERror of a Judgment in C. B. in Debt upon a Bond for Performance of an Award; after Null' Award pleaded, the Plaintiff did ſet forth an Award on ſuch a Day, reciting ſeveral Suits depending between the Parties in the Common Pleas, and a Submiſſion of all Matters pending. 1. The Arbitrators award, that all Suits between the Parties ſhall ceaſe. 2. That the Defendant ſhould pay the

Error in Debt upon Award.

Plaintiff 10 l. in full of all Demands, and also give him a Release from the Beginning of the World to the Time of the Award made. 3. That upon Receipt of the 10 l. the Plaintiff should make a Release to the Defendant from the Beginning of the World to the Time of the Award.

1. Exception upon the Awarding Suits to cease.

Parker took three Exceptions to this Award: 1. It is not final, for it is only that all Suits now depending should cease, that is to say, should not go on; which is no more than that the Party should be nonsuited, which is not final, and therefore not good: It is true, no new Suit can be brought while these pend, because these may be pleaded in Abatement; nor can these be prosecuted because of the Award; but if either of the Parties die, new Suits may be prosecuted for the said Causes, notwithstanding this Award.

2. Upon the Award, a general Release.

2. The Awarding a general Release would indeed make it a good Award, if it were concluſive, but it is left in the Plaintiff's Election whether he makes any or not; for the Release is ordered to be made upon Receipt of the 10 l. and it is not awarded that he shall receive it, and if he refuse, he is not bound to release.

3. Release to be to the time of the Award.

3. The Release is ordered to be till the Time of the Award; but he confeſs'd he did not much inſiſt upon that; the Authorities were against him upon a double Reason: 1. That no Cause of Action shall be intended to have arisen between the Time of the Submiſſion and Award, if it be not shewn. 2. That a Release to the time of the Submiſſion is a good Release in Purſuance of the Award, and the latter he said he took to be the better Reason; for a Man might have a Cause of Action accrue to him between the Submiſſion and the Award, and not know of it, and it were hard to put him under a Neceſſity of releaſing it; and the Reason why a Release to Time of Submiſſion is held good, is not because it shall be intended to be the Meaning of the Arbitrators that it should be so, but it is rather a controlling of their Meaning as far as it is void by Conſtruction of Law.

Vide 3 Keb. 253, 666.

Reſp. 1.

Pengelly contra. The Awarding that all Suits shall ceaſe, is that they shall for ever ceaſe, and it extinguiſhes the Duty; for if the Words had been that all Actions should ceaſe, the Duty had been gone, for if the Remedy be gone, the Right is gone; and the Word Suit is of a larger Extent and Senſe than Action; for by Release of Suits one may bar himself of Execution, which he cannot do by Release of Action, 1 Rol. Ab. 261. p. 7. That such Award extinguiſhes the Duty. Paſch. 29 Car. 2. Strangford & Greene, and 11 W. 3. Ball & Heſcott, in this Court, Award was, That one of the Parties should pay the other so much Money on such a Day, and that all Suits should ceaſe till Failure of Payment, and good, 1 Lev. 58. Besides, this Sum being awarded in full of all Demands, and the Submiſſion being with an Ita quod de prem', it is in itſelf final. Aleyn 26. 1 Rol. Ab. 260. pl. 55. 1 Sid. 154. 1 Lev. 132, 133. Hob. 190. Aleyn 85. Style 27. 1 Rol. Ab. 258, 259. 3 Cro. 851. 3 Cro. 448.

Holt. Ch. J. As to the Releaſe you ſay, That it is put upon the Party's own Act, in receiving or refuſing the Money, to releaſe or not; but it has been held in London and Craven's Caſe, in the latter End of Style, That where a Thing is agreed to be done upon Payment and Receipt, that Tender of the Payment and Refuſal intitles the Party to it as much as an actual Payment, and the Authorities have been ſo ever ſince. Quære 9 Co. 79. Dyer 356. 1 Lut. 224, 227, 238. Lev. Ent. 30. 2 Sand. 96. Reſp. 2. Tender and Refuſal, as much as actual Payment, Style 481, 388.

Then as to the next Point, That all Suits pending between the Parties ſhould ceaſe; The Queſtion is, Whether this goes to the Cauſe of Action? A Man releaſes his Action, and has no other Remedy for his Right but an Action, Does not that diſcharge the Right of the Thing? Now here is an Action depending, if a Man releaſe that Action, he thereby releaſes the Right of Action, and by the ſame Reaſon determining Suit determines the Right of the Thing, becauſe there is no Remedy but by Suit; then this Award is final. If in Treſpaſs the Plaintiff after the laſt Continuance releaſes the Action, the Right is gone; and if a Releaſe would do it, why not an Award? Indeed if the Party had two Remedies, one by Action, and another by Entry, if he releaſed the Action, he might notwithſtanding enter. Determining the Suit determines the Right. Co. Lit. 289. 2 Ro. Abr. 404. 1 Danv. 1. Cro. El. 14. 161.

And as for the Releaſe to the Time of Award made, it ſhall not be underſtood that there was any Cauſe of Action meant, if it be not ſhewn; and if there be, the Party may ſhew it, and ſay that he tendered a Releaſe to the Time of the Submiſſion. Releaſe to the Time of Award.

Powell. I think all the three Points are final, or if but one of them is ſo, the Award will be good for ſo much, if that does not depend upon another Branch of the Award which is ill; and if there were any Suits pending, the Awarding they ſhould ceaſe is, that they ſhould be at an End for ever; and the Words [now depending] was only to ſhew what Sort of Actions they made their Award of. And the ten Pounds being awarded to be paid in full of all Demands, that ſhall be intended in full of all Demands to the Time of Submiſſion, and not to Time of Payment. And if Money be awarded to be paid, and that the other upon Receipt ſhall make Releaſe, that I take to be an Award to receive, and for this he quoted a Caſe in the Common Pleas in his Time, and 1 Rol. Ab. 254, 255. pl. 16. If one Point is final, the Award good for ſo much if, &c. To pay 10 l. in full of all Demands, how far extends. 2 Cro. 354. 1 Salk. 74, 71. Style 44. Hob. 49. 8 Co. 97.

And per Holt, Ch. J. Here the very Awarding a Sum of Money is a Bar of Actions; for by the Awarding Money to him, there is thereby a Duty ariſes, and veſts in him, which is a good Bar, whereever Accord with Satisfaction is a good Plea; but anciently it has been held, That if the Thing awarded be not Money, but the doing of ſome collateral Act, the Party to whom it is awarded is without Remedy, and therefore ſuch Award would be void. But the contrary has been held ſince, for if two Men ſubmit to the Award of a third Perſon, they two do alſo thereby promiſe expreſly to abide by his Determination, for agreeing to refer is a Promiſe in itſelf; but where a Sum of Money is order'd to be paid, it is immediately a Duty, and if there were no more than an Award to pay a Sum of Is final, and a Bar of Actions.

Judgment affirm'd.

Money in Satisfaction of all Demands, it would be final. And Judgment affirm'd per tot' Cur.

S. C. 2 Salk. 442.

Ward *verſus* Evans.

A Caſe made at *Guild hall* concerning Payment of 60 *l.* to a Merchant's Servant, by a Bill of Exchange, &c. on another who had juſt failed before. Vide 5 Mod. 398, 399. Moll. Li. 2. c. 10. §. 17.

A Caſe made before my Lord Ch. J. Holt at Guildhall was this: One F. owed the Plaintiff 60 l. by Bill of Exchange. Evans the Defendant owes F. 100 l. alſo by Bill. The Plaintiff ſends his Man to F. with the Bill for Payment. F. ſends his Man with the Plaintiff's Man to Evans with the Note of 100 l. to pay the Plaintiff his Bill. E. writes off 60 l. of the 100 l. Note, and endorſes it upon the Back, and gives the Plaintiff's Servant a Bill of 60 l. 10 s. upon another Perſon for his 60 l. taking 10 s. from the Plaintiff's Servant, who the very next Day carries the Bill for Payment to the Party, who had juſt failed immediately before: And if this were a good Payment by Evans to the Plaintiff was the Queſtion.

Darnell Serjeant. There are three Things to be conſider'd here: 1. How far the Tranſaction of a Servant as to Receipts and Payments ſhall bind his Maſter? 2. What amounts to a Payment? Whether ſuch a Note as was given here were good Payment to the Maſter himſelf. 3. Whether, tho' this Tranſaction of the Servant would not bind the Maſter generally, it will be ſo between Goldſmiths, as this Caſe is?

If a Merchant's Servant may accept of a Bill of Exchange without Authority to do it. Vide Winch 24, 25. 3 Mod. 86. 3 Lev. 299. Moll. L. 2. c. 10. §. 19, 27, 29.

As to the 1ſt, he ſaid, That upon this Head of Servant binding Maſter by his Act, there might be a reaſonable Difference between the Servants of Merchants and thoſe of other Men; for probably Servants may affect their Maſters being Merchants, &c. in Point of Charge and Diſcharge; but that firſt muſt be in Matters purely concerning their Trade and Way of Dealing, as to anſwer Bills of Exchange, and Letters of Advice concerning Goods, or ſuch like, which require Diſpatch; but he cannot accept of a Bill of Exchange, without plain Evidence that he has Authority to do it. So is Lex Mercat. 265. which is an excellent Book concerning theſe Matters. And it is good Evidence in that Caſe, that the Maſter allowed the Payment or proteſting of Bills drawn by him, or gave him ſuch Authority; for it is hard to put it in the Power of a Servant to ruin his Maſter without his Order or Knowledge. And it was never heard, that if Merchant ſends his Servant to receive Money, that he may receive a Bill for it; and without Doubt it would be void if done by any other Servant of private Perſon, becauſe beyond his Authority, which ought to be purſued ſtrictly.

Whether ſuch a Bill be Payment at all.

2. Whether ſuch a Bill be Payment at all? The Law takes no Notice of any Payment to diſcharge a Debt but ready Money, or ſomething elſe given and taken in Satisfaction. A leſs Sum is not Payment for a greater, if not before it is due, or at another Place than it is payable at. Mar. fo. 25.

3. It being the Case of Goldsmiths does not alter the Case, for the Delivery of these Notes as is now used is no Part of their Trade; a very new Invention, already obnoxious to such Practices as deserve no Encouragement.

If between Goldsmiths doth alter the Case. Vide 2 Salk. 442.

He agreed, That in some Cases such Notes may be given for absolute Payment, as if one comes to buy Goods of another, and having agreed on a Price, the Buyer, upon Delivery of Goods, gives the Seller a Goldsmith's Note in Satisfaction: This shall be looked upon as Payment prima facie; because being all at one Time, it shall lie upon the Seller to prove that it was a conditional Payment, and so expressed at that Time; but here it lies upon the Giver to prove that he gave it in Satisfaction. Secondly, The Party's not going immediately to call for it, is Evidence that it was taken in Satisfaction; but he went the next Morning.

How such Notes may be Payment, and on whom the Proof lies.

Holt, Ch. J. It is plain the Servant was sent by his Master to receive the Money, and not the Bill. Next, it is also plain, if the Servant upon Tender of the Bill had come back to the Master to know his Mind, and the Master had sent him back for the Money, and notwithstanding he had took the Bill, that would not have charged the Master, but here was some time for the Master to assent to what Servant had done: But giving such a Bill as this upon an original Contract, is Evidence that it was given and received for Payment; and he held clearly, that the Indorsement by Evans on the Note of F. was a Receipt by him of so much Money to the Use of Plaintiff, for which an Indebit. assumpsit would lie; and in this Point they all clearly agreed without Doubt.

Vid. Pasch. 5 Annæ, in B.R. Sir Cha. Thorold. vers. Smith. Hob. 154. Moll. L. 2. c. 10. §. 17. 1 Salk. 132, 133.

And at last they all agreed, That if Master send his Servant to receive Money upon a Goldsmith's Bill, or any other, and he takes another Bill upon another Person for Payment, that shall not bind Master without some subsequent Act of Consent, as if he would not send the Bill back in reasonable Time, with regard to Circumstances, &c. And Ch. J. Holt desired the Counsel, if they were not satisfied with the Opinion of the Court, to have their Bill of Exception, and that he would sign and seal it, that they might have a Writ of Error, which they declined.

Where Master not bound by such a Bill taken.

Per Holt, Ch. J. If there be two Coroners, one whereof being a Beggar suffers an Escape, it is very hard to charge the other with it. The Case came before me once, and I would not take upon myself to determine it, tho' my Brother Levinz reports that I would have over-ruled him in the Exception. And that Case has been argued several Times in the Common Pleas, but not adjudged; but Court thought hard to charge the other. Vide Butcher and Porter's Case, in Time of the late King.

Two Coroners, one Insolvent suffers an Escape, if the other shall be charged. 3 Lev. 399. 2 Mod. 23, 24. Show. 400.

Godol-

S. C. 2 Salk. 468. poſt 234.

Godolphin & Ux. *verſus* Tudor.

Demurrer join'd in Paper, and Plea allow'd to be changed. See 2 Sal. 515. poſt 84, 88, 118.

A Demurrer was joined in Eaſter-Term laſt, and all continuing in Paper, they moved now to change their Plea, and plead a Matter iſſuable. Per Cur. It is very regular while it is in Paper to change or amend upon Payment of Coſts; and Motion was granted upon Payment of Coſts.

Lord Harry Scot and Brace, Redmond *& al.*

If Bail in Error upon Bond for Return of a Ship.

BOnd was for ſafe Return of ſuch a Ship (ſuppoſe under 100 l. Penalty) and Judgment thereupon in the Common Pleas, and Writ of Error here; and the Queſtion was, Whether there ſhould be Bail within the Statute: And per Cur, Let their be Bail niſi.

S. C. 2 Salk. 638.

Monkton *verſus* Aſhly *& al.*

Treſpaſs for Breaking his Cloſe, and Hunting and Killing his Rabbets with a *Continuando*. Skinner 42, 641. Carthew 230. Verdict, and entire Damages. 2 Mod. 253. 5 Mod. 178. Obj. That every Hunting and Killing was a new Treſpaſs. What things may be laid with a *Continuando*. Upon an Entry with and without *Ouſter*.

TReſpaſs for Breaking Plaintiff's Cloſe, Treading his Graſs, Hunting and Killing his Rabbets, continuando Tranſ. præd. quoad all the Particulars diverſis Diebus & Vicibus, from ſuch a Time to ſuch a Time: After Verdict and entire Damages: And now moved in Arreſt of Judgment by Salkeld, That of their own ſhewing they had recovered Damages for that for which they ought not to have recovered; for every Entry, Hunting and Killing, was a new Treſpaſs: Vide 2 R. 3. Defendant came every Day upon the Plaintiff's Ground to claim it as his own; and they held he could not be declared againſt with a Continuando. 21 H. 6. 43. Fitz. Treſp. 51.

Nothing properly can be laid in Continuance but Acts of Duration in themſelves, as Nuſance, Stopping of Lights, Water, &c. Feeding of Cattle: Theſe are permanent Things, and have Duration without Intermiſſion, and therefore may be laid with a Continuando. And other Things can by no Means be continued, as Killing a Man's Horſe, Cutting a Tree; for there the Treſpaſs terminates with the very Act, and cannot be repeated.

So the Queſtion will be then of Acts that may be repeated, In what Caſes they may be alledged with a Continuando? If the firſt Entry ſuppoſe be without an Ouſter, the ſecond Entry will be ſuch a new Treſpaſs as cannot be called a Continuando of the firſt; and a Releaſe of the firſt will not diſcharge it: But if the firſt Act amounts to an Ouſter, all ſubſequent Acts are Continuances of it: Vid. Velv. 126. 1 Brownl. 223. and he ſaid, Without this Diſtinction, the Books were not reconcileable: F. N. 91. L. Treſpaſs for Breaking his Cloſe, and Cutting his Graſs with a Continuando, it muſt be underſtood of of an actual Ouſter; 20 H. 7. 3. 1 Lev. 210. and 1 Sid. 319. which he ſaid was a wonderful ſtrong Caſe, and contrary to the Caſe of Brook *v.* Biſhop, Paſch. ult. 2 Roll. Abr. 549.

Anſwer. As to the Objection, either it is poſſible or not; if poſſible, Damages may well be for it; if impoſſible, the Court will intend the Damages to have been given altogether for that which is poſſible, and not for that which is impoſſible.

Reſp. How the Damages ſhall be intended.

Reply. The Damages muſt be intended given for whatever we are expreſly charged with, and all the Particulars of the Treſpaſs are ſpecially and expreſly laid in a Continuando; indeed, if he had declared with a Continuando Tranſgr' præd' generally, the Court would apply the præd' to that which might be continued: But they cannot do it againſt the expreſs Allegation of the Party, and an Ouſter cannot be intended in this Caſe.

Reply, That the *Continuando* is ſpecial *quoad* all the Particulars.

Ch. Juſt. Holt. I cannot ſee but a Man may lay Entring into his Cloſe, and Hunting in his Warren, with a Continuando of the ſame, for ſeveral Days: It is not indeed one continued Act, that laſts from one Day to another; but it is, that the Defendant has been Hunting there daily, &c. and that is præd' tranſgr' continued; and I cannot agree the Caſe in Yelverton, but it was in Favour of the Judgment: But to ſay, that if Treſpaſs be laid with a Continuando, that anſwering the original Treſpaſs is of conſequente an Anſwer to the Continuando, ſeems ſtrange; for the Continuando is a Treſpaſs continued, which ought not to be unanſwered. If I ſay, that ſuch a Day J. S. entred into my Wood, and cut ſo many Load of Wood, and carried them away, Continuando quoad the Cutting, it is ſenſeleſs, and ſo is the Caſe of 1 Lev. and 1 Sid. which you deny as to the Throwing of the Logs; and when ſuch Treſpaſſes that lie not in Continuando are laid with a Continuando, the Judge ought not to ſuffer any Thing to be given in Evidence but the firſt Act.

Ch. J. That the *Continuando* might be. 2 Salk. 638, 639.

1 Lev. 210.

1 Sid. 319.

Powel. Why may not the Hunting lie in Continuance, as well as the Feeding of Cattle; for as a Man cannot hunt Night and Day inceſſantly, ſo cannot a Beaſt feeding; nor is the Feeding yeſterday the ſame identical continued Feeding in your Senſe of Uninterminſion: Yet Treſpaſs Quoad Depaſturacon', is frequently laid with a Continuando; but Cutting a Tree cannot, or Killing ſo many Rabbets ſuch a Day Continuando, or entred and took away ſo many Loads of Corn ſuch a Day, you cannot ſay Continuando, but the Way is to ſay, that ſuch a Day the Defendant entred, and did ſo and ſo; and diverſis Diebus & Vicibus, between ſuch a Day and ſuch a Day he did, &c. and in theſe Caſes there ought to be no Evidence but of ſingle Inſtance, and the Jury can give no Damage but as far as their Evidence: And ſo are the Caſes of H. 7. and R. 3. which you quoted.

That the Hunting may lie in Continuance.

But Killing the Rabbets may not.

How the *Continuando* ought to be laid.

And as to the Ouſter, Holt, Ch. J. took this Difference: If you lay an Ouſter in your Declaration, you muſt lay a Re-entry, or elſe you cannot recover the mean Profits; but if you enter, you may lay it with a Continuando if it will bear one, and recover Damages for the Entry and mean Profits. And at another Day the whole Court held

Upon an *Ouſter* a Re-entry muſt be laid. 1 Inſt. 257.

Here the *Continuando* held well laid, and Judgment *pro Quer'*.

held it well, and ſaid, That a Treſpaſs for Proſtrating a Bench with a Continuando was held good, ſo conculcavit & aſſumpſit lies in Continuance; cutting certain Quantity of Wood lies not in Continuance; but to lay that well vid. 31 H. 6. but this here is relative to no Quantity, but a Continuance of a ſmall kind of Treſpaſs; if it had been, that he killed three Rabbets that Day Continuando, it had been bad; ſo if for Cutting 500 Loads of Corn ſuch a Day, and they in that Caſe can give no more in Evidence than what was on that Day. Jud' pro Quer'.

See Carthew 144, 230. Skinner 42, 641.

S. C. poſt 57.

Domina Regina *verſus* George.

Diſſolute Perſon kill'd Hares, and Indictment quaſh'd becauſe not ſaid Not qualified. Special Juſtification.

A Conviction upon the Statute of 4 & 5 W. & M. was, That the Party, Exiſtens diſſoluta Perſona, did hunt and kill ſo many Hares; and quaſh'd, for that it was not ſaid, That he was not qualifi'd; for there are many diſſolute Perſons worth 2000 l. per Annum, and by Conſequence are qualified to hunt, &c.

And if there be a ſpecial Juſtification, that muſt be of Matter of Fact, and not of Record; for Matter of Record muſt be pleaded even by an Officer.

Quaſhing Writ of Inquiry.

Ch. J. Holt. Writ of Inquiry cannot be quaſhed, till it be returned and filed; but before Return it may be ſuperſeded, quia improvide emanavit. See the caſes cited poſt 43.

Order removed by *Certiorari*, on which Appeal lies.

If an Order be removed by Certiorari on which Appeal lies, before Appeal it ought not to be filed till the Court is informed of the Matter; and then they will grant a Procedendo, notwithſtanding the Certiorari. Holt Ch. Juſt. Vide poſt 43, 83, ante 33.

Shepherd and Baily *verſus* Orchard.

Where two brought Error, and made two Attornies. 1 Lev. 146. Vide 1 Salk. 86, 88.

They Two brought a Writ of Error, and made two Attornies upon the Sci. fac': The one Attorney aſſigned Error; to which the Defendant took Iſſue, and then the other would plead in Abatement of the Writ. Per Cur. If one of the Plaintiffs had made Default, he ſhould be ſevered; but if they go on, they muſt proceed jointly; and if one Attorney will aſſign Error, &c. without Authority from both, we cannot help him, let him take his Remedy againſt the Attorney.

Nul tiel Record.

Note. If a Record of this Court be pleaded, nul tiel Record, without more, is a compleat Iſſue.

I

Domina

Domina Regina *verſus* Dyer.

S. C. 1 Salk. 181. Qu. poſt 96. Conviction for imbezilling Yarn.

HE was convicted upon the Statute of 7 Jac. 1 cap. 7. for imbezilling Yarn delivered to him to be woven, and the Conviction begun; Whereas Complaint hath been made before us *A. B. &c.* Juſtices of the Peace in *C.* by *J. S.* That on ſuch a Day; and ſets forth the Charge: It further ſets forth a Summons made by them to bring him in; and that by Vertue thereof he appear'd before them on Tueſday the 17th of April, in the Year 1702.

Obj. That a Summons is eſſential, and here 'tis impoſſible.

The Objection was made, That a Summons is eſſential in the Caſe; and that here it did appear on the Face of the Conviction, that there was no Summons, for the Summons ſhewn is impoſſible, there being no ſuch Day as Tueſday the 17th of April that Year; for the 17th of April that Year was on a Friday. To this it was offered for Anſwer, That the Order had been good without ſetting that Matter forth; for Things incident to a Juriſdiction need not be ſet forth, but things accidental muſt: Vid. 2 Bulſt. 48. 9 H. 6. 44. Return to Habeas Corpus, directed to the Chancellor of Oxford, that he was a Juſtice of Peace, &c. and that the Party was convicted before him for Extortion, without ſetting forth the Manner.

And if needleſs, yet if ſet out, it ought to be done well.

Objection. Though perhaps it needed not have been ſet out, yet if you go about it, you muſt do it well at your Peril. Anſwer. What is ſaid, is only under a [whereas], and by way of Recital; and the Words do not ſay, That he did not appear; but ſay, That he appeared at a Day impoſſible; which does not exclude an Appearance at a Day poſſible: And according to the Rule, in Alton Wood's Caſe, and Plow. 32. that which need not be ſhewn, if ſhewn ill, ſhall not vitiate. Vid. Dyer 95. Raym. 192. 2 Jo. 50. 12 H. 7. 12.

Ch. J. That Party ought to be ſummoned, and how it ought to be ſet forth, &c.

Ch. Juſt. Holt. Of common Right the Party ought to be ſummoned, if poſſible; and it would be well to ſet forth, That he was ſummoned and appear'd, or did not appear, or could not be found to be ſummoned; and though the Act of Parliament orders the Offender ſhould be convicted, yet that muſt be intended after Summons, that he may have an Opportunity of making his Defence; and this ſummary Juriſdiction ought to be held ſtrictly to form, and every Thing ought to appear regular in them; and they ought to make a Memorand. that ſuch a Day Complaint had been made, that thereupon a Summons iſſued returnable ſuch a Day, and that the Party being ſummoned did or would not appear, or could not be ſummoned, &c. and it is abominable to convict a Man behind his Back. And all the Court agreed, That of common Right there ought to be a Summons; and that the Almanack is Part of the Law of England, of which Court muſt take Judicial Notice; and that nothing could make this good but an Intendment, that the Juſtice would not convict one without a Summons.

Per Cur. There ought to be a Summons, and that the Almanack is Part of the Law. 1 Lev. 242. Vide poſt 81. 160, 252.

Powel said, That if Action were brought against an Officer upon Execution of this Conviction, it would not lie, for an erroneous Conviction would justify him: Indeed, if you had shewed no Summons, perhaps he would intend one, according to Precedents; but here you shew a Summons, and an Appearance at a Day impossible: And he said my Lord Hale used to say, There ought to be a Summons: And for the said Objection, the Conviction was quash'd per tot. Cur. the last Day of Hillary after.

Conviction quash'd *per tot. Cur.*

Constable.

Per Holt, Ch. Just. No Man that keeps a Publick House, ought to be a Constable.

Upon an Attorney's Promise to appear. Vide postea 86, ante 16.

Note; If before a Writ be taken out, an Attorney promise to appear to it, and after it is taken out, and shewed to him, he ought to appear, but that is no actual Appearance; but if such Undertaking be after Writ is actually taken out, it is an Appearance; per Holt, Ch. Justice.

Vide post 61. 105, 301.

Domina Regina *versus* Orbell.

Indictment for Cheating upon a Foot-Race. See 2 Show. 341.

INdictment was for fraudently, and per Conspirationem, to cheat J. S. of his Money, got him to lay a certain Sum of Money upon a Foot-Race, and prevailed with the Party to run booty; And Court would not quash it upon Motion; for they said, That being a Cheat, though it was private in the Particular, yet it was publick in its Consequences.

Of Bail to try it, and when.

And note; After this the Defendant would not plead till he was served with a peremptory Rule; and for that by the Course of the Court his Plea ought not to be received without Bail to try it the same Term: Whereas if he had pleaded freely, he need not try it till the next Term. And ordered per Cur. to give Bail to try it this Term, or the Sitting after.

Turn.

S. C. 2 Salk. 659.

Chetly *versus* Wood

Nul tiel Record. Record Recognizance, which Was taken at a Judge's Chamber, and set forth as if taken in Court.

IN Debt upon a Recognizance, the Plaintiff set forth a Recognizance knowledged in Court of Common Pleas before Sir George Treby, & Sociis suis: And upon nul tiel Record pleaded, the Record was produced, and was a Recognizance taken before Justice Nevil in his Chamber in London, and brought by him and delivered into Court after at Westminster; and whether this were a Failure of Record, was the Question? It was agreed, that Recognizances in this Court are always entred as present in Court, and never mention a Day certain; but in Common Pleas they make an Entry of a Recognizance entred into at a Judge's Chamber on a Day certain, and there it binds Land from the very Day of the Caption, and a Sci. Fac. may be brought upon it in either County, that is, London or Middlesex.

And being moved again at another Day, it was offered, That it was a conſtant Practice in Common Pleas, for above theſe 20 Years to recite Recognizances taken at Judges Chambers, as taken in Court.

To which Holt, Ch. Juſt. anſwer'd, Then they muſt make their Entry ſo, or elſe their Uſage is contrary to Law, and not to be regarded; but here the Entry is made, that the Recognizance was taken in London before a Judge in his Chamber: And per tot' Cur', here was a Variance. Vide Hob. 195, 196.

Per Cur', Here was a Variance.

Certiorari was directed to Juſtices of the Peace to remove an Indictment of Forcible Entry, and the Return was void. Per Cur', The Juſtices Names need not be ſubſcribed to it, but it ſhould be Reſponſio Juſticiar' &c. patet, and it ſhould be Dominæ Reginæ; but before this was diſcovered it was filed, and the Recognizance into which the Party had entred, for laying the Cauſe in purſuance of late Act of Parliament was eſtreated; and the Court ſaid, That if the Party that removes Indictment by Certiorari don't enter into Recognizance to try it the next Aſſize or Term, or the Sitting within the Term, the Certiorari is no Superſedeas. 2. That Failing of Trying is a Forfeiture of Recognizance, after which they will not hear a Motion in Arreſt of Judgment; but they doubted whether this for want of due Return, being a Kind of Album Breve, why they ſhould order the Juſtices to make a Return, and reſpite the Recognizance in the mean Time.

Certiorari, and void Return.

Recognizance for a Trial eſtreated.

Antea 33. Failure is a Forfeiture of Recognizance.

Dubitatur.

Note; After Certiorari returned and filed, no Procedendo can go. Per Cur'. Vide antea 33, 40, poſt 83, 61.

No *Procedendo* after *Certiorari* filed.

Per Cur', If a Number of Perſons meet peaceably on a lawful Occaſion, and a ſudden Fray happens between them, it cannot be made a Riot; but if ſeveral meet upon an unlawful Occaſion, and a ſudden Fray happens between them, and a Perſon who came upon a lawful Occaſion joins in the Fray, it may make him a Rioter as well as the reſt.

If Riot upon Perſons meeting, and a Fray happens.

Per Holt, Ch. J. You cannot except againſt a Juror upon a Writ of Inquiry. See of Writs of Inquiry, Carthew 70, 86, 362, 371, &c. ante 40.

Exception againſt Juror.

Indictment for exerciſing Artem, Myſterium, ſive Occupationem des les Taylors, not having ſerved, &c. quaſhed.

Vide Hob. 183. this Exception taken and rejected.

Queen *verſus* Croſſe.

HE confeſſed on Interrogatories, that a Copy of a Writ being ſerved upon him, and the Writ ſhewed, and before he knew the Contents of it, or out of what Court it was, he had ſpoke with Contempt; and this was judged a Contempt.

Confeſſion of a Contempt. poſt 74. Fareſl. 31.

College of Phyſicians *verſus* Roſe.

4 Mod. 47. Vid. 5 Mod. 327, 328. 2 Salk. 451. Caſe againſt an Apothecary for practiſing Phyſick without Licence. Special Verdict. 2 Show. 158.

IN an Action for practiſing Phyſick within Seven Miles of London, without Licence: The Caſe upon a ſpecial Verdict, That the Defendant being an Apothecary by Trade, was ſent to by J. S. then ſick of a certain Diſtemper; and he having ſeen, and being informed of the ſaid Diſtemper, did, without Preſcription or Advice of a Doctor, and without any Fee for Advice, compound and ſend the ſaid J. S. ſeveral Parcels of Phyſick as proper for his ſaid Diſtemper, only taking the Price of his Drugs; and if this were a Practiſing of Phyſick, ſuch as is prohibited by the Statute, was the Queſtion: And after ſeveral Arguments, the Court at laſt unanimouſly agreed, That Practiſing of Phiſick within this Statute, conſiſts,

What is practiſing Phyſick within the Statute.

1. In judging of the Diſeaſe and its Nature, Conſtitution of the Patient, and many other Circumſtances.

2. In judging of the fitteſt and propereſt Remedy for the Diſeaſe. And,

3. In directing or ordering the Application of the Remedy to the Diſeaſed: And that the proper Buſineſs of an Apothecary is to make and compound, or prepare the Preſcriptions of the Doctor purſuant to his Directions.

Judgment *pro Quer'*, but reverſed in Parliament.

2dly, It was agreed, That the Defendant's taking upon himſelf to ſend Phyſick to a Patient as proper for his Diſtemper without taking ought for his Pains, is plainly a taking upon himſelf to judge of the Diſeaſe, and Fitneſs of Remedy, as alſo the executive or directing Part. Et per tot' Cur', Plaintiff had Judgment.

Note; This Judgment was reverſed in Domo Procerum, & juſte, *&c.*

Ford *verſus* Lord Grey.

S. C. 1 Salk. 285.

See 5 Mod. 385, 6. 2 Jon. 27.

AT a Trial at Bar in Ejectment, the Statute of Limitation being pleaded, theſe ſeveral Points were ruled upon Evidence:

In Ejectment Poſſeſſion of one Jointenant is Poſſeſſion of the other.

1. That the Poſſeſſion of one Jointenant is the Poſſeſſion of the other, ſo as to prevent the Statute.

2. That in proving an Entry and Claim, it is neceſſary;

How to prove an Entry and Claim. Vide Hob. 120. 1 Inſt. 199, 181, 376, 377.

1. To prove the Claim to be upon the Land claimed (without ſpecial Cauſe.)

2. That it be Animo clamandi.

3. A Man makes an Anſwer in Chancery prejudicial to his Title, and after conveys away his Eſtate, this Anſwer cannot be read againſt the Alienee by any claiming under Alienor.

Recital of a Leaſe, Evidence of a Leaſe. Vid. 2 Lev. 108, 109.

4. That the Recital of a Leaſe in a Deed of Releaſe, is good Evidence of a Leaſe againſt Releaſor, and thoſe that claim under him.

5. A Fine was produced, but no Deed declaring the Uſes; but a Deed was offered in Evidence which did recite a Deed of Limitation of the Uſes; and the Queſtion was, Whether that was Evidence? And the Court ſaid, That the bare Recital of a Deed was not Evidence; but that if it could be proved that ſuch a Deed had been, and loſt, it would do if it were recited in another; and it not being proved that ever there was a Deed leading the Uſes of the Fine, the Counſel of one Side oppoſed the ſame Deed of Recital's being at all read: But the Court ſaid, We cannot hinder the Reading of a Deed under Seal; but what Uſe is to be made of it, is another Thing.

Upon bare Recital of a Deed of Uſes upon a Fine, Proof to be made.

6. A Deed bore Date 22 Car. 2 Anno Dom' 1671. and notwithſtanding that Miſtake, the Year of the King being certain, it was well.

Anno Dom' miſtaken.

7. If there be two Jointenants in Fee, and one of them levies a Fine of the whole, this amounts to no Ouſter of his Companion, but it is a Severance of the Jointure, tho' he be in of the old Uſe again; as if a Man ſeiſed of a Manor levies a Fine of the Demeans, the Manor is gone for ever: Sir Moyle Finch's Caſe; and after the Fine, though he has the ſame old Eſtate, yet he has it in another manner; for the Fine being ſur Conuzance de Droit come ceo, preſuppoſes a Feoffment; and if one ſeized as Heir to the Mother, levy Fine ſur Grant and Render, the Eſtate ſhall go to the Part of the Father; otherwiſe of other Fines.

Fine by one Jointenant of the whole Fee.

Vide & Nota Hob. 27.

Fine by Heir of Mother.

8. A Deed of Title to Leſſor of the Plaintiff of a Will, (ſuppoſe, except Black-acre) the Statute of Limitation being pleaded, and an Entry and Claim being offered in Evidence to avoid it, they were put to prove the Entry to have been in another Place than was excepted.

Entry upon an Exception.

Aſhbey *verſus* White.

S. C. 1 Sal. 19. & vid. 2 Salk. 503, 504. 5 Mod. 311, 312. 1 Mod. 145. 146, &c. 2 Lev. 114. 3 Keb 365, 389, 664. Pollexf. 470. Fareſt. 13. Poſt 49.

IN Caſe, the Plaintiff declared, That one Day of December, 12° of the late King, there iſſued a Writ to Sheriff of Bucks for Election of Members of Parliament in his County, that the ſaid Writ was delivered to the ſaid Sheriff; whereupon the Sheriff made his Warrant to the Conſtable of Ailesbury to chooſe two Burgeſſes for that Borough, which Warrant was delivered to the ſaid Conſtable; that in purſuance thereof the Burgeſſes were duly aſſembled to chooſe, &c. That the Plaintiff being then duly qualified to give his Voice for the Election of two Burgeſſes before the ſaid W. he was ready to give his Voice for L. and B. to be Burgeſſes of Parliament for the ſaid Borough; and that the Defendant knowing the Premiſſes, with Malice, &c. did obſtruct him from giving his Voice, and did refuſe it, and not allow or receive it, and that two Burgeſſes were choſe without allowing or receiving his Voice: Verdict pro Plaintiff. And now the Court argued ſeriatim, three againſt the Plaintiff, and Holt, Ch. Juſt. totis Viribus for him.

Caſe upon a Writ for Election of Members of Parliament. That Defendant obſtructed him from giving his Voice, &c.

Gould

Argument against Plaintiff.

Gould, puiſne Juſtice, againſt Plaintiff, for four Reaſons:

1. The Conſtable in this Caſe is Judge who ſhall vote or not, and as ſuch not be liable to Actions; as Sheriff ſhall not be liable to Action for taking inſufficient Bail, becauſe he is Judge of their Sufficiency: Hutt. 120. 21 Car. 2. in B. R. Rot. 469. Action for taking Bail, having nothing in the County, does not lie. Lev. 6. Eſcape upon Proceſs, Defendant pleads, that he let him go upon ſufficient Bail, and held that the Sufficiency of the Bail is not traverſable: 2 Mod. 218. Jury fined for Verdict againſt Evidence, and held ill: 9 H. 6. 6. Judge not liable to Action for making up a falſe Record.

1. The Conſtable in this Caſe is Judge of Sufficiency.

Vide poſtea.

2. This is a Parliamentary Offence, with which we have nothing to do by way of Action; for we cannot examine, whether the Party refuſed has a Right to vote or not, for that properly belongs to the Houſe of Commons to determine; and ſuppoſe the Queſtion be, whether the Right of Voting be in a ſelect Number, or in the Populace? And the Defendant refuſed the Plaintiff for being of the Populace; and we judge him to Right of Voting, being of the Populace, and upon that Ground give Judgment for the Plaintiff, and after the Right of Election in that Borough comes in queſtion in Parliament, and there the Right is adjudged to be in a ſelect Number; this will occaſion a Concurrency of independing Juriſdictions, which will be wonderful inconvenient; vid. 2 Vent. 87. that even for falſe Return it does not lie, for no Precedents are of any before Stat. of H. 6.

2. 'Tis a Parliamentary Offence, with which Court hath nothing to do by way of Action.

3. Here is no Profit preſent, or Poſſibility of a future Profit, ſo it is an Injuria ſine damno, and damnum ſine Injuria, or Vice versâ, will not bear an Action, for both muſt neceſſarily concur to maintain the Action; for Things muſt not only be done amiſs, but it muſt redound to the Prejudice of him that will bring his Action for it: 19 H. 6, 24. If a Man forges a Bond in my Name, it is poſſible I may be damnified by it; but till it be put in Suit againſt me, I cannot bring Action againſt the Forger: Hob. 267. idem, 6 Edw. 4, 7. 2 Bulſt. 268.

'Tis *Injuria ſine damno*, &c.

4. This relates to the Government, and is a kind of a popular Offence, and for that an Action will not lie for it; for by the ſame Reaſon that an Action would lie for the Plaintiff, it might lie for 200 upon the ſame ſingle Queſtion; and ſuppoſe we all ſhould give Judgment in ſo many Actions againſt him, and after the Matter is decided otherwiſe in Parliament, what Remedy has this poor Officer? And the avoiding Multiplicity of Actions, is the Reaſon of Fitz-William's Caſe. 5 Co. and Boulſton's Caſe in the ſame Book, that Actions lie not by any particular Perſon againſt one that not being qualified builds a Dove-cote, but is puniſhable in the Leet; but I do not ſay but that after the Right is determined in Parliament, it might be proper for an Information, 2 Brownl. 194. 2 Cro. 268. upon the ſame Reaſon: As to the Reaſon that ſuch Action never has been, therefore it don't lie, I do not much depend upon it: Vid. 2 Cro. Guntley *verſus* Holmes, 2 Vent. 25. 2 Lev. 2, 250. there is no Remedy there for the Party grieved but an Action, but here is Remedy in Parliament: Beſides theſe Reaſons, it is not alledged that any Return

This relates to the Government, and is a kind of popular Offence.

How it may be proper for an Information.

Remedy in Parliament, &c.

was made of the Members chose without his Consent or Vote, and Action does not lie to be sure before Return, 2 Bulst. 255. for till then the Party has no Damage. post. 122.

Powys accord. For these Reasons:

1. The Officer in this Case, tho' not properly and strictly a Judge, yet he is quasi a Judge; for he has a distinguishing Power who shall be admitted to vote, and who not; not indeed finally and conclusively, but at that Time who to admit, and who to refuse; but all he does is obnoxious to a subsequent Examination in Parliament. *Pro Def'*, 1. That the Officer is *quasi* a Judge

2. If such an Officer misbehaves himself, in certain Cases Acts of Parliament have already given Remedy; and this Case may come incidently in question, and be determined upon such Actions as the Statutes have provided; and the Statute giving Remedy in one Case, and being silent in all other Cases, seems to expound the Common Law in this Point. 2. Remedy by Acts of Parliament.

3. This would subject Mayors and such Officers, to such Infiniteness of Actions, as would not only ruin them, but also deter every Body from exercising the like Office: For the Heats in Elections are so great, that the losing Party would never fail of bringing every Man his Action, which the Court could not join in one, and so the poor Officer would be undone: Whereas the whole Matter might be fairly determined by an Action for False Return by either Candidate, according to the Statute. 3. This would make infinite Actions against Officers to their Ruin, &c.

4. There is such Intricacy in Elections, that scarce any two Towns agree; in some Boroughs a select Number has the Government; in some all that pay Scot and Lot, in some Pot-wallers, or House-keepers, &c. So that it would be hard to make an Officer distinguish them at Peril of Action. 4. Great Intricacy in Elections. &c.

Objection. By Law every Man that has an Injury done him, ought to have a Remedy therefore; and it would be strange to tell an English-man, that he has a Wrong done him, and no Redress for it. Obj. 'Tis a Wrong.

Answer. This is no wrong to him, for he does not lose his Privilege of Voting by it; for if an Action be brought for a False Return, or a Petition preferred to the House, if he has a Right, the House will reckon his Vote as much as if it had been received at the Election; and besides, if it be an Injury, it may be one of those that come within the Rule, de minimis non curat Lex: Moor 842. 2 Cro. 368. 1 Roll. Rep. 125. 2 Bulst. 326. and the Stat. of 7 & 8 W. 3 Lev. 30. that the Party elected before the Stat. of 27 H. 6. had no Remedy in Case of False Return, and before the Stat. of 7 & 8 W. Vid. Case of Anslow in 3 Lev. and 2 Vent. no Action lay for a double Return. Resp. 'Tis no Wrong; he may be righted upon Petition.

5. Reason: That such an Action was never brought before, and then Littleton's Argument on the Statute of Merton, vid. Cro. 142. which though it be not a conclusive Reason, yet thus far it may be urged, That it shews the Law is not apt to encourage Actions where none was brought ever before: And it is said in Anslow's Case, That the That such an Action was never brought before.

the Parliament could not be misconusant of Double Returns, & ideo, if they had thought it convenient, they would have provided a Remedy. It may in like Manner be said here, they could not be misconusant of denying of Burgesses their Votes.

That such Disputes properly belong to the House to determine

6. The Determination of all Disputes concerning Elections does properly belong to the House to determine, and it is a fundamental Right of theirs to determine who are to be the constituent Members of their own Body; and the right Decision of these Things depends upon a Parliamentary Kind of Learning, whereof most People are ignorant, as we may see by their being daily decided within the House contrary to the Opinions of all People out of Doors: And now in Actions for False Return, the last Determination in Parliament is what we must be concluded by.

It would be a Clashing of Jurisdictions. 1 Vent. 206. 2 Vent. 25. 2 Lev. 50. post 55, 100. & *Infra.* 3 Lev. 29. 2 Lev. 114.

7. The Clashing of Jurisdictions that would be.

And as to the Case of Starling and Turner, it is not like this; for that depended on a private Custom of a Corporation, and this here is Parliamentary: And he quoted 2 Vent. 37. That Courts of Westminster-Hall must not enlarge their Jurisdiction. 2 Bulst. 368.

And concludes for Defendant.

As to the Pleading, tho' he agreed it would be bad on Demurrer, for the Generality of the Allegation, That he was ready to give his Vote, and that they hinder'd him, &c. yet after Verdict he held it well enough, and he concluded for the Defendant.

Powell. At the first Opening of this Case I was surprised with the Novelty thereof, but that is no Reason against it; for many Actions are daily brought, the like whereof was never brought before.

That the Officer is only a Minister, and the Injury will not maintain an Action.

I don't agree with my Brothers, That the Officer here is a Judge; nor do I know what quasi a Judge is: Sure this Officer is only a Minister to execute the Sheriff's Precept.

But what moves me to be of Opinion against the Plaintiff is, That this is not such an Injury or Damage to the Plaintiff as will maintain an Action on the Case; for Injury is in relation to some Right a Man has, except it be where a Man is hinder'd from trying whether he has a Right or not, as was the Case of Turner versus Sterling; and the Case of Forge and Hoskins was upon solemn Debate, and it was compared to the Case of Cestuy que use, who could not maintain Case against Feoffee, for not executing Possession. However, let that Case be how it will, it does not oppose the Case of Sterling; for there was an old Remedy in Chancery to compel the Lord to hold his Court, in that Case; and in the other, there was no Manner of Remedy but an Action upon the Case.

Vide Supra 2 Lev. 50.

That the Jury are not Judges whether he has a Right, but the Parliament.

Objection. The Party here shews he has a Right, and the Jury find it upon their Oaths.

Answer. His own Allegation does not give him a Right, and the Jury are not Judges whether he has Right or not; for it is a Matter solely inquirable and determinable in Parliament by their Committee of Election, whether their Members be chose as they ought to be,

and what is that but to determine the Right of Voting? And there is no Doubt but they have Conuſance of that Matter.

Objection. The Determination of the Right in Parliament does not avail the Party injured of his Vote; nor repair him in Damages.

This Action ought not to be till the Parliament has determined his Right.

Anſwer. At leaſt you come too ſoon for this Action, before it be determined in Parliament whether you have a Right; and indeed, if it may be called a Right, it is ſo dubious and incertain a Right, that it is extream hard to ſay, till it be determined, that a Man may be injured in it ſo as to bear an Action; and the Plaintiff has a proper Remedy, if he has a Right, by Application in Parliament; and when the Matter is there determined, he may then bring his Action for his Damages; for I agree, it would be hard to ſuppoſe an Injury without a Means for a Reparation in Damages.

Vide ante 45. 2 Lev. 50, 114. 2 Keb. 435. Pollex. 470. 2 Keb. 356, 664, 433. Lutw. 88, 89, &c.

There be but few Caſes in our Books to this Purpoſe, but the Caſe in Hob. 318. comes up to the Reaſon of it: If a Church becomes litigious, ſo that there are two Perſons in Conteſt about it, the Ordinary's ſafe Way is to aſcertain the Title by a Jure Patronatus: If after, he admits the wrong Perſon, contrary to the Inqueſt of the Jure Patronatus, and the rightful Patron recovers in a Quare impedit, he ſhall after have Caſe againſt the Ordinary, but not before the Right is determined in a former Action. So here you ſhould aſcertain your Right in a proper Way, and then bring your Action: And there is great Reaſon for this, for the Right may be determined quite contrary by Parliament; and if we give Damages and Judgment againſt the Defendant, and after the Matter comes before the Parliament, who determine againſt the Plaintiff, what Remedy has the Defendant? This is a monſtrous Miſchief, only to be prevented by ſtaying till the Matter be determined in Parliament.

Beſides, as it appears on the Declaration, there is not ſufficient Damages to maintain it; for every Injury, to maintain an Action, muſt have a real preſent Damage, or a Poſſibility of a future one: As where one has a Market and Toll, and another is coming with Goods to the Market, for which, if ſold, Toll would be due, and a third Perſon hinders him from coming to the Market: Action lies for Lord of the Market, becauſe of the Poſſibility of Damages.

Poſſibility of Damages.

Another Fault in the Declaration is, That he does not particularly tell how the Defendant obſtructed him, as that he ſhut him out; and tho' it be after Verdict, yet the Declaration muſt be ſo certain as to be ſubſtantial: For if Action be brought by him in Reverſion, for refuſing to let him come upon the Ground to ſee Waſte, and he only ſays he obſtructed him, and does not ſhew how, Verdict will not help it.

Shews not how the Defendant obſtructed him, and not helped by Verdict.

Objection. It is Penitus recuſavit.

Anſwer. Indeed if it were a Thing that lies in Demand, as a Rent-ſeck, there Demand and ſaying Recuſavit is enough; but here he ſays, He refuſed his Vote. What then? If he gave it, it is nevertheleſs a Vote for the Officer's refuſing it; and if there were Room

Alſo, it is a Vote if he gave it.

to controvert it, it would have been looked upon as much a Vote as if it had not been refused.

The Plaintiff's Right has no Profit in it, &c.

Then this Right of Voting has no Profit in it, and it is as criminal to take Money for it as to sell a Presentation, as far as I can see; yet there was no Damages in Quare impedit at Common Law; therefore why here? And if so, no Action ought to be.

That an Action may lie where the Party has no other Remedy.

The Multiplicity of Actions, which Law will never suffer but upon Failure of other Remedy, and that is the Reason of the Case of the Common Watering-place in Southwark, because there was no other Remedy; but if an Indictment would have lain, no Action would have been maintained there; but here is another Remedy; and he agreed, the Case of Hemming and Finch, that Action will lie for refusing a Freeman his Vote in chusing a Mayor, but there the Party has no other Remedy: Besides, this would be a great Discouragement to sober discreet Men to meddle with these Offices, and the Difficulty of Elections, and Right of Voting, in some Corporations is very great. So being an Action of the first Impression, attended with many Inconveniences, and the Right determinable elsewhere, I am against the Plaintiff; but after Right determined in Parliament, for the Trouble and Charge the Party is at in prosecuting his Right, Action may lie.

Holt Ch. J. *pro Quer.*

Holt, Ch. J. The Case is truly opened and stated, and the only Question is, Whether or not, if a Burgess of a Borough, that has an undoubted Right to give his Vote for the chusing a Burgess of Parliament for that Borough, is refused and obstructed from giving his Vote; whether, I say, he has any Remedy in the King's Courts for this Wrong against the Wrong-doer?

That the Action is well maintainable.

All my Brothers agree, That he has no Remedy; but they differ in their Reasons, I can't agree with them, for I think the Action well maintainable; and first, I shall consider the Reasons given by my Brothers. The first Reason given by my Brother Gould is, That this Officer is a Judge of the Matter, and therefore no Action lies against him; but Brother Powys does not wholly concur with him in that; he says, He is only quasi a Judge: But Brother Powell throughly explodes that Reason, and says, He is neither a Judge, nor any thing like a Judge. And certainly he is in the Right of it, for he is nothing like a Judge; for what has he to do as Judge? The Sheriff receives the Writ, and is commanded to execute it, and thereupon he makes a Precept to the Officer of the Borough by Virtue of the Writ; and what has he to do, but to call the Town together, and give them Notice to come and make their Election, and then to receive their Votes and cast them up, and return him chose that has the Majority? And all this is purely ministerial.

Method of maintaining his Opinion.

But the Method that I shall observe in maintaining my Opinion is,

1. To shew that the Plaintiff has a Right and Privilege to give his Vote.

2. That

2. That in neceſſary legal Conſequence of this Right, if he be hindred or obſtructed in the Exerciſe or Enjoyment of it, the Law gives him an Action.

3. That this is the proper Action the Law gives him to vindicate his Right, and recover Damages for the Injury done.

As to the Plaintiff's Right:

I did not think it difficult to prove, that he has a Right; but it may be neceſſary to ſhew, that he has a Right veſted in him to maintain this Action.

And Property, &c. of the Commons of *England*.

It is not doubted but that the Commons of England have a conſiderable Property in the Eſtates of the Land; and that for that Reaſon they have a great Part of the Legiſlative Authority, without whoſe Conſent no new Law can be made, old ones abrogated, or Taxes given: But becauſe the vaſt Number of which the Community is made, renders it impracticable for them all to exert this Right; therefore by the Conſtitution of the Land, they are to ſend particular Members choſen by and from themſelves to Parliament, who when they are choſe, they have the full Power and Authority of thoſe that ſent them; that is, Knights for Shires, Citizens for Cities, and Burgeſſes for Boroughs: Theſe are the three Sorts of Perſons qualified to have this great Truſt repoſed in them.

As to the Election of Knights of Shires.

Firſt; As to Knights of Shires, the Election of them belongs to the Freeholders of the County; and this is an original Right veſted in them, and inſeparably incident to their Freehold; and a Freeholder cannot be deprived of this Right no more than of his Freehold: And before the Statute of ---H. 6. c. 7. any Man that had a Freehold of ever ſo ſmall a Value, had a Power to give his Vote at the Election of a Knight of the Shire; and that Statute recites the Miſchief thereof, and confines that Power to a Freehold of 40 s. per Annum: Yet tho' it be confined to that Value, and inferior Freeholders excluded, ſtill it remains an original Right to the Freehold of thoſe that have a Right of Voting, or that have Freehold above 40 s. or of that Value per Annum.

As to Citizens and Burgeſſes.

The Second Sort is of Citizens and Burgeſſes: I put them together, becauſe they both are upon the ſame Foundation; and no Difference between them, but only that a Citizen is of greater Dignity: In all other Things they agree.

Two Sorts of Boroughs.

Now there are two Sorts of Boroughs: The Firſt, where the Electors give their Votes in reſpect of their Burgages.

The Second, where they give them as Members of the Corporation.

1. Freeholders.

The firſt Sort, that vote by reaſon of their Burgage, do it as Freeholders of Houſes within the Borough by Burgage-tenure of the Lord of the Borough, which is a very ancient Tenure, and holds Place in the moſt ancient Towns in England, and ſends Burgeſſes to Parliament, and the Right of chooſing Burgeſſes to Parliament is incident to every Tenant in Burgage: Vid. Litt. 162. So that it is

Part of their Conſtitution, whether incorporated or not; and the Borough in queſtion is a Borough not incorporated, and therefore this Right is upon Account of their Inhabitancy, and not Part of their Tenure, but a Privilege annexed to their Burgage-Lands, and is a real Right belonging to their Eſtate.

2. Members of a Corporation.

The other Sort is, when there is a Corporation by Charter or Preſcription, that Corporation by Conſequence does chooſe and ſend Members to Parliament; and whereas this Right, in thoſe that hold by Burgage-tenure, is a real Intereſt annexed to their Eſtate and Inheritance in thoſe that do it as Freemen of a Corporation either by Charter or Preſcription, it is a perſonal Privilege, the Inheritance whereof they have by their Charter or Preſcription in ſuch manner as the Charter or Preſcription directs; which Right and Inheritance is lodged in Point of Right in the whole Body Politick, tho' the Exerciſe and Poſſeſſion be in particular Members purſuant to the ſpecial Directions and Limitations of the Charter, or Uſage of the Preſcription.

Corporation begun within Time of Memory.

If the Corporation be begun within Time of Memory, it muſt be by Grant, and he quoted the Caſe of the Town of Dungannon in Ireland, 12 Rep. 120. Hob. 15. The Town was Incorporated by the Name of Provoſt, Free Burgeſſes and Commonalty, *&c.* Et ulterius, that the ſaid Provoſt and Free Burgeſſes ſhould chooſe Parliament-men; and held on Debate, that the laſt Clauſe veſted the ſaid Privilege in point of Intereſt in the Corporation, but confin'd the Exerciſe to the Provoſt and Burgeſſes: So let the Exerciſe be according to the Charter or Preſcription, either in ſome particular Members or in all, ſtill the Right and Intereſt is in the whole Corporation: I do ſay, this is a diſtinct and particular Right veſted in every Member of the Body Politick, tho' the Exerciſe be in a particular Number; for if we but conſider the Matter ſeriouſly, it is they whole Perſons, Eſtates and Liberties, are put in the Power of the choſen Member, that ought to have the Right of voting for, and chooſing ſuch Member, veſted in them, and it is not quatenus they are a Corporation that they can give this Power to bind their Property, but it is as they are particular, private, natural Perſons: As in London, the Body Politick do not pretend to the Right, but it is in all the natural Members that compoſe the Corporation, tho' exerciſed by a ſelect Number; and ſure the Freemen of England have too conſiderable an Eſtate in this Right, to have it only lodged in a Body Politick; and when Parliament-Men were paid Wages, it was paid not by the Corporation, but by the whole Community: 46 Ed. 3. Memb. 4. upon the Back, there is a Writ directed to the Mayor and Aldermen of N. commanding them to raiſe from the Community of the whole Town; and Abundance of other Writs there are in like manner for raiſing the Salary of Parliament-Men of the whole Community; and not of the Corporation: Which ſufficiently ſhew, that the Corporation only is not repreſented, but alſo all the whole Community; for none ought to contribute but who is repreſented.

Privilege in point of Intereſt.

Who ought to have right of Votes.

Wages paid to Parliament-men.

Who are repreſented.

It

It is no new Thing, but agreeable with Reason and Rule of Law, for a Franchise to be of an Inheritance in a Body Politick; and the Enjoyment and Benefit of it to enure to the Town in their private and natural Capacity; and this is a Case of constant Experience: Vid. 1 Saund. 343. Prescription in the Burgesses of Darby for Common for their Cattle, levant and couchant; so if it be a Burgess, he has a distinct Property and Right as such; if a Freeman, he votes in his natural Capacity, and his Person, Estate and Liberty, are bound by it, therefore he has a Right in it.

A Franchise may be of an Inheritance in a Body Politick.

I wonder to hear it said, That it is so small a Right, as an Injury offered to it should be unpunishable, by the Rule of De minimis non curat Lex. Is this a little Thing to have the Privilege of giving my Vote in the Election of a Person, in whose Power my Life, Estate and Liberty lie, obstructed? Vid. the Stat. of 33 & 34 H. 8. & 25 Car. 2. cap. 5. concerning Chester the one, and the other concerning Durham; and note the Words [Privileges] and [Liberties] in them: Now it is plain, that the Want of this Privilege does occasion Damages, and the having it does prevent it; so it is a great Privilege to vote for a Parliament-Man, and sure every one that has that great Privilege has a Right in it; and if so, of necessary Consequence he has an Action to vindicate and maintain that Right.

'Tis no small Right to have the Privilege of giving a Vote, and therefore Action lies to maintain it.

2. It is a vain Thing to imagine, there should be Right without a Remedy; Want of Right, and Want of Remedy, are Termini convertibiles: Vid. 6. Co. Brediman's Case, 58. A Man buys the Inheritance of an Advowson, and upon the next Avoidance there is an Usurpation; and no Quare Impedit within six Months; he has lost his Right, because he has lost his Remedy: For suppose upon the next Avoidance he should present by Usurpation, and die seised, his Heir could not be remitted; so it is without Precedent to have Right without Remedy: One indeed may have both Right and Remedy, and lose his Remedy, and by Consequence his Right.

'Tis without Precedent to have Right without Remedy.

Would it not look strange to any Man that has heard of our Constitution, that the Commons of England should have a Share in the Legislature by Members eligible by themselves; and that it should lie in the Power of a Sheriff, or other Officer, to deprive any of them of so transcendent a Right, and he to be without Remedy by the Law of England?

It would otherwise look strange.

Taking it then that the Plaintiff has a Right, it is most apparent on the Record, that this Officer did exclude him from the Enjoyment thereof, and that in so doing he did well or ill: None will say he has done well, then he has done the Plaintiff Wrong in so barring him of his Right; and it is not at all material whether the Candidate, that he would have voted for, were chosen or likely to be, for the Plaintiff had a Right to vote, and being hindered of that, he has Wrong done him, for which he ought to have Remedy. If an Act of Parliament be made for the Benefit of any Person, and he is hindred by another of that Benefit, of necessary Consequence of Law he shall have an Action, 12 Rep. 100. 2 Inst. 118. and the Current of all the Books are

The Plaintiff having Wrong done him, ought to have Remedy.

2 Inst. 39. 3 Cro. 133. 134. that it must be *tam pro Dno' Rege quam pro seipso.*

are ſo; how comes an Action of Scandalum Magnatum? The Statute gives none, it was made for publick Peace; but being for the Benefit of great Men, of Conſequence an Action lay for them, and that is the Reaſon why a Writ of Error lies not in the Exchequer-Chamber of Action of Scandal' Magnatum, becauſe it is not any of the Cauſes mentioned, but an Action founded upon the Statute. Now if this be ſo, in caſe of an Act of Parliament, why ſhall not Common Law be ſo too? For ſure the Common Law is as forcible as any Act of Parliament: And the Common Law is, That a Freeholder ſhall vote in chooſing Knights, &c. And if you have a Right by Law ſo to do, ſhall not that Law give him an Action againſt him that bars him of that Right? And by the Statute of W. 1. cap. 21. all Elections ought to be free; the Words are general, [all Elections:] Now then when this Act, which indeed is but an Inforcement of the Common Law, takes this Matter to be of ſo great Conſequence as to declare it, and give a new Authority and Sanction to it; ſure it is a very bold Stroke to ſay, that when a Man is hindred in his Election, he had no Remedy; and it cannot be leſs than a Violation, and an Oppoſition to that Statute, to ſay, that he has no Remedy, after that the Statute has ſo manifeſtly interpoſed in it.

1 Vent. 34, 49. Hob. 43. 1 Cro. 142. 1 Jo. 194. 1 Cro. 535.

Injury imports Damage for Diſturbance of Right, &c. Vid. Hob. 43. Vi. Dyer 26. So for Words. So for Indignity offered, &c. So for Invading a Franchiſe.

3. That this is his Remedy: My Brother Gould ſays, and all my Brothers agree with him, That he has no Hurt done him; but I did think it impoſſible there ſhould be an Injury without Damage: Injury in its Nature imports Damage, though it coſt not the Party injured a Farthing; for Damages does not conſiſt in Things pecuniary, but in Diſturbance of his Right: If Words be ſpoken of a Man, whoſe Reputation is ſo very intire that no Body believes the Words, ſo that he loſes nothing by them; yet becauſe it is an Injury to a Man to be ill ſpoken of, he ſhall recover Damages. Suppoſe one gives another a Cuff on the Ear, but does not hurt him, yet for the Indignity offered his Perſon, Action lies: So if another rides in a Path-way in my Land, I ſhall have an Action, becauſe it is an Invaſion of my Property, and Injury to my Right; here the Wrong being not Vi & Armis, ſo as to maintain Treſpaſs generally, and the Law in that Caſe gives this Remedy: If a Man has Return and Execution of Writs, and another enters, and executes a Writ within his Franchiſe, he ſhall have Action upon his Caſe for the Invaſion upon the Right; a pari here, for the Party had Right; and the Defendant diſturbed him in the Enjoyment of it.

Hob. 43. Where Multiplicity of Injuries cauſes Multiplication of Actions. Where only Puniſhment by Indictment.

Objection. But here will be a Multiplication of Actions.

Reſp. So there ought; for if one will multiply Injuries, it is fit the Actions for the ſame ſhould be multiplied: As if in this Caſe the Defendant had taken upon himſelf to refuſe 40 Votes, why ſhould he not be liable to as many Actions? For if he had beat 40 Men, every of them would have an Action againſt him, for every Man's Damage is diſtinct from the others. If many Men are injured by one particular Act, there the Wrong-doer ſhall be puniſhed by way of Indictment, becauſe Actions ſhall not be multiplyed; but if there be but one Man of-

fended by that particular Act, or a more special Manner than others, he shall have his Action; and if he injure a third Person by another particular Act, he shall have his Action, & sic in infinitum. If there be a Common, and one hundred Commoners thereof, and one Person digs a Pit there; for that one Pit every one of the Hundred shall have his Action, because of their several Rights; but if a Pit were dug in a Highway, then it were a common publick Nusance, and that is the true Reason of Williams's Case: And of the Case of Turner *v.* Sterling, there he was not elected; for it could not appear who had the Majority, he or his Competitor; there he could not give his Loss of Place in Evidence for Damage, because he was not elected: But the Cause of Complaint was, That it being difficult on the View to guess who was chose, he had a Right to demand a Poll, and the Denial of that was an Injury to his Right, for which Action was held maintainable. And he quoted Bowman's Case, 2 Roll. Man makes a Lease, the Law gives him Leave when he thinks fit to come and see if there be Waste; he comes to see, and Lessee hinders him: It did not appear what the Damage was, or that any Waste was committed; yet he shall have his Action, because he had a Right in the Enjoyment whereof he was disturbed.

Action for digging a Pit in a Common.

Alit', If in the Highway. 2 Lev. 50. Post 100. *ante* 48. 1 Vent. 206. 2 Vent. 25. 3 Keb. 26, 32.

Action for denying a Poll.

For hindring Lessor to see if any Waste be.

My Brothers say, Oh! alas, here is a Remedy in Parliament; we must be very tender, for the Matter is nice, and the Parliament may judge this a different Way.

Answer. As this Case is, they cannot go to Parliament; for it is agreed, That those against whom he would have voted were elected, and his Grievance here is, that he is not represented; for if a Man be not allowed his Vote, he is not represented; if he be allowed his Vote, and the Majority is against him, his Vote is included in the Majority; and the Encouraging of Remedies for Injuries is the most effectual Way to make these Officers honest and observant of the Constitutions of their Cities and Boroughs, and they would decline such Practices as we daily see them guilty of.

As the Case is, they cannot go to Parliament for Remedy.

Objection. But it relates to Parliament: What then? It is a Matter that wholly depends on Charter or Prescription, and they sure are Things of which the Queen's Courts have Conusance; and to judge of them, is not to enlarge their Jurisdiction; and if this be Matter within our Jurisdiction, we are upon our Oaths bound to maintain it, more especially when they cannot go to Parliament: And if a freeman of a Borough had applied to the House of Commons, for that he was denied his Vote, they would have sent him to take his Course at Law.

What if it relates to Parliament?

As to the Authority of my Lord Hobart, 318. it is true, my Lord Hobart is of that Opinion, and it is a very fine one; but how it would hold on Debate, may be doubtful: There was indeed no Damage in a Quare Impedit at Common Law, but the Statute gives it against the Disturber; and if the Plaintiff in a Quare Impedit does not make the Bishop a Disturber, he is barr'd of the Benefit of the Statute:

Quare Impedit.

But

No Recourſe to Parliament.

But let that be how it will, it is not like this; becauſe as this Caſe is, they can have no Recourſe to Parliament to aſcertain the Right.

As to the Object. That ſuch an Action was never brought before.

As to the Saying of Littleton, That ſuch an Action was never brought, therefore it lies not: It is true, Non-uſer is a good Argument where it is ſupported with Reaſon, otherwiſe not; this Saying was upon the Statute of Merton, cap. 7. The Statute ſays, That if Lord by Knight-Service married the Heir under Fourteen, where he was diſparaged, ſi Parentes conquerantur, the Queſtion was, What was meant by Conquerantur, whether it muſt be a Complaint in a judicial Manner? And it was agreed, that Conquerantur was the ſame as if he had Cauſe of Complaint; and that as a more ſevere Conſtruction againſt the Lord, that if he ſhould be ſo unjuſt as to diſparage his Ward, that he ſhould loſe him, and that in Conſequence muſt have been by Entry upon the Lord; and if they were diſturbed, they ſhould have an Ejectment of Ward, becauſe the Law gave them the Cuſtody: So in that Caſe the Argument is grounded on Reaſon, from the very Words of the Statute, and the conſtant Conſtruction thereupon: And to carry it generally farther, and to extend it to all new Caſes, would deſtroy many late Authorities, as the Caſe of Hunt and Bowman, 16 Jac. for hindring Leſſor to ſee if Waſte were committed, which was the firſt of the kind, as was alſo the Caſe of Turner and Sterling.

Diſparagement of Ward.

Vide ante 48. 1 Vent. 206. 2 Vent. 25.

The Law conſiſts not in particular Inſtances, but in the Reaſon that rules them.

Let us conſider wherein the Law conſiſts; not in particular Inſtances, but in the Reaſon that rules them: Ubi eadem Ratio, ibi idem Jus: And if where one is injured in one Sort of Right he has a good Action, why ſhall he not have it in another? Or how does this differ from other Caſes? For though the Houſe of Commons have Right to determine Elections, yet they cannot judge of the Charter originally, but ſecondarily, or as incident to the Determination of the Election; and therefore where an Election does not come in Debate, as it does not in this Caſe, they have nothing to do: And we are to exert and vindicate the Queen's Juriſdiction, and not to be frightn'd becauſe it may come in queſtion in Parliament; and I know nothing to hinder us from judging of Matters depending on Charter or Preſcription: Morſe and Slew's Caſe, 23 Car. 2. 1 Vent. 190, 238. was the firſt of the Kind; Jo. 93. Palmer 350. Action for malitious indicting for Treaſon: And he quoted a Caſe of Bodily and Lawne, 15 Car. 2. in the Lord Bridgman's Time; for there Action was held maintainable for a Man againſt ſome that had made a Riding for him and his Wife, the Wife it ſeems being uſed to henpeck her Husband; and he concluded for the Plaintiff.

The Election comes not in Debate.

1 Mod. 85. 2 Lev. 69. 2 Keb. 866. 3 Keb. 72, 112, 135. 3 Keb. 578.

Err' brought and Judgment reverſed by the Lords.

Note; A Writ of Error was brought of this Judgment before the Lords, and the Judgment reverſed.

Sutton, *Marſhal of the Court.*

S. C. Poſt 91. Vid. 1. Sal. 2.

HE having not attended for two Terms, and a new Marſhal being preſented to Court to be ſworn in, he produced a Leaſe from the Patentees of the Office, for a certain Number of Years, determinable on his Death: And held per Cur', That albeit a Leaſe for Years abſolutely of this Office was void, yet a Leaſe of it for Years determinable upon Life of Leſſee is good; for the Danger of the Office's going to Executors or Adminiſtrators is avoided, and that is the ſole Reaſon why the Office is not abſolutely grantable for Years.

That a Leaſe of this Office for Years determinable on Leſſee's Death, is good. Vid. tamen Hob. 153.

Note; Here the Court ſaid, They would ſwear this Man in, without meddling with the Poſſeſſion, but leave that to the Determinaon of the Law in the ordinary Courſe: And he took his Oath upon his Knees.

New Marſhal ſworn upon his Knees.

Queen *verſus* George.

S. C. Ante 40.

IT was agreed, That the Clauſe in the Statute of 4 & 5 W. & M. againſt deſtroying the Game, (That if any Hare, Rabbet, *&c.* be found upon a Perſon not qualified, he ſhall be convicted) it was agreed, I ſay, That [be found upon,] ſhall be underſtood [Proof made] that it was found upon him, otherwiſe there could be no Conviction.

Game found upon a Man, &c. ſuppoſes Proof made.

Memorandum; It was ſaid by Serjeant Powys in Chancery, That if a Biſhop make a Leaſe for 21 Years, and Leſſee creates a Truſt thereupon, and after the Biſhop dies, and his Succeſſor, ſuppoſe for a Fine, renews the Leaſe, though not compellable to do it; and tho' there be no Truſt of the ſecond Leaſe, yet Equity ſhall ſubject it to the former Truſt.

Biſhop's Leaſe renewed, ſubjected to a former Truſt.

Leſauld *verſus* Dyer.

S. C. 2 Salk. 457. 650. Antea 18.

Note. PEr Cur', & omnes Clericos; The Meaning of the Rule, that after a Cauſe has ſlept four Terms, after Iſſue joined, there muſt be a Term's Notice of Trial, is, that there ſhould be ſome actual Proceeding within the four Terms; for a Proceeding actually out of the four Terms, though by Acceptation of Law it may be within the four Terms, is not enough: As if Ven' fac' be taken out in the Vacation after the fourth Term, teſted, as it muſt be, in Term, ſo that in Conſideration of Law it is of that Term; yet becauſe in Fact it was after, it is no ſuch Proceeding as to bring the Party out of the Neceſſity of giving a Term's Notice.

Concerning a Term's Notice of Trial after a Cauſe has ſlept 4 Terms.

What ſhall be ſaid ſufficient Proceeding in the Cauſe. Notice,

And here Gould, Juſt. cited the Caſe of Cow and Hare, Paſch. 10 W. 3. that if the Cauſes had any Agitation within the four Terms, as ſtriking a Jury, or any Motion in the Caſe, it would be ſufficient Proceeding: And per omnes Clericos, Notice any time, ſedente Cur', within the laſt Day of the laſt of four Terms, is ſufficient, for that ſhews the Matter has not ſlept four whole Terms, and the Term of which the Iſſue is joined is to be taken excluſively; for the Rule is, that Proceeding be within four Terms after Iſſue joined: So that if Iſſue be joined in Trinity-Term, and any Proceeding or Notice before the End of next Trinity-Term, it will be enough. And here it appears by the Indorſement on the Back of the Ven' fac', that it was taken out in Vacation; and for want of Compliance with the Rule, the Verdict was ſet aſide.

Term of which Iſſue is join'd, is excluded.

Ven' fac' in Vacation.

Queen *verſus* Hoskin.

Servant to *J. S.* a good Addition. Vide 2 H. 6. 31. & 9 E. 4. 48. acc. So 2 H. 4. 7. 21 E. 4. 71. Bro. Additions, 56, 58, &c.

SErvant was indicted for a Treſpaſs committed by him by the Command of his Maſter, by the Name of A. B. Servant to J. S. and Exception was taken that there was no Addition, Servant being not good: But per Holt, Servant to J. S. is a good Addition, and as certain as [Gentleman;] and he ſaid, There could be no other Exception to the Caption the ſame Term it comes in; and no more was done. See of Apprentices poſt *69*.

Claxton *verſus* Baſty.

Statute of Compoſition of Two Thirds pleaded in Bar. Vide poſt 156.

THE Statute of Compoſition of two Thirds was pleaded in Bar, and averr'd, that the Defendant had abſconded at ſuch a Time before the Statute; but not ſaid, that he had abſconded, or was in Jayl at the Time mentioned in the Statute: And the Exception taken was, that for ought appeared in this Plea, the Defendant was ſolvent at the Time of the Statute, and therefore not capable of the Benefit thereof. But per Cur', This being a Bar, ſhall be good to a common Intent; and if the Defendant became ſolvent after the Failure, it ought to come of the Plaintiff's Side by Replication.

If the Writing was to be produced with a *Profert*.

2. Exception. That the Defendant pleaded the Compoſition as a Writing under Hand and Seal, Ideo a Deed, and by Conſequence to be produced with a Profert: But per Cur', he only pleads it ſign'd and ſealed, but not to have been delivered as a Deed muſt have been; and the Statute does not require Delivery, Ideo no Neceſſity of a Profert.

Judic' pro Def' Niſi, &c.

3. It is pleaded to have been made the 12th of February after the Statute, ſo it may have included Debts becoming due after the Statute. But per Cur', It ſhall only be a Compoſition for the Debts underſtood by the Statute, at leaſt as to the Non-ſubſcribers, though it may be otherwiſe to Subſcribers. And Jud. Niſi pro Def'.

Lord Mohun's *Case.*

Vid. 3 Chan. Rep. 102.

CHarles Gerrard, Son to the Lord Brandon Gerrard, was attainted of High Treason in the Second Year of King James 2. for Treason committed against King Charles 2. and obtained his Pardon, and Leave to reverse his Attainder; and accordingly he brought a Writ of Error, and assigned Error, which the then Attorney General confessed, and obtained a Rule upon his own Motion for Reversal of the Attainder; but the Record of the Reversal was never made up. The Lord Brandon Gerrard dies, and Charles Gerrard succeeds him in Honour and Estate, and sate many Years in the House of Lords, and before the Death of his Father, after the Reversal in the House of Commons, as a Person duly qualified, he was after by King William made Lord Macclesfield, and by his Will devised his Estate to my Lord Mohun, and made him his Executor, though he had several Daughters that were Heirs at Law. Upon this the Daughters finding that there was no Roll of the Reversal of the Attainder, suggest that Matter by Petition to the Queen, and implore her Grace. The Queen refers the Matter to the Examination of the Attorney General and Sollicitor: Whereupon Mr. Sollicitor in Trinity-Term before, moved for a Rule for staying of all Things as they were 'till the Court were further moved, and had such a Rule: And now it was moved for my Lord Mohun, That he might make up the Record; and it appearing upon Examination that there was no Writ of Error, or Assignment of Error, that his Counsel would own or produce; the Court unanimously declared, That the first Rule was a very reasonable good Rule, and chid some of the Counsel that called it an Extraordinary one: They said, They would ever make such a Rule upon the like Occasion; and that it is frequently done between Party and Party, that if there be a Rule for a Judgment, and it is not entered for many Years, if the Court be informed of it, they will not let them enter it 'till the Matter be examined, how it came not to be entered before.

C. Lord *Gerrard* attainted in K. *Jam.* 2d's Time of High Treason committed in K. *Ch.* 2d's Time. Err' brought, and Rule to reverse the Attainder, but Record never made up.

C. Gerrard his Successor devises the Estate to Lord *Mohun*, in Prejudice of his Heirs.

Heirs petition the Q.'s Grace, there being no Roll of the Reversal. Ld. *M.* moves to make up the Record.

When Court will not let a Judgment neglected (after a Rule) to be entred. Vide post 191.

2. They said, they would supply the Neglect or Defect of the'r Officer, that Subjects should not suffer by it, and therefore would give Leave to make up the Roll now.

3. That they could not make up a Record of a Reversal of an Attainder without a Warrant, viz. 1st, A Writ of Error: 2dly, Assignment of Error: For the Writ of Error being brought in the King's Bench, viz. the same Court where the Attainder was, no Error could be assigned there, but Error in Fact; and it may be the Errors assigned were Errors in Law, and this ought to appear to us that we may not order a wrong Record to be made up.

Said they could not make up the Record without a Warrant, as Writ of Error, *&c.* Vide 2 Lev. 38.

And at another Day perceiving the Court would not suffer the Roll to be made up without a Writ of Error, they produced a Writ, which was of a Judgment of Attainder for Treason committed in King James the 2d's time; whereas it should have been, as the Truth was, in King Charles the 2d's time: And the Errors assigned were

Ld. *M.* produced a Writ of Error of a Treason committed in Time of K. *Ja.* 2.

both in Fact, and in Law; in Fact, that two of the Jury never appeared; in Law, for that the Ven' fac' was qui tam: Whereas it was in the King's Case; and now they moved for Leave to make an Entry.

Obj. against entring the Judgment upon this Writ of Error.

Attorney General contra. It appears their Writ of Error is not to reverse this Attainder, and therefore you will not now suffer them to enter up a Judgment of Reversal, when it does appear the Writ which is the Foundation is wrong, and can't be an Authority to reverse the Attainder, for it is not Ad idem. And if Judgment be entered now, it becomes your Judgment; and therefore you ought to examine the Foundation of it, and not give Order for the Entring of a Judgment only to put the Matter in Wrangle. Besides, when there is a Rule for Judgment, and that not entered for some Time, you take Care for the Safety of Purchasers to have it entered of that Time that it is really given of. And by the Act of the Civil List, this Estate is unalienably fixed in the Queen, and would by the Relation of this Entry be devested out of her.

The Question, *per Cur'*.

Cur'. The whole Question will be, Whether we shall now command our Officer to do that which he ought to have done long before? And it was said, That in case of Common Recovery, after Death of Parties, the right Original not having been filed, but found in the Attorney's Study, was ordered to be entered up. And as to the Matter of Purchasors, there are in all Probability many in this Case under my Lord Macclesfield, which it were hard to defeat. And the Doubt at last came to be, Whether they would leave my Lord Mohun loose of the Rule, to do what he could according to Law, or hold him to particular Directions from the Court? For the Court said, That if he should make any Entry but what should be well warranted, the Court would punish the Clerk that should do it, and also set it aside. And at last it was ruled, That they should make a Draught in Paper of the Record that they would make up, and attend the Judges and Mr. Attorney with it. And the Writ of Error, such as it was, was entered on the Roll (with a Valeat quantum valere potest, per Cur') but the Court would not make a Rule in it to make it their Judgment, but only that their Officer should make that Entry now, which he should have made when the Rule was pronounced.

A Doubt.

Burridge *versus* Fortescue.

Of staying Proceedings upon Payment of Principal, &c.

IN Debt upon a Judgment, the Court will not stay Proceedings on Motion upon Payment of Principal, Interest and Costs, as they will upon Debt on Bond; and in that Case it is an equitable Motion to be relieved against the Penalty, and therefore whatever Costs the Plaintiff has been in any wise put to, shall be allowed him. Per Cur'. Vide antea 25. Farest. 114, 140, post 153.

Evans *verſus* Roberts.

A Writ of Error of a Judgment upon a Bond, before the Sheriff and Bailiff of Briſtol in Cur. held before them, Secundum Legem Mercatoriam, ſecundum Conſuetudinem Civit. præd. tempore cujus, &c. Eyre excepted, 1. That there is no Curia held per Legem Mercatoriam before the Sheriff, for that muſt be only held before the Mayor of the Staple, and in Matters only concerning Staple Tranſactions. But, per Cur', It being laid to be Secundum Conſuetudinem Civitatis, it will be well enough, like the Caſe in 1 Cro. 46. where a Court of Pypowders, which only is intended of Courts for Fairs and Markets, during the Fair or Market, and for Matters there ariſing, is ſaid to be held at Glouceſter, ſecundum Conſuetudinem Civit. præd', and Action for 100 l. therein; and held good, becauſe of Conſuetud', &c. Vid. Saund. 87, 311. for it being laid to be an ancient Court, it ſhall be intended a common inferior Court, for common Matters conuſable there. 2. Exception was to the Writ, for it was to remove Recordum Loquelæ quæ coram vobis reſidet, and it appears that the Record removed was before his Predeceſſor. And Court ſaid, That the Writ being directed to the Sheriff, without naming him, it is well enough; and if a Writ be directed to the Sheriff of B. and before its Return another Sheriff is choſe, he ought to return and execute the Writ, and the Difference is when it is directed to him by Name, and when by the Name of his Office generally; and this is not like a Writ of Error from Common Pleas, for that is always to the Chief Juſtice by his Name, if there be a Chief Juſtice, or to the others by Name, and therefore muſt not vary.

Error of Judgment *in Cur. Briſtol* upon a Judgment upon a Bond *Sec'm Leg. Mercat. & Cons. Civit.*

Sec'm Cons. Civit' is well enough.

1 Sid. 64. 1 Keb. 165, 187.

Note; Here the Anſwer to the Writ of Error was, That there came another Writ of Error to them before that Writ, bearing the ſame Teſte and Return, and recited the Writ, and made a Return to it; and held good, and Judgment affirm'd.

Judgment affirm'd, another Writ of Error having been before, and return'd.

Domina Regina *verſus* Dixon.

S. C. 1 Salk. 150.

HE was indicted for Selling five Yards of Muſlin, and affirming it to be worth 4 s. a Yard, when in Fact it was really worth but 2 s. 6 d. a Yard, and a Certiorari brought to remove it, but not ſerved till after Conviction; and tho' the Court had no Opinion of the Indictment, yet they ſaid they did not like Certiorari's after Verdict, and that whenever one removes an Indictment on which there is a Conviction, the Certiorari ought to give Day above, which was not done here, therefore it was altogether irregular, and that by this Certiorari they could by no Means remove the Indictment; for if one takes out a Certiorari to remove an Indictment, and will not uſe it till after Conviction, or the Jury ſworn, he loſes the Benefit of it: And

False Affirmation of Value upon Sale. For cheating &c. Vide ante 42. Poſt 105, 311. 1 Salk. 379.

Vide ante 17, 33, 40, 43. Poſt 83.

And for that the Writ was quaſh'd, and a new one granted to remove the Indictment, and Conviction thereupon, and ordered them to make it ſpecial, and give the Proſecutor Day thereupon above. Vide ante 17.

Mills *verſus* Wilkins.

Intrat' Hill. 13 W. III. & ad Mich. 2 An'.

Treſpaſs for taking Skins.

IN Treſpaſs for taking ſeveral Skins from the Plaintiff, the Defendant juſtified as an Officer by Vertue of the Statute of 1 Jac. 1. c. 22. for well Tanning of Leather, ſetting forth the Title thereof variant from the Record, and averred, That the Skins were not dreſſed according to the Intent and Meaning of the Statute, without ſhewing any particular Defect. And two Exceptions were taken to the Plea:

1. That there is no ſuch Act intituled as they ſet forth, and tho' it was unneceſſary for them to ſet forth the Title of the Act, or to recite it particularly, yet ſince they have taken upon themſelves to do it, they muſt do it truly at their Peril; for by their particular Deſcription of the Act, they tie up their Juſtification to the Statute they deſcribe. Cro. Car. 232. 3 Keb. 648.

3 Keb. 641, 642, 648. Dyer 324.

2. That they did not ſhew wherein the Defect was, that the Court might judge whether it were contrary to the Act or not.

If Variance in the Title of Act of Parl' avails.

To the firſt Exception it was offered for Anſwer, That the Title is no Part of the Act, and that an Act may be without any Title at all, as moſt of the ancient Acts are, and therefore a Variance in the Title is nothing; and for this was quoted the Saying of my Lord Hale in Hard. 324. and an Opinion of the whole Court in Common Pleas in the Caſe of Chance verſus Adams, Hill. 7 W. 3. Rot. 868. grounded upon that of Hale. Hutton 56. Hob. 310. 11 Co. 33. 4 Inſt. 345.

3 Cro. 186. Staund. 128

And to the 2d it was anſwered, That the Seizure was not as an abſolute Forfeiture, but to try the Sufficiency, and it would be hard to put an Officer at his Peril in ſuch a Caſe to know and to ſet forth the Defect.

The Title is no Part, and need not be ſet out ſpecially.

Holt, Ch. J. It is true, the Title of an Act of Parliament is no Part of the Law or enacting Part, no more than the Title of a Book is Part of the Book; for the Title is not the Law, but the Name or Deſcription given to it by the Makers: Juſt as the Preamble of a Statute is no Part thereof, but contains generally the Motives or Inducements thereof, and therefore not neceſſary to ſet forth the Title or Preamble, but generally that at a Parliament-Seſſions held ſuch a Time, &c. enactitat' fuit; tho' ſome have been ſo over-cautious, as not only to ſet forth the Title of the Act, but alſo

How to be ſet out.

to

to do it in Engliſh; but ſure that is too much Caution, and the true Way to ſet it out, if at all, is in Latin; and by ſetting out the Title ſpecially, you tie your Juſtification to an Act ſo intituled, and if you cannot produce one, you are gone: And he ſaid, the Saying of Hale was ſudden, [if at all,] and notwithſtanding his great Veneration for his Opinion, he could not agree with him. And Gould agreed with the Chief Juſtice, tacente Powell, only declaring, that he had concurr'd with the reſt in the Common Pleas, ſolely upon the Opinion of Hale reported in Hard. And upon this Exception the Plaintiff had Judgment.

3 Keb. 641, 642, 648. Dyer 324.

Vid. poſtea.

Judic' pro Quer.

Cotton *verſus* Martin.

DEBT upon a Bond to come to an Account. The Plaintiff had been Priſoner in the Fleet, and having eſcaped, was taken up by a Warrant according to the late Act of Parliament, and committed to Newgate. And an Affidavit being made that nothing was due, and the Plaintiff by his being in Newgate being diſabled from coming before a Judge to ſhew Cauſe of Action, and that Diſability coming from his own Wrong, viz. the Eſcape, the Court ordered common Bail; if he had not been eſcaped, he might have got out by a Day-Rule.

Debt upon Bond, &c.

Eſcape

Vid. ante 21, 22, 37. Poſt 95, 125, 154, 183, 225, 253, and 78.

Smartle *verſus* Penhallow.

S. C. 1 Salk. 188.

Intrat' Trin. 2, & Mich. 2 An. B. R.

UPon a ſpecial Verdict, the Caſe was this: The Cuſtom of the Manor of Tregueir in Cornwal was found to be, That every cuſtomary Copyhold of that Manor might be granted to three Perſons, Habendum to them ſucceſſively, ſicut nominantur, & non aliter; and that on the Death of every Tenant, the Lord ſhould have his beſt Beaſt for a Heriot: And a Surrender is found to have been to T. N. and his Aſſigns, for his own Life, and the Lives of two others; and the Queſtion was, If this Surrender were warranted by the Cuſtom?

Special Verdict of a Cuſtom to grant a Copyhold to three Perſons, *habend'* &c.

Vide 1 Mod. 102.

1. For the whole; that is, for three Lives.

2. In caſe it be not good for three Lives, Whether it be good for his own Life?

In the Argument of this Caſe it was agreed, That a Leſſee for Years of a Manor might grant a Copyhold Eſtate in Fee, and ſo for Life or Lives, and the Grant ſhall be good againſt him that has the Inheritance. But it was urged, that if by making a leſs Grant than the Cuſtom warrants, the Tenure ſhould be altered, or any Damnification of the Service occaſioned, ſuch Grant of leſſer Eſtate than Cuſtom warrants would be void, and a Prejudice would enſue

Where a Leſſee may grant above his Eſtate, but no leſs.

6 Co. 37. Vaug. 187 to 205. 2 Bulſt. 11, 12, 13. Cro. El. 58, 721. Vide poſt 68. Carth. 427.

enſue to the Lord by this Grant; for now it would be an Eſtate for auter Vie of which there might be an Occupant, and then the Lord would have a Tenant whom he knows nothing of, and Occupancy may be of a Copyhold, as well as Poſſeſſio Fratris. It is true, a Copyhold Eſtate ſhall not have all the Qualities of an Eſtate at Common Law, as Tenancy by the Curteſy, and Dower, but theſe are excreſcent Intereſts; and tho' 1 Ro. Ab. 511. Ven & Howell's Caſe, be againſt this, yet it ſeems that the Reaſon of the Prejudice which would enſue to the Lord is ſufficient to overthrow that, and if it cannot be good in all, it is more conſonant to Law to make it void for the whole, than to let it ſtand in Part, and avoid it for the reſt; for the Cuſtom is in the Nature of a Power, which muſt be ſtrictly purſued; as if a Tenant for Life by a Settlement has Power to make Leaſes for 21 Years, and he makes a Leaſe for 30, it is void even for 21 Years; ſo if there can be Occupants, it cannot be good becauſe of the Prejudice to the Lord; if there cannot be Occupancy, it cannot be made good to his Aſſigns, becauſe not purſuant to the Cuſtom, and then it cannot be good for the firſt Life, becauſe leſs than the Cuſtom, (which is in Nature of an Authority) warrants.

Averment of Term or Life.

Again, ſuppoſe it might be good for Life of T. N. yet the Jury not having found him alive, it ſhall not be intended; as if Tenant for Years, or for auter Vie, bring an Ejectment, he muſt aver the Term, or the Life of Ceſtui que Vie, to continue; and ſo here the Jury ought to have found it, eſpecially when they have not concluded upon a ſpecial Point, in which Caſe the Court ſhall only conſider what the Jury have made a Doubt of, and all other Things ſhall be intended according to 2 Cro. 622, & 6 Co. Goodale's Caſe.

Heriot-Service. 2 Saund. 166, 167.

Beſides, if this were conſtrued a good Grant within the Cuſtom, the Lord ſhould loſe his Heriot; for the Payment of that Service is confined to ſuch Grant as is preciſely warranted by the Cuſtom, viz. a Grant to three for Lives ſicut nominantur; and this is no ſuch Grant, therefore no Heriot; ideo it would be a Prejudice to the Lord, and by Conſequence the Grant not good; and it will not be an Anſwer to ſay that Heriot-Service is an accidental Service, 2 Cro. 76. and the Dean of Worceſter's Caſe in 6 Co. for the Statute upon which thoſe Caſes go, that orders the uſual Rents to be reſerved, takes no Notice of Heriot, becauſe it is an accidental Service; but here the Cuſtom ſpecially mentions a Heriot to be Part of that Service, and therefore it ought to receive the ſame Conſtruction that thoſe Caſes would, in Caſe the Statute had mentioned Heriot.

2d Arg. That this Surrender, &c. was not according to the *Cuſtom*. Ante 19, 20.

At another Day, in Michaelmas Term, for it was ſpoke to firſt in Trinity Term, Serjeant Hooper argued of the ſame Side, and urged, That this could not be a Grant within the Cuſtom, for that is of a Grant to three, Habendum ſicut nominantur ſucceſſive; and the Grant here is only to T. N. for the Life of two more and himſelf; ſo it is no Grant at all to the two Ceſtui que Vie's, nor is T. N. the firſt Life mentioned.

And as the Objection of Qui poteſt plus poteſt minus, if a Man may grant in Fee by Cuſtom, he may grant for three Lives, it is true with ſome Diſtinctions; if a Man has Power to grant in Fee, reſerving Rent, he cannot grant for Life without Reſervation.

2. The Eſtate granted muſt not only be leſs in Judgment of Law, but alſo in Value; for if a Man has Power to let for three Lives, and he lets for 100 Years, that indeed is leſs in Judgment of Law, but becauſe not leſs in Value, the Grant is void. All Authorities, whether created by Act of Parliament, or the Party, as in Settlements, or by Cuſtom, as here, are ſtill but Authorities, and therefore not to be varied from; and he quoted Whitlock's Caſe, and the Difference there, and puts Caſes upon the Statute that enables Biſhops to make Leaſes: If a Biſhop who by the Act may make a Leaſe for 21 Years, makes it for 22, it is void for all; and if a Man makes a Leaſe parol for four Years, it ſhall not be good for three, upon the Statute of Frauds and Perjuries: But he inſiſted chiefly upon an Inconvenience that would enſue in this Caſe; for if T. N. were a Trader, and committed Bankruptcy, this Eſtate for three Lives would be granted to an Aſſignee, and then it would be quite out of the Cuſtom; for then Aſſignee would hold it after Death of T. N. during the other two Lives, and the Lord ſhould loſe his Heriot.

Biſhops Leaſes, &c.

Loſs of Heriot.

Williams contra. 1. We are upon the Conſtruction of a Grant to an honeſt Purchaſer, for a valuable Conſideration.

2. This will be good, if not to him for his and two other Lives, at leaſt for his own Life, and that will do as well for us: The Subſtance of the Cuſtom is to make a Grant for three Lives, that is, the Quantity of the Eſtate; but whether it be to one Perſon for three Lives, or to three for their Lives, is only accidental, and a Quality; and the Quantity or Continuance of the Eſtate, is what is only material; and the Meaning and Drift of the Cuſtom is to hinder any longer Incumbrance upon the Land than for three Lives, but not whether the Lives named or others, are to enjoy it; and ſince by the Cuſtom it may be to three for their Lives, a fortiori it may be to three for the Lives of three others, ſo that is a leſs Eſtate; and that which we contend for is leſs than that again; and if the firſt Grant had been ſtrictly purſuant to the Letter of the Cuſtom, as found, ſure it cannot be denied but the ſeveral Grantees might grant each his own Eſtate, and the Lord would be compelled to admit each Surrenderer; Or might they all grant their Eſtates to one Perſon, who then would have the ſame Eſtate as we now contend for? And if ſo, why may it not be at the firſt? For it would be againſt all Reaſon, that the Grantees that claim under the Lord ſhould do it, and not the Lord himſelf: And he relied upon the Caſe in 1 Roll. Abr. 511. as full in Point; for the Reaſon given there rules this, viz. That it can be no Inconvenience, but rather a Convenience to the Lord; for ſince there can be no Occupancy of a Copyhold Eſtate, it would be more advantageous to the Lord to have ſuch a Grant as this, than to have it to the three Perſons named for their Lives; for upon the Death of the Tenant that takes for his own Life and

As to the Quantity and Quality of the Eſtate.

If ſuch Grant a Convenience or Inconvenience to the Lord, and if Occupancy may be.

two more, the Eſtate would come to him again; whereas in the other Caſe, it would go to the next in Remainder; and there is a known Diverſity between the Lord purſuing a Cuſtom, and one acting by a bare Authority; the one has Authority and Intereſt, and therefore may do leſs, the other has a bare Authority without any Intereſt, and for that Reaſon cannot vary from it. 1 Inſt. 52.

If it may be good for the Life of *T. N.*

But ſuppoſe this Point were againſt me, at leaſt it will be good to T. N. for his own Life, for that is leſs than for his own and two Lives more. 4 Co. 29. If by Cuſtom the Lord may grant for Life, he may grant durante Viduitate, tho' ſuch a Grant were never made before; yet becauſe at moſt it can go no farther than Cuſtom warrants, and that poſſibly it may determine ſooner, it is good, ſo far of the Grant as to go to him for Life is good; and if the Words, and for the Lives of A. and B. be repugnant or void, let them be rejected, for a void Clauſe will be the ſame as if it were not in at all. Hob. 171. makes a Difference where Tenant for Years grants all his Eſtate, Habend' after his Death, the Grant is good, and Habend' void; but where all is one entire Sentence, as if he had granted his Eſtate after his Death, there the Grant were all void: And ſome Books make the Difference where an implied Eſtate is granted in the Premiſſes, for that may be avoided by an Habend'; but otherwiſe of expreſs Eſtate, as if Feoffment be to A. Habend' to him and his Heirs after Death of B. the Whole is void by the Habend', and it may be Reaſon that where an Habendum may encreaſe an Eſtate, that it may likewiſe avoid it, if it be againſt Law; but here the Habendum cannot encreaſe it, for if it cannot make it but for Life, Ideo not deſtroy it.

Void Clauſe.

Intire Sentence.

Deed void by the *Habendum*.

If an Occupant of a Copyhold Eſtate. Q. Vide 6 Co. 37, &c. contr' 1 Sid. 136, 137. Adjudg'd in C. B. That the Statute extends to Things that lie in Grant, and of them there could be no Occupancy. *Ergo Quære de hoc?* A bare Power exceed.

There can be no Occupant of a Copyhold Eſtate for two Reaſons:

The firſt, Becauſe there cannot be a Tenant of Copyhold, but by Surrender and Admittance.

Secondly, The Statute concerning ſpecial Occupants, does not extend to it, becauſe there were no Occupants could be before, and that the making it now would turn to the Prejudice of the Lord, and general Words of an Act ſhall not be extended to Copyhold Eſtate if it may prejudice the Lord.

As to the Objection, That the Verdict does not find the Life of T. N. to continue: I anſwer, That ſhall be ſuppoſed to continue 'till the contrary appear; and he quoted ſome Caſes where one having a bare Power exceeding that Power, it ſhall be good for what is within the Power, and void for the reſt, 1 Inſt. 52, 258. Perk. 189. Letter of Attorney to deliver Seiſin to A. and he delivers it to A. and B. and good to A. and void to B. though the making of Livery is as entire an Act as the limiting an Eſtate can be.

PerCur', Lord that may grant for 3 Lives, may grant for one.

Holt Ch. J. and Cur', If the Cuſtom be to grant a Copyhold Eſtate for three Lives, the Lord in Fee of the Manor cannot exceed that, and a Lord at Will of it may go ſo far, for it is not material what Eſtate the Lord has in the Manor; and ſure he that may grant for three Lives, may grant for one Life, as if Cuſtom be, that he may grant a Copyhold in Fee ſolummodo, yet he may grant in Tail, for Life, or Years,

and here the three Lives is only the Extent of the Custom, but not to bind a Man to the Formality of an Estate for three Lives. The Custom in this Case consists of three Parts:

1. The Constitution or Creation of the Estate, viz. that it be by Copy. How this Custom consists.
2. The Extent of it, that it shall not exceed three Lives.
3. The Manner of granting it, that if it be to three, that they shall not take jointly and in presenti, according to the Course of the Common Law; but that the first named shall take all for his Life, and the second all for his Life, and so of the third.

If the Custom then enables him to let for three Lives, it will enable him to do it for one; as if the Custom were to grant in Fee, he might lease for Life, Remainder for Life or in Tail, Remainder in Fee, for the Custom is not to grant one entire Estate in Fee; if the Custom be to grant for Life, he may grant durante Viduitate, tho' that be another Limitation than for Life: And generally where the Custom is to grant to three for their Lives Habend' successive sicut nominantur, there likewise the Custom is, that the Tenant in Possession may by the Surrender of his Estate defeat the Remainders. And the Chief Justice put a late Case in this Court, where upon a special Verdict this Custom was found, and the first of the three purchased the Manor; and the Question was, Whether inasmuch as he had a Power to frustrate the two Remainders by Surrender, he by his Purchase of the Manor had extinguished them? And there it was held to be no Merger or Extinguishment of the Estate, because the Custom of destroying the Remainders is confined to the Formality of the Surrender, and the Purchase of the Manor, tho' it be between the Parties a Surrender, yet it shall not be construed as such to other Purposes, viz. to destroy the Remainders; and if the Grant had been only to T. N. in this Case for his own Life, that had been good; and if he had granted it to another Grantee, he would be Tenant pour auter Vie; and why may not that be by the first Grant as well as by mean Grants? I cannot tell; for this is no Estate capable of Occupancy; and if the first of the three commit a Forfeiture, he in Remainder should not enter, but the Lord should enter, and hold it during the Life of such first Tenant. And as to the Objection, That the Heriot would be lost, that is not so; for the Lord would have a Heriot upon the Death of every Tenant, and upon the Death of T. N. here, and he is the only Tenant; and tho' he has none on the Deaths of the Cestuy que Vies, it is because they are not Tenants. And as to the Objection, That the Jury does not find the Life of T. N. it would be necessary to aver it in Pleading, but not in a Verdict; and we shall not intend him dead, especially when the Plaintiff makes Title against him, and therefore ought to allege his Death if the Truth be so.

Vid. 4 Co. 23. a. 30. a. Godb. 20. 1 Leon. 56. Cro. El. 323. 373. Mod. 627. 1 Rol. Ab. 511. L.

Lord may grant for another Limitation.

Remainders defeated by Tenant.

If the Grant had been only to *T. N.* for his own Life.

Heriot not lost.

If *T. N.* had become a Bankrupt. Vid. 1 Danv. Abr. 691.

But ſuppoſe T. N. had become a Bankrupt, and this Eſtate be aſſigned. Reſp. Suppoſe it were to three, ſicut nominantur ſucceſſive, and the Tenant in Poſſeſſion became a Bankrupt, ſhall not the Caſe be the ſame? for Aſſignee ſhall be Tenant pour auter Vie. And the Objection will be the ſame, for this is a Conſequence upon the Interpretation of the Act of Parliament, and ſhall not at all prejudice the Lord; for if the Aſſignee dies during the Life of Copyholder Bankrupt, there will be a Caſe out of the Cuſtom by the Tranſmutation of the Tenant by the Act of Parliament, and yet the Lord ſhall have his Heriot; for it never was the Intent of the Statute to put the Aſſignee in a better Condition than his Principal, whoſe Eſtate he has, would have been in, nor to work an Alteration of Tenement to the Prejudice of the Lord: This is ſuppoſing the Copyholder ſurviving ſhould not have it back again; and if he ſhall have it again upon the Death of Aſſignee, during his Life, then the Lord by original Cuſtom ought to have Heriot, and a ſubſequent Act of Bankruptcy ſhall not defeat him of it; and if the Copyholder had died, living the Aſſignee, and thereby his Intereſt determined as ſome thought it would; Q. Who ſhould pay the Heriot? But upon this Point they ſeemed cautious of delivering any Opinion, but reſerved themſelves till that Matter would come to be a Queſtion, for they ſaid it was worth Conſideration.

Aſſignee in no better Condition than the Principal.

Q.

If Aſſignee died, living the Copy-holder.

Powell ſeemed to incline, That if Aſſignee had died, living the Copyholder, the Lord ſhould immediately have the Land; for the whole Intereſt of Copyholder was veſted in him by the Statute; and Powys thought, that upon Death of Copyholder the Eſtate of Aſſignee would determine, tho' the Ceſtuy que Vies were living.

No Occupant of a Copy-hold without a ſpecial Cuſtom.

Here it was agreed, That if the Grant had been to A. for the Lives of B. C. D. and A. dies, the Lord ſhould have the Land again, tho' againſt his own Limitation, becauſe there can be no Occupant of a Copyhold Eſtate without a ſpecial Cuſtom; and this would be no Miſchief, becauſe the Faller would be on the Side of the Grantee only: For if Rent be granted to one for three Lives, and he dies without Diſpoſition, living Ceſtuy que Vies, yet Grantor ſhall hold the Land diſcharged, becauſe Occupancy cannot be of a Rent, for that only can be of Lands which paſs by Livery, whereby the Freehold paſſed, and ſhall not revert again till Limitation be determined, and it is for the Sake of a Præcipe of a Stranger; and per tot Cur', The Grant held good. And the ſame Objection of Bankruptcy might be made in Ven & Howel's Caſe.

No Occupancy of a Rent-charge.

Per Cur', The Grant good. Ante 64. *

Leonard *and* Stacy, *at* Guildhall, coram Holt Ch. J.

Vid. poſtea 139. Replevin upon Defendant's being cheated in Bargain.

THE Caſe was: A Cheat bought a Quantity of Goods from the Defendant upon Credit, and ſold them to the Plaintiff: The Defendant diſcovering that he was catched, and that the Goods were come to the Plaintiff's Warehouſe, takes out a Replevin out of the Sheriff's Court in London, and with ſeveral others takes the Goods

Goods again, and for this the Plaintiff brought Treſpaſs. And in this Caſe, Holt, Ch. J. ſaid:

1. That in Replevin, if Property be claimed, and notwithſtanding Party replevies, Treſpaſs will lie, and the Claim or Notice of Property ſhall be the ſole Iſſue. Vide poſt 81, 103. 1 Salk. 5, 94. 2 Lev. 92. 1 Vent. 127.

2. That whereas ſeveral are declared againſt, and ſome under a Simul cum, to take off the Evidence of thoſe that come under the Simul cum, ſomething muſt be proved againſt them, and likewiſe Endeavours uſed to take them, as Proceſs taken out againſt them, &c.

3. If Treſpaſs be againſt two or more, and one demur, and another pleads to Iſſue, the Damages aſſeſſed upon the Iſſue ſhall affect him that demurred, if the Demurrer be ruled againſt him: So if Treſpaſs be for breaking Houſe, and entring into a Cloſe, againſt one who pleads Not Guilty as to one, and demurs to the other, there the Jury muſt find Damage ſeverally for the Not Guilty, and conditional upon the Demurrer: So if there be two Defendants, and they vary their Pleas as to the Parcels in the Declaration. Some of the Defendants here would give Evidence, that they were no farther concerned, than as Appraiſers to appraiſe the Goods. To which the Chief Juſtice anſwered, There could be no Appraiſement in Replevin, and if there could, that however here the Taking being tortious, he, being there all the while, would be guilty of it; beſides, if the Law gives a Man a Licence for the doing a Thing, in Treſpaſs you muſt plead it, and not give it in Evidence upon Not Guilty. Iſſue and Demurrer. If Appraiſement may be in Replevin. Licence to be pleaded.

Barber *verſus* Dennis.

S. C. 1 Salk. 68.

THE Widow of a Waterman, who, as was ſaid, by the Uſage of Watermans-Hall may take an Apprentice, had her Apprentice taken from her, and put on Board a Queen's Ship, where he earned two Tickets, which came to the Defendant's Hands, and for which the Miſtreſs brought Trover: And it was agreed, The Action would well lie, if the Apprentice were a legal Apprentice, for his Poſſeſſion would be that of his Maſter, and whatever he earns ſhall go to his Maſter. But it was objected, 1. That the Company of Watermen is a voluntary Society, and that, being free of it, does not make a Man free of London: So that the Cuſtom of London, for Perſons under One and twenty to bind themſelves Apprentices, does not extend to Watermen, which was agreed by all. Then it was ſaid, The ſuppoſed Apprentice here was no legal Apprentice, if the Indentures be not enrolled purſuant to the Act of Parliament of 5 Eliz. and if he were not a legal Apprentice, Plaintiff had no Title. But Holt, Ch. J. ſaid, he would underſtand him an Apprentice or Servant de facto, and that would ſuffice againſt them being Wrong-doers. An Apprentice to a Waterman's Widow. Vide ante 58. Extends not to a Freedom of *London*. But Trover lies for his Tickets, &c.

Note; In another Caſe, which was Action of Covenant againſt an Apprentice for leaving his Service, Holt, Ch. J. held theſe two Points:

1. That

If a Maſter may recal his Licence to an Apprentice, &c.

1. That if a Maſter does licence his Apprentice to leave him, he cannot after recal that Licence.

2. That if a Maſter bring Covenant for leaving his Service at ſuch a Time, and Defendant juſtifies by Vertue of a Licence at that Time, the Maſter cannot upon that Declaration give Evidence of a Leaving him at another Time, for there the Time is material, and is not like a tranſitory Matter in Treſpaſs.

Brigs *verſus* Collingſon, in C. B.

Treſpaſs for entring Plaintiff's Houſe, and taking away his Goods, &c.

TReſpaſs for breaking Plaintiff's Houſe, and entring into it, and taking and carrying ſuch and ſuch Goods to ſuch and ſuch a Value: Defendant pleads Not Guilty as to the breaking the Houſe, and juſtifies quoad entring, taking and carrying away the Goods; for that K. is an antient Borough, in which there is an antient Court to be held by Vertue of Letters Patents, & conſuetud' Cur' præd', every three Weeks on Thurſday; and that it has Conuzance of all Debts and Actions ariſing within, &c. not exceeding 40 l. That ſuch a Day and Year J. S. did there levy a Plaint for 15 l. againſt the Plaintiff for a Cauſe ariſing within their Juriſdiction, found Pledges, and made Proteſtation to follow, &c. That thereupon a Proceſs was directed to Defendant to ſeize his Goods and Chattels, in order to bring him to appear; that by Vertue thereof they did attach him by his Goods and Chattels in the Declaration mentioned, and them ſafely kept to the Intent to compel an Appearance: And on Demurrer to the Plea, Carthew took ſeveral Exceptions:

Juſtification by Proceſs of inferior Court for Appearance, but anſwer not to the carrying them away. Vide Co. Lit. 145. 3 Lev. 281.

1. They ſhew the Court to be held by Letters Patents and Cuſtom, which is repugnant.

Obj. *Virtute cujus*, if traverſable.

2. It is ſaid to be held according to the Cuſtom of the ſaid Court, which is abſurd; for it ſhould be, by Cuſtom of the Hill or Borough in which it is held.

3. It is not ſaid, the Proceſs was delivered to them, ſo as they might execute it; and the Virtute cujus is not traverſable, and therefore in all Pleadings where the Sheriff juſtifies by Vertue of a Writ, he alledges, that before the Execution the Writ was delivered to him, and the Virtute comes after, otherwiſe any Body might take upon himſelf to execute a Writ ſued out, tho' not delivered to him.

Delivery of Writ.

4. The Attachment ought to be moderate and reaſonable, as to the Value of 12 d. 18 d. or 2 s. at firſt; and if he did not appear upon that, to double that infinitely, and here they have taken all the Party's Goods; ſo that if we had come with Affidavits of this Oppreſſion, you would have granted an Attachment for the Abuſe; and if one abuſes the Authority the Law gives him, he is a Treſpaſſer ab initio, for the Diverſity is between Licence of Law when abuſed, and actual Licence of the Party. Vide 8 Co. 146. Carpenter's Caſe.

Licence of Law, &c. 8 Co. 146, 147.

5. We charge them in Declaration with having taken the Goods, and carried them away; and they juſtify only the Taking, and ſay nothing as to the Carrying away.

6. Though they were aware, they must shew a Return; for whenever the Sheriff, or Officer to whom the Writ is directed, will justify under it, he must shew a Return, otherwise if under Bailiffs to Sheriff. Cr. Car. 446, 447; and here they only say, Debito modo retornat', which might be if they had returned nulla bona: And Court could not make them mend or change it. Return of the Writ not shewn.

Prat contra. As to the first Exception; We shew the Court was held by several Letters Patents, and we need not shew by what King or Queen, or the Date of them; and as to consuet' without tempore cujus, &c. it does not imply a Prescription, but only an Usage. *Resp.* Court held by Letters Parents, &c.

Objection. Not said the Process was delivered to Defendant.

Answer. We are upon a general Demurrer, and we say it was directed to us, and that by Vertue of it we seized them, which is impossible to be true if it were not delivered to us. General Demurrer.

Objection. But they ought not to take so much.

Answer. The Process is to attach him per Bona & Catalla; and the Law does not define how much they shall take; and it is in Plaintiff's Power to have all by giving an Appearance, and they are only to be a Pledge for his Appearance in the mean time.

Objection. We ought to make a Return true, and we have so done; for when we confess that we have taken the Goods, and alledge a Return Debito modo, that must be according to Truth. Return *Debito modo*.

Trevor, Ch. J. You have not answered the carrying away, so it is not within your Not Guilty, nor admitted by your Justification; for if you justified the carrying them away, perhaps you would have given them a new Cause of Demurrer, for they should not have carried them away till Failure of Appearance: As to the Excess, that will not make it a Trespass, for that is only an Irregularity; and your saying in the Declaration, that they were of such Values, is nothing. Goods ought not to have been carried away till Failure of Appearance.

Cur' accord', and seemed strong for the Plaintiff for want of Answer to Asportation', but gave him Time till next Term to maintain it.

Bishop of Durham *versus* Ladler, in B. C.

DEBT was upon a Bond, conditioned for the Obligator's Submission to the Church: The Bond was given in the Year 1693. and there being a general Act of Pardon since that Time, the Question was, Whether since that Act took away the Offence and Excommunication, it would not likewise discharge the Bond? And the Case of the Bishop of Exeter and Sterling in my Lord Hale's Time, now in Levinz's Reports, was remembred and said, That there never was any Judgment upon the Roll; and it went over to be spoke to this Term. Debt upon a Bond given to a Bishop for Submission, &c. Vid. 2 Lev. 36.

Michelson

Michelſon *verſus* Cawſey, in C. B.

Caſe for an Eſcape upon Proceſs out of an inferior Court.

AN Action upon the Caſe, for the Eſcape of one taken upon the Proceſs of an inferior Court. Plaintiff declared, That he levied a Plaint ſuch a Day, &c. That Proceſs iſſued, and was delivered to the Defendant, who, Virtute thereof, took the Party at ſuch a Place, &c. and ſuffered him to eſcape, per quod, &c.

And the Exception taken to the Declaration was, That it did not ſhew by what Authority the Court was held, and then the whole Proceedings were void, and therefore the Impriſonment was falſe, and the Eſcape no Offence or Injury to the Plaintiff: And for this was quoted Turner's Caſe, where, in pleading a Judgment in an inferior Court, the Party was forced to ſhew the Authority of the Court, and to give it Juriſdiction. And if ſo in a Plea in Bar, which is good to a common Intent, a fortiori, it will be in a Declaration which charges the Party, and therefore muſt be certain to all Intents: And here if there were no legal Court, or if it wanted Juriſdiction, the Officer would be liable to an Action of Falſe Impriſonment, and likewiſe to an Eſcape. And it was ſaid, That it is eſſentially neceſſary, let the Plaintiff be a Stranger or Privy, to give the Court Juriſdiction.

8 Co. 133. Vide Vaug. 93, 94. Yel. 46. Cr. El. 489. Cr. Jac. 184, 493, 532. Cr. Car. 46. 1 Jo. 451.

If a Stranger ought to ſhew the Authority of the Court.

To which Carthew anſwered with this Diverſity, That any who is an Officer of the Court, or acts under the Authority of it, and by Conſequence ought to be conuſant of it, ought in Pleading to ſet it forth; but Strangers, as the Plaintiff is here, need not do it. 2. The Plaint, Proceſs and Arreſt, are only Inducements to the Action, and the Eſcape, whereby, &c. is the Subſtance; therefore it ſuffices if the Subſtance be well ſet forth, and that is done here. And for this he quoted the Caſe of Hodges and Moyſe, 1 Cro. 45, 46. Beſides, he urged that this would be the Cauſe of Reverſal or Irregularity, yet Sheriff could not take Advantage of it. Vide Cro. El. 895. 2 Mod. 195. and Gould and Stroud, Mich. 2. W. 3. in B. R. where, in an Eſcape again Sheriff, it appeared that the Action was brought upon a Judgment in Weſtminſter-Hall by an Adminiſtrator, and that Adminiſtration was committed to him by an Ordinary of another Dioceſe, ſo as it was utterly void; yet Plaintiff had Judgment.

Vide poſtea.

It ſeems he ought to ſhew the Authority of the Court.

Trevor, Ch. J. and Blencoe, conceived the Law to be, That whereever one juſtifies by Vertue of Proceedings of an inferior Court, or makes it a Ground for an Action, he ought to ſhew the Authority by which the Court is holden, and that the whole Proceedings were the Giſt of the Action here, and if that were actually void, that the Plaintiff ought not to have Judgment, tho' Officer cannot take Advantage upon Error in Proceſs; but they doubted whether the Defendant, having taken upon himſelf to arreſt him, did not thereby make himſelf liable to an Eſcape. But Tracy ſeemed to differ from them, upon the Authority of 1 Cro. 46. And it was Cur' adviſare vult.

Eodem Termino in B. R.

Warren *verſus* Mathews.

S. C. 1 Salk. 357.

Per Cur. EVery Subject of common Right may fiſh with lawful Nets, &c. in a navigable River, as well as in the Sea, and the King's Grant cannot bar them thereof; But the Crown only has a Right to Royal Fiſh, and that the King may only grant.

Lawful Fiſhing.

Vid. 2 Salk. 637.

They alſo held, That let the Proſecution be never ſo maliciouſly carried on, yet if there be probable Cauſe or Ground for it, no Action for malicious Proſecution will lie. Vide 1. Salk. 14, 15. contra.

Malicious Proſecution. Vid. ante 25. 1 Salk. 14. cont.

Saunders *verſus* Melhuiſh.

S.C. Ante 16.

MElhuiſh had got an unknown Perſon to aſſume the Name of Tenant in Poſſeſſion, and to perſonate him in receiving a Declaration in Ejectment, and upon the uſual Affidavit tricked the Plaintiff out of his Poſſeſſion; and the Matter being made out by Affidavits, and even by the Affidavits of the two Comrogues, viz. he that delivered, and the other that received the Declaration, the Court ordered Reſtitution; for no Man's Poſſeſſion ought to be diſturbed upon the Affidavits of ſuch infamous Witneſſes. And Melhuiſh, the Plaintiff in Ejectment, attending, was committed to anſwer Interrogatories; for Holt, Ch. J. ſaid, When one is put to anſwer Interrogatories for a Fact fully proved againſt him, he ought to anſwer in Cuſtody; but where it is any thing doubtful, the Courſe is to put him to anſwer, that is, to bind him by Recognizance to anſwer. And in either Caſe, if they purge themſelves upon Oath, they are diſcharged; but they may be proſecuted for Perjury if they ſwear falſe. And if the Interrogatories be not exhibited in four Days, by Courſe of the Court they are diſcharged.

In Ejectment one trick'd out of Poſſeſſion.

Commitment to anſwer Interrogatories.

The Caſe of *Elderton*, *Porter*, and others.

THey were taken up by a Warrant from my Lord High Steward, Treaſurer, Controller, and Clerk of the Green-Cloth, ſetting forth a Complaint made to the Board of Green-Cloth, of a forcible Entry made by them into a Houſe in Scotland-Yard, in the Queen's Royal Palace of Whitehall, riotouſly, and in Contempt of the Privileges of the Queen's Palace, and without Warrant from the Green-Cloth. The Warrant was directed Portatoribus Virgarum Hoſpitii of the Queen, and they not giving Bail, was committed to Lovet, Porter of the Palace, to receive and keep them till they gave Bail for Appearance at the next Seſſions to be held for the Verge, or till he received further Directions from the Board of Green-Cloth; and being

Contempt againſt the Privilege of the Queen's Palace. Vide 1 Mod. 76. 1 Vent. 169. 2 Mod. 181. Philip's Regale neceſſarium. Chap. 1. & 3. Pryn on 4 Inſt. 18, 19.

Vide infra.

being brought up by Habeas Corpus, Return was made of a Commitment for the Cause aforesaid, by the Persons aforesaid, all which were returned to be Justices of Peace for the Verge.

1. Obj. To the Authority of the Green Cloth.

Montague took these Exceptions: 1. The Warrant sets forth an Information made to this Board, without shewing what Board; and if it had expressed the Board of Green-Cloth, it had not mended the Matter; for as such their Power is only over the Servants of the Family, and over none else, even in case of Trespass or Bloodshed, or any other Breach of the Peace; for that which gives them a Power is the Statute of 33 H. 8. c. 12. and therefore they have no farther Authority than that Act gives them.

2. That the Queen did not reside there.

2. The Queen did not then actually reside there, nor does it set forth that she did, and it cannot be said a Breach of Privilege, for two Reasons: 1. The Queen's Honour is as much concerned that the Proceels of Law should be duly executed, as in the Privilege of her Palace.

All Privileges taken away, &c.

2. By the late Act of Parliament all Privileges are taken away; and that Act is to be construed favourably in the Execution of Justice.

3. If it be said, that they have Conusance of it as Justices of Peace, they should have committed them as such, and under a proper Officer, as Constable, &c.

No legal Commitment as to Time.

4. The Conclusion of the Commitment is not legal; for it should be, till they are delivered by due Course of Law, but this is, till they find Surety for their Appearance at the next Court of the Verge, and not said when that is to be, or that ever there will be any.

The Privileges set forth.

5. They say, it was in Breach of the Privilege of the Queen's Court, but not what those Privileges are, that the Court might judge whether this Fact be against them.

Argument for the Return.

Attorney-General: For the Return, the Authority of the Party committing never appears upon the Commitment, but always upon the Return, and that is the right Way.

Objection. They have no Power to commit as a Board.

Answer. It is not necessary to enquire into their Power as they are a Board now, for tho' they meet there about other Business, yet their being there does not make them cease to be Justices of the Peace, and they have their Sessions for the Verge, and the Commitment is, till they find Surety for their Appearance at the next Sessions of the Verge. It never was the Intent of the late Statute to expose the Queen's Palace to the Disorder that often attends Execution of Process: And he quoted Jacob Hall's Case.

1 Vent. 169. 2 Keb. 846. 2 Mod. 181. 1 Mod. 76.

Vid. 3. Inst. 141. 27 Ass. pl. 49. Philips Regale necessarium. cap. 1 & 3. & vide Wilkins LL. Æthelstani. p. 63. & Hen. 1. p. 245.

There needs not an Act of Parliament to make a Palace, for it is the King's Right to declare a Royal Palace, and the Privileges follow of Consequence, and King William declared Kensington a Palace.

Warrants are not like Pleadings, as being made by Persons entrusted with the Execution of the Law, but have not the nice Knowledge of it. Of Commitments. Vid. 1 Salk. 348. 349, 351, &c.

Commitment till he find Bail, or Commitment generally for Want of Bail, is the same; for whoever is committed for Want of Bail, is in Truth committed till he find Bail. Commitment till Bail.

Where-ever there is a Palace, the Privilege of a Palace is incident to it, whether there be an actual Residence or not; and the Act of 33 H. 8. c. 12. was needless, tho' it makes this Case the stronger, and that Statute setting Limits to Whitehall, shews there are local Privileges belonging to the Palace; and what can they be if not that something may be lawfully done elsewhere that may not be so there? And this being in the outward Part of the Palace makes no Difference, for they shall set no other Bounds to Privileges than the Act has done here.

Holt. Ch. J. It need not appear in the Warrant or Commitment that they were Justices of Peace, but is always upon the Return, and these Fellows are very wilful, for either they are right or wrong, and why may not they find Bail, and have the Matter determined legally? There is a Commission of Oyer and Terminer, and a Commission of the Peace for the Verge; and the Lord Steward has only a Commission for the Houshold. The Matter therefore will be only this, Whether this being done within the Queen's Palace, and not said the Queen was actually residing there; that is, Whether the Privilege be not confined to the Residence? And another Question will be, in case it be confined to a Residence, What will amount to a Residence? For suppose the Queen were at Windsor, and a Murder committed at Whitehall, should the Lord Steward judge of it upon the Statute of H. 8? Or suppose it were now at Winchester? To which the Attorney put the Case of Burchett, 3 Inst. 140. who killed his Keeper in the Tower: And tho' the King did not reside there, yet because it was in his Palace, his Hand was cut off first, and after he was hanged. And tho' the Words of the Statute be, [Or other House where the King is resident,] those Words are only to give the same Privileges to Houses that are not Palaces during the Kings Residence. Upon the Return. The chief Matter, what. As to the King's Residence.

As to the Objection, That they are committed for not giving Security to appear at the Sessions of the Verge, and it does not appear that they have Jurisdiction of it, we are judicially to take Notice of all Things belonging to the Queen, and by Consequence of the Power and Jurisdiction of the Session of the Verge of the Palace. If no Jurisdiction appears.

Powel. Sure the Words [Other Houses where the King resides] is only applicable to Houses, not Palaces, and sure the Privilege of a Palace is not confined to actual Residence; and he insisted on Burchett's Case aforesaid, and the other two Judges seemed of that Opinion: And besides, if it were confined to a Residence, the Queen's Secretary of State keeping his Office here, would be good Evidence If the Privilege be confined to Residence.

Vide Infra.

Arrests in *Westminster-Hall.*

Officers of *Green-Cloth* Justices of Peace, &c.

Commitment to the Marshal, &c.

Commitment to *New-Prison.*

Universal Power of *B. R.*

Court remanded the Prisoners without Bail.

of a Residence. And Powell said, he had known Arrests condemned for being in Whitehall without Leave; and if Arrest be in Westminster-Hall, sitting Court, it is a Contempt; and why may not it be the same if in the Queen's Palace, to the Disturbance of the Queen or her Servants? And the Consequence might be very dangerous, to suffer a Number of Fellows in a rude Manner, under Colour of Process, to enter into the Queen's Palace. It is true, we do not know in this Court that Green-Cloth have Jurisdiction here, but they are returned to be Justices of the Peace, and we know there is a Commission of the Peace, and of Oyer and Terminer, for the Verge, which have Power to punish Riots, Trespass, &c. He said farther, That the Marshall of the Queen's House is the Gaoler, and that the Commitment properly ought to be to him; but perhaps it might be to the Porter, in order to carry him to the Marshal, as in this Court to a Tipstaff; but still the Commitment ought to be to the Marshal and their Authority is to commit as Justices of Peace, and not as a Board. It is true, if the Commitment had been by them generally, we would have understood it to have been in that Capacity that they lawfully could do it; but whether they have not tied it up to their Power as Board of Green-Cloth, so as to leave no Room for such Intendment, is a Question. However, if the Commitment should be bad for these Faults, we may indeed discharge them of their present Imprisonment, and bind them to appear at Sessions of Green-Cloth; as if Commitment be to New-Prison, it is not lawful, as not being a legal Gaol; yet we will not set the Party at Liberty, but commit him legally by Virtue of the Universal Power of the Court: And tho' this Porter be not a proper Officer, we may remand him to him till we consider of the Matter, and order him to be brought up again by Rule, and all Matters to stay in the mean Time as they are.

And after the Return was filed, tho' they offered Bail for their Appearance here the last Day of Term, yet the Court remanded them, and gave Rule for the bringing them up two Days after, and would not bail them in the mean Time.

3 Inst. 140.

Nota.

2 Inst. 549. Vide 2 E. 3. 13 & 19 E. 3. F. Judgment 174. 51 E. 3.

Note; The Chief Justice upon this Occasion ordered the Record of Burchett's Attainder to be brought into Court, and it is Mich. 15. & 16. El. Ro. 2. and there is no Judgment there that his Hand should be cut off, tho' the Chief Justice said his Hand had been in Truth cut off, and so is my Lord Coke and Stow's History, and nothing further was ever done in this Matter that I have found. But vide Postea.

F. Coron. 280. Dyer 188. St. 25 E. 3. c. 1. and note 33 H. 8. c. 12. of striking in the King's Court. 3 Inst. cap. Misprision. Philip Regale necessarium, 18, 24, &c. 39 E. 3, 4, 35. Mich. 40 E. 3, 4, 34. Flet. lib. 2. c. 23. Ryley plac. part 6, 7. 27 Ass. 49. Pryn. on 4 Inst. 18, 19. Cotton, &c. 1 Lev. 106, 107. 1 Sid. 211. Cro Car. 272.

Overſeers of the Poor of the Pariſh of St. *Andrew*.

S. C. 2 Salk. 525.

AN Order of two Juſtices for one's taking upon him the Office of Overſeer of the Poor being removed; ſeveral Exceptions were taken againſt it by Montague: 1ſt, That it did not appear by it that the Party was an Inhabitant or a Houſe-keeper, and you will not intend him to be either; for it is not like the Caſe in Hob. 312. where a Man ſhall be intended to be in his Senſes, or a Witneſs credible, till the contrary appears: And the Way were for the Pariſh to preſent theſe Officers to the Juſtices to be by them confirmed. 2. Exception was, The Order appointed him Overſeer of the Poor of that Part of the Pariſh that lies in Middleſex, (for the Pariſh of St. Andrew extends both in London and Middleſex) and for this the Caſe of the Houſe of Correction for Black-heath was relied on. And the Court ſeemed to think the Appointment ought to have been for the whole Pariſh, but after they might order him to meddle only with ſuch a Diviſion.

If Juſtices may replace an Overſeer removed. Vide poſt 97.

Note; Per Holt, Ch. J. at Niſi prius, ut audivi, this Difference was taken: If a civil Action be brought as Trover for Goods after Recovery, you may indict him for Treſpaſs or Felony for the ſame Taking, becauſe the Offences or Cauſes of Action are of a different Nature, the one civil, and the other criminal; but if the firſt Proſecution had been criminal, as an Indictment for Treſpaſs, &c. and the Crime appears to be Felony, there you cannot have Verdict or Judgment on the Indictment for Treſpaſs, it being the inferior. And this, he ſaid, had been adjudged in Mr. Luttrell's Caſe.

Indictment lies after Recovery in Trover, or not. 3 Inſt. 213. Hob. 138. Vid. 2 Lev. 208. Videt' contra.

Jordan *verſus* Thomkins.

1 Salk. 25. Vide ib. 22, 29.

INdebit' aſſumpſit for Meat, Drink and Lodging found for a third Perſon; and moved in Arreſt of Judgment, that it would not lie, but a ſpecial Action upon the Caſe. But per Cur', It lies againſt him upon the Contract; as if A. deſire B. to cure the Horſe of C. and that he (A.) will pay him ſo much, an Indebit' will lie againſt A. and only againſt him; but they agreed it would not lie for Money won at Play, but a ſpecial Aſſumpſit; and the Plaintiff had Judgment.

Indeb' aſſumpſit lies for Diet found for a third Perſon. Hob. 216. 1 Vent. 6. Raym. 302. Vid. poſtea.

Per Cur'. If one give a Warrant of Attorney to confeſs a Judgment for the ſaving Bail harmleſs, tho' the Debt be not paid, he cannot ſue Execution before Damnification.

Smith

Smith *verſus* the Mayor and Aldermen of *London*.

If Prohibition lies for refuſing Appearance of a 3d Conſignee in *London*.

ONE who had been broke, and run away beyond Sea, had conſigned Goods to three Perſons here for the equal Benefit of his Creditors, two whereof were his Conſignees, and ſet up a Truſtee for them to attach the Goods in London; the third Conſignee, to whom nothing is due, offered to appear, the other two would not appear: And the Court would not receive the third Man's Appearance without he appeared for all, which he could not juſtify doing, having no Warrant for it: And now a Prohibition was moved for, becauſe they refuſed his Plea.

When Bill of Exceptions or Error. 1 Salk. 288, 289.

Holt, Ch. Juſt. If they refuſe your Plea, your Way is by Bill of Exceptions; if they proceed otherwiſe erroneouſly, you may have a Writ of Error; and we are not to prohibit inferior Courts becauſe they proceed againſt Law, for in that Caſe the Law gives another Remedy.

Proceſs upon an Attachment in *London*. See Skinner 516 & 669.

Upon an Attachment of Goods there goes a Sci' fa by way of Garniſhment, and two of the Garniſhees will not appear; the third offers to appear and plead, but is not admitted without appearing for all. Sure this Courſe is of very ill Conſequence, and here we can have no Bill of Exceptions, becauſe we are not in Court till Appearance; and they will not ſuffer us to appear, though Bill of Exceptions be always of Matter not appearing of Record: And the Court were ſtrong againſt the Cuſtom to compel one Garniſhee to appear for the reſt; and here they ſaid, There could be no Certiorari, becauſe they could not proceed in this Court according to the Cuſtom of London.

No *Certiorari* in this Caſe.

He may wage his Law alone, &c.

And Dee, the Common Serjeant, ſaid, That in ſuch Caſe, if he put in Bail, and waged his Law alone, that would have diſſolved the Attachment: This Caſe was put: If Præcipe be brought againſt two, and one of them appears, and takes the whole Tenancy upon himſelf, and traverſes the other's having any Thing, and pleads in chief, he may do it: And Cur' adviſare vult.

Domina Regina *verſus* Ball.

If Excommunicant eſcapes.

HE was charged in the Sheriff's Cuſtody upon an Excommunicato capiendo, and committed to the Fleet charged therewith, and from thence by Habeas Corpus to the King's Bench, where he was ſuffered to eſcape; And what could be done, was the Queſtion. And firſt it was agreed, That if the firſt Writ were not returned, they might take a new one, and thereupon take him up de Novo; otherwiſe if it were return'd, 1 Roll. Rep. 174. And here it was doubted, whether there could be a new Writ in caſe the former had not

Vid. antea. He may be taken *de novo*, if no Writ returned, &c.

not been return'd; because by the Hab. Corp' and Return thereof here on Record, it does appear he was in Execution upon that Writ: If the Escape had been in the present Marshal's Time, we could make a Rule upon him to take him up, but we cannot do it now, the Escape having been in former Marshal's Time; because if the Escape were voluntary, the former Marshal could not justify doing it himself, and let us consider whether we cannot make a Record of his having escaped, and award a new Writ. And per Cur', Let it stay a little, and know whether the former Writ be returned.

Vide ante 21. 22, 37, 63. Post 95, 125, 154, 283.

Escape in former Marshal's Time.

Jonson *versus* Shepney.

S. C. 1 Salk. 35. Vide ib. 34. Vide ante 11, 12, 25. Ship in Distress pawned by the Master, if Prohibition may be to a Libel. Vide Hob. 12. 1 Vent 32, 238. 1 Lev. 267. 1 Sid. 418. 2 Keb. 511, 610. ante 12.

A Ship being in Distress on the High Sea in her Voyage, put into Bostock in New-England, and there was hypothecated by the Master for Necessaries; and being libelled against here, a Prohibition was moved for, because the Contract appeared to be upon Land, even on their own Libel. And it was urged against it, That if the Distress, which occasions the Contract, be on Sea, tho' the Things be bargained and agreed for at Land, (for it is not to be supposed they can be had at Sea) in case of Hypothecation they have Jurisdiction, otherwise the Prejudice would be intolerable to Navigation. And Benson *versus* Jeoffries, Hill. 96. was quoted.

Vid. Hob. 12. acc. Moll. Lib. 2. c. 2. §. 14, 15. 3 Mod. 244. That the Admiralty has the Jurisdiction.

Holt, Ch. Just. When a Ship is in Distress in her Voyage, and hypothecated for Necessaries, we allow the Admiralty a Jurisdiction, for there is no other Way for him to have Credit but that, and they can have no Remedy by our Law against the Ship; and this Point was argued and resolved by all the Judges in the Case of Croftwick *versus* Lowsely, 1 W. & M. Vide 1 Salk. 34.

Vid. Hob. 12. contra. Lat. 252. Vi. 1 Vent. 32. 1 Lev. 267. Such Hypothecation is absolutely necessary. 1 Lev. 267. 1 Vent. 32. Hob. 115 contra. Prohibition as to the Party, &c.

And Powel added, That though in that Case the Libel laid the Contract to have been super altum Mare, yet the Court took Notice of it as done at Rotterdam; but being in the Voyage, and occasion'd by a Stress at Sea, it was held well enough within their Jurisdiction; and that the Hypothecation of Ships is absolutely necessary for the Preservation of Navigation; for the Masters have nothing else to get Credit with, and they are the Only Court can give them Remedy: If a Ship in Harbour here in England be hypothecated, they shall not sue for it there; Master cannot at any time sell, but he may hypothecate in Voyage for Necessaries: But the Libel being against the Ship and Party, the Court said, They would send a Prohibition as to him, unless quatenus it is necessary to make him Party towards the Condemnation of the Ship: And so it was done. For Prohibitions to the Admiralty and other Mattersc oncerning that Court, see *Carthew* 26, 32, 166, 294, 398, 423, 474, and 518. See also *Skinner* 59, 93, 230, 279, 334, 361.

Day

Day *verſus* Musket.

S. C. 2 Salk. 640.

Treſpaſs *tempore W.* 3. *cont. Pacem* Q. *Ann.*

TReſpaſs in Time of King William, and ſo laid with a contra Pacem of the preſent Queen; and this was ſaid to be a Deſcription of the Treſpaſs, and an impoſſible One, and therefore not good: Againſt which was quoted 1 Sid. 253. that Treſpaſs in two Kings Reigns ought of Right to be laid contra Pacem of both; but however, that was but form. But Powel quoted the Caſe of Melwood and Leach, 7 W. & M. where it was held fatal: And the Court ſaid, That many Actions upon the Caſe for Miſfeazance are laid contra Pacem, and it is not wrong to do ſo, as in Actions for Nuſance.

Ill upon a Demurrer, tho' help'd after Verdict.

And at another Day the Court ſaid, That the Omiſſion of contra Pacem might be but Form, but being put in is a Deſcription of the Treſpaſs, which is repugnant, and held that it would be well after Verdict; but it was on Demurrer, and therefore fatal. Vid. 2 Ed. 4, 24. And the Plaintiff had Leave to diſcontinue upon Payment of Coſts. Vid. Stat. 4 & 5 Ann. cap. 16.

Vide 5 Mod. 304.

Battersby *and* Marſh.

Abatement to an Addition of Gentleman. Skinner 15.

PLaintiff in his Bill declared, and called himſelf a Gentleman: Defendant pleaded in Abatement, that he was no Gentleman; to which Plaintiff demurr'd.

1 Lut. 238. Ray. 449. 5 Mod. 304. Poſt 105.

Per Cur', The Plea is good, being confeſs'd by the Demurrer; but it being after general Imparlance, they put him to anſwer over.

Brough *verſus* Perkins, Trin. 2 Ann.

Error upon an Inland Bill of Exchange not proteſted.

WRit of Error of a Judgment upon Nil dicit in common Pleas, in an Action brought againſt the Drawer of an Inland Bill of Exchange: And now Raymond objected, That ſince the Act of 9 W. 3. no Damages ſhall be recovered againſt the Drawer upon a Bill of Exchange without a Proteſt, and therefore the Action lies not, here being none.

But Holt, Ch. Juſt. The Statute never meant to deſtroy the Action for Want of a Proteſt, but only to deprive the Party from recovering Intereſt and Coſts upon an Inland Bill againſt the Drawer without Notice of Non-payment by Proteſt; for before the Statute there was this Difference between Foreign and Inland Bills of Exchange: If a Bill were Foreign, one could not reſort to the Drawer for Non-acceptance or Non-payment without a Proteſt, and reaſonable Notice thereof; but in caſe of Inland Bill, there was no Occaſion for a Proteſt; but if any Prejudice happen'd to the Drawer by the Non-payment of Drawee, and that for Want of Notice of Non-payment, which he to

Difference of Bills. Ante 29, 30.

whom the Bill is made ought to give, the Drawer was not liable; and the Words Damages in the Statute were meant only of the Damages that Party is at in being longer out of his Money by the Non-payment of Drawee, than the Tenor of the Bill purported, and not of Damages for the original Debt: And the Protest was ordered for the Benefit of the Drawer; for if any Damages accrue to Drawer for Want of Protest, that shall be born by him to whom the Bill is made; and if no Damages accrues to him, then there is no harm done him; and Protest is only to give formal Notice that the Bill is not accepted, or accepted and not paid; and if in such Case the Damage amount to the Value of the Bill, there shall be no Recovery, but otherwise he ought not to lose his Debt; but that ought to appear either in Evidence upon Non assumpsit, or by special Pleading; and the Act is very obscurely and doubtfully penned, and we ought not by Construction upon such an Act to take away a Man's Right. Tot' Cur' accord'.

Protest by Stat. 9. *W.* 3. is for Benefit of the Drawer.

Ante 29.

Another Exception was, That the Writ of Inquiry in Common Pleas is returnable Quinden' Martin', which is always on the 25th of November, a fix'd Day, and it is returned as executed the 25th of November ult'; that is, on the Day on which it is returnable, and that is Contradiction.

As to Return of the Writ of Inquiry. See Carthew 70, 362, 371.

But Ch. Just. Holt. Though Writ be returnable on such a Day, yet they never come in 'till the Quarto die post, and a Writ may be executed on the Day of its Return: And he agreed, They must judicially take Notice on what Day Quinden' Martini falls, because they must take Notice of Festum Sti' Martini, and on what Day it is, and the Almanack is Part of the Law of England, and so of Annus Bissextilis, and that it would be the same in Case of moveable Feasts; for the Diversity between fixed and moveable Feasts is ridiculous; for if we judge of fixed Feasts by the Almanack, as that Book that takes the Diversity admits, why not of the other? But the Almanack to go by is that annexed to the Common Prayer-Book: And Judgment affirmed per tot' Cur'.

Postea 250, &c.

Almanack

Vide 1 Leon. 242.

Ante 41.

Post 148, 160, 252.

Judgment affirmed.

Presgrove *versus* Saunders. Mich. 2 Annæ, in *B. R.*

S. C. 1 Sal. 5.

Intr. Mich. 1 Ann. Rot. 467.

IN Replevin for several Things, as to some the Defendant pleads Property in himself, and to others Property in a Stranger in Bar; and it was objected, That Property in a Stranger could not be pleaded in Bar. 1 Vent. 249. 2 Lev. 92. But Holt, Ch. Just. said, He remembred to have heard Hale make the Difference, That if Property be pleaded in Defendant, it may be either pleaded in Bar or Abatement, if in Stranger only in Abatement; but that upon great Deliberation it had been held since, that there was no Difference at all, for both might be pleaded in Bar, according to 2 Cro. 519. Sackild *versus* Sheton. And Judgment was, Plaintiff nil Capiat per Billam, and Return awarded per Cur'. Parker *versus* Meller.

In Replevin, Property in a Stranger may be pleaded in Bar on Abatement. Vid. post 103. ante 69. 31 H. 6, 12. 1 Salk. 5, 94.

Vide 1 Salk. 69, 75. Poſt 160.

Robiſon *verſus* Calwood.

When an Award is ready to be delivered. Vid. poſtea 160. 1 Cro. 541.

DEBT upon Bond for Performance of an Award, Condition was to ſtand to, &c. ſo it were ready to be delivered at ſuch a Time; nul Award pleaded, and Award ſet forth, but not ſaid, that it was ready to be delivered at the Time: And per Holt Ch. Juſt. As ſoon as it was made, it was ready to be delivered, and ſo I remember it has been adjudged, but it ſtayed upon another Exception.

William *verſus* Farrow.

Feoffment and Acceptance pleaded in Satisfaction of a Bond. Carth. 238, 347. 2 Lev. 165.

DEBT upon Bond laid in London, and Feoffment of Land in another County in Satisfaction thereof; and Acceptance thereof in Satisfaction in the ſame Will was pleaded in Bar, and ſpecial Demurer, for that the Acceptance was not laid in London: But per Cur', They muſt lay the Acceptance where the Feoffment was, it being local; but if it had been a tranſitory Matter, it ſhould not have made it foreign by his Plea, and when ſuch Plea is local, it ought not to be accepted without Oath of the Truth of it: And Plaintiff had Leave to diſcontinue upon Payment of Coſts.

S. C. 1 Salk. 89.

Lamb *verſus* William.

Remittit by Attorney, *Retraxit* in *prop' Perſona.*

ACtion was in Common Pleas upon ſeveral Damages: The Attorney entred a Remittit damna as to ſome, and upon Writ of Error it was held the Attorney could well do it, though he could not enter a Retraxit, for that muſt be done in Perſon.

Vaughan *verſus* Company of Gun-makers in *London.*

No *Mandamus* for an Approver of Guns.

RIchardſon moved for a Mandamus to reſtore V. to his Place of Approver of Guns, and ſetting his Mark of Approver upon the Guns made by the Company: And he ſaid, That ſelling Guns not marked was a Forfeiture of their Charter, and that by a By-Law made by them they had appointed him an Approver, but now turned him out.

Vid. antea 18.

Petition to the Queen.

But per Cur', It is a Thing in which the Publick is no way concerned, nor is there any publick Law for it, therefore out of the Reaſon of Mandamus; but your Way will be to petition the Queen, and ſhe perhaps will order the Attorney General to bring a Quo Warranto againſt them.

Morley *verſus* Stacker.

Vid. 1 Salk. 147, 380.

A Warrant of Juſtice of Peace was given to the Defendant to levy Money by Diſtreſs, againſt one convicted of Deer-ſtealing according to a late Act of Parliament againſt Deer-ſtealers: In purſuance whereof he diſtrained the Party's Cattle, and ſold them for ſo much abſolutely; but before he paid the Money, he was adviſed that it was dangerous for him to ſell the Cattle, for it was doubtful whether the Words of the Act did warrant a Sale: Upon this he comes to Morley, and proffered him the Money if he would ſecure him harmleſs, which Morley denied to do: Whereupon he undoes the Bargain, and reſtores the Money to the Buyer, and the Cattle to the firſt Owner. And now a Mandamus was moved for to compel him to pay the Money to Morley; and this was the more ſtrongly inſiſted on, for that they could not charge him in any Action without giving the Warrant in Evidence, which was out of their Power in his Cuſtody.

Juſtices Warrants to levy by Diſtreſs upon a Deer-ſtealer. poſt 214, 215.

Upon a Doubt the Diſtreſs was reſtored by Officer after Sale, &c.

Mandamus moved for, but denied.

And per Cur', 1. It has been ſolemnly reſolved in the Caſe of the King *v.* Speed, that theſe Words in an Act of Parliament, To be levied by Diſtreſs, muſt be underſtood of Diſtreſs and Sale.

1 Rol. R. 76. Noy 17. 2 Jo. 25. 1 Brownl. 41.

2. That a Copy of the Warrant would be good Evidence in this Caſe.

3. If an Officer, who has Power to ſell, ſells upon Credit when he may ſell for ready Money, he is thereby immediately charged to the Party for whom the Sale was.

Defendant's Remedy againſt the Officer.

4. That in a doubtful Caſe it is hard to make an Officer ſell at his Peril.

Note; In this Caſe, after the Warrant iſſued out, a Certiorari was brought, and the Record thereby removed up hither, and that could not hinder the Execution; as if Writ of Error comes to Common Pleas after Execution ſued out, the Return of the Writ of Execution muſt be in the Common Pleas; and if Goods be taken in Execution before the Writ of Error allowed, after the Record is returned here above, a Vendition. Exponas ſhall go out of Common Pleas.

When a *Certiorari* may not hinder Execution. Vide ante 33, 40, 43.

Vide poſtea 206, 208.

5. That if in this Caſe the Warrant be not made returnable, the Officer is not bound to return it.

If a Warrant be not made returnable.

6. If the Juſtices made the Warrant returnable before them, tho' the Record of Conviction be after moved hither by Certiorari, yet they call the Conſtable to Account upon the Warrant.

7. If before Certiorari comes Execution be done in part, notwithſtanding the Certiorari he may go on with it; as if Execution be out of Common Pleas, and Goods be ſeized before Writ of Error allowed, notwithſtanding Writ of Error, they may proceed to Sale. If this were the Caſe of a Sheriff, we would compel him to make a Return, and would leave the Party to his Remedy upon the Return: And if a Conſtable will not return his Warrant, the Seſſions may fine him;

What if the Officer will not make a Return of his Warrant, &c.

which indeed is no Remedy or Satisfaction to the Party; and the Miſchief is the ſame in caſe of a Sheriff, for if he will not make a Return to a Fieri facias the Court can only amerce him: And the Court would not grant a Mandamus, but left the Plaintiff to that Remedy; for if we would grant a Mandamus, and he diſobey it, we could only fine him for the Contempt, and the Juſtices of Peace may do it as well.

Releaſe to a Writ of Error, but no *Venue* laid. poſt 88, ante 38.

A Releaſe was pleaded to a Writ of Error, but no Venue laid to try it; and for that a Demurrer, and Joinder in it, and all entred on the Roll; but the Roll was not brought into Court, or put upon the Book of Rolls: And Eyre now moved to amend it: But per Cur', It cannot be, for it is now a Record by being put on the Roll; but if it had been a Paper, it might be amended upon Payment of Coſts.

No Amendment of the Roll.

S. C. 1 Salk. 5.

Lord Banbury *verſus* Wood.

Intr. Mich. 2. Ann. Rot. 398.

Demurrer to an Abatement for Want of Addition in a Writ *De homine Repleg'*. Poſt 115. 198. Vide Cro. Eliz. 897. Noy 135. 4 Mod. 347.

IN a Homine Replegiando, Want of Addition to the Pluries was pleaded in Abatement; and on Demurrer the Queſtion was, Whether this was within the Statute of 1 H. 5. c. 5. of Additions? And that it was, it was urged, that Proceſs of Exigent lies upon this Writ; therefore it is within the very Words of the Statute, and that Exigent lies here, and did ſo at Common Law: Though it be not Expreſly Vi & Armis, yet it is impliedly ſo, for it is a Treſpaſs and falſe Impriſonment; it lies in a Writ of Deceit, though it be not Vi & Armis, upon the ſame Reaſon: Vide 25 H. 6. 6. 2 Roll. Ab. 835. 11 H. 4. 15. And the Reaſon why Writs of Replevin in the Regiſter are without Addition, is, becauſe that Book is much more ancient than the Statute of Additions. Vid. 2 Inſt. 595, 665.

But it is objected, That there was no Capias in Replevin till 25 Ed. 3. cap. 5 & 17.

Anſwer. So it did not lie in Debt or Covenant 'till given by Acts of Parliament, and yet there muſt be Addition.

If this differ from other Replevins.

And Holt, Ch. J. at firſt inclined ſtrongly, that the Plea was good, and would diſtinguiſh this from other Writs of Replevin; for here, he ſaid, the Proceſs of Outlawry iſſues immediately upon the Pluries homine Replegiando, which he affirmed to be a Withernam in its ſelf; but in common Replevin the Proceſs of Outlawry is not upon the Pluries Replegiari, but upon the Capias in Withernam, which iſſues upon the Sheriff's Return of Averia Elongat. upon the Pluries; and upon the Sheriff's ſpecial Return of the Capias in Withernam, that is upon the Sheriff's Return of Nulla bona on the Withernam, there ſhall go a Capias againſt the Perſon, and ſo to Outlawry.

Withernam in this Caſe, and then Outlawry.

But Powel contra. There is no Difference; for in both Caſes the Proceſs of Outlawry is upon the Withernam, and not upon the original Writ; for in a Homine Replegiando there ſhall go no Wither-

nam 'till Return of the Homine Replegiando: And as the first Withernam in common Replevin must be De Averiis, so the first in a Homine Replegiando shall be of the Person.

And at another Day the whole Court awarded a Respondeat Ouster, for the Process of Outlawry lies in a Homine Replegiando; yet there ought to be no Addition, for the Pluries on which we held Plea here, is not the Original in Replevin, but the original Writ of Replevin is it, which Writ is Vicontiel: So if Replevin be removed by Recordare, though upon Withernam thereon there will lie Process of Outlawry, yet there is no Addition according to the Statute; therefore it is not the Original, and therefore out of the Statute.

Respondeat Ouster awarded.

No Addition is needful to a Writ *Vicontiel, &c.*

2. There being no Addition to the first Replevin, the Pluries, which is indeed an Original to us, must have none, because it must not vary from the first Writ; and the Statute of 1 H. 5. c. 5. is to be construed strictly; in an Assize, if the Desseisin be found with Force, there is a Capiatur against the Defendant, and Process of Outlawry thereupon; yet because it is mix'd, and not a personal Action, it is out of the Statute.

1 Salk. 6.

And Powel said, There never is an Addition to any Writ that is Vicontiel.

Per Cur', Respondeat Ouster.

Inman *versus* Crew.

Vide 1 Salk. 402.

THE Doubt was, Whether it be necessary an Attorney should be present at the Executing of a Warrant to confess Judgment by one under Arrest by Process of an inferiour Court? And it was agreed,

Concerning an Attorney's Presence upon a Warrant given by one under Arrest to confess a Judgment. Post 163. 1 Mod. 1. 2 Lil. 47, 434. 5 Mod. 144.

1. That if one under Arrest confess Judgment in this Court in Presence of a sworn Attorney of Common Pleas, it will be well, and so vice versa.

2. That though an Attorney be present, yet if there be Practice in obtaining it, it will be set aside.

3. If one under Arrest by Process of inferiour Court, gives Warrant for confessing of Judgment in that Court, we will not set it aside, though an Attorney be not present.

3. If one under Arrest by such Process gives Warrant to confess Judgment in this Court, if an Attorney be not by, it will be ill.

How if the Party be discharged of the Arrest, &c.

5. If a Man be under Arrest, and seemingly discharged by the Bailiffs, with design that he should give a Warrant of Attorney to confess a Judgment, to stand though no Attorney were by, and to retake him in case he did not, gives Warrant for confessing of Judgment, it will be set aside.

6. Though such Person be really discharged, yet if he has probable Reason to believe himself not to be discharged, and under such Apprehensions he gives a Warrant for confessing of Judgment, it will be set aside. So if under Terror of Arrest. Vide post 163.

Wigg

Wigg *verſus* Rook & *Ux'*.

Vide 1 Salk. 86, 87. 1 Rol. Ab. 747. Contempt upon an Attorney's undertaking to appear for a Defendant, &c. Vide antea 42, 16.

THE Caſe upon the Report of Mr. Clarke the Secondary, was; A Writ againſt Huſband and Wife, and an Attorney on Sight of the Writ undertook to appear for them, but after would not do it: They delivered a Declaration, which he received de bene eſſe, and Judgment was entred for Want of a Plea; and the Court ſet aſide the Judgment for Irregularity, but ordered the Attorney to be laid by the heels: And it is was ſaid, That if an Attorney undertakes to appear, and after will not do it, upon Summons before a Judge, he ſhall be compelled to do it. In an Action againſt Huſband and Wife, if Huſband will order an Appearance for himſelf, it will not be received without an Appearance for the Wife too; and for an Attorney to undertake to appear, and not to do it after, is a Contempt of the Court.

Vid. 2 Lev. 38. That Wife under Age ſhall appear by Guardian. 1 Cro. 161. 2 Cro. 10, 250. 3 Cro. 42, 541. 1 Keb. 241. 1 Ro. R. 287. Vide 2 Salk. 599, 602. 2 Jo. 228. Fareſl. 40, 96, 138.

Jevon *verſus* Turner.

TWO Sci' fa's were taken out with the ſame Teſte, but different Returns; the one returnable in Quinden. Hill. and another Craſtin. Pur': Though there were different Returns, and at convenient Diſtance, yet becauſe they were actually taken out at one Time, it was judged wrong; for thus the Party would loſe the Benefit of two Sci. fa's, which the Law gives him. Per Cur'.

Two *Sci' fac.* of the ſame *Teſte*, ill. See Carthew 468. Where the firſt *Sci. fac.* returnable *ubicunq;* the ſecond *ad Diem apud Weſtm.*

A Sci' fac' to revive a Judgment againſt an Executor, mentioned firſt a Day of Appearance coram nobis ubicunq; but after gave Day to Party to appear, ad præd' Diem apud Weſt', and it was now moved to amend it; but Court ſaid, That it being in the Writ, they could not do it of Grace or Favour, but would give Day to ſhew Cauſe why it ſhould not be amended, ex merito Juſtitiæ; and the Plaintiff for his Expedition moved to quaſh it.

Horner *verſus* Bonner. Poſt 96.

If Tithes for barren Ground newly cultivated, &c. Vide poſtea 96.

PROHIBITION was moved for upon the Statute of Ed. 6. for ſuing for Tithes of barren Ground newly cultivated; but it was denied, for two Reaſons:

1. Becauſe the Suggeſtion did not alledge it to be ſuapte natura ſterilis.

2. That there way no Affidavit that it was pleaded below.

If Party dies after Warrant to confeſs Judgment, &c.

If a Man gives a Warrant of Attorney to confeſs Judgment the firſt Day of Term, and dies, it may be well entred any Time that Term, according to Shelly's Caſe, and the Dean of Salisbury's Caſe, and many other Caſes. Per Cur'.

No Indictment where Statute gives a Penalty. 1 Salk. 134. Show. 398. 3 Mod. 144. 7 Co. 36.

It was ſaid to have been reſolved in the Caſe of the Queen and Watſon, two Years ago in this Court, and alſo in one Caſtle's Caſe, That where an Act of Parliament gives a particular Penalty, the Party ſhall not be puniſhed by Indictment: In this Caſe, the Indictment was for ſelling Ale without Licence, and it was quaſh'd Niſi.

The Queen *verſus* Glin & al'.

THEY were indicted for not producing the Pariſh Books of Rates before certain Juſtices of Peace appointed by the reſt to examine and make Orders thereupon, and for diſobeying ſuch Orders: And it was excepted, That this was a Delegation of their Authority, which they could not do; for though it were agreed, that they might appoint ſome of themſelves to examine and ſtate the Matter to them, and then they to make Order thereupon, yet ſure they cannot delegate the Power of making Order. 2d Exception was, That Notice of the Order was not alledged.

Where Juſtices of Peace cannot delegate their Authority to others, to make Rates and Orders, &c. Vide 2 Salk. 436,489,493, 674,699,701.

Holt, Ch. Juſt. I am not ſatisfied that they can ever refer the Examination of the Matter to a certain Number of themſelves, becauſe they are all Judges of the Fact, and therefore they tranſact it as Judges in Court; but allow they may refer the Examination of the Fact, and reſerve the Judgment to themſelves, yet doubtleſs they cannot give a Power to make Rates and Orders. And it was quaſh'd.

Vide ante 77. Poſt 97.

Cunmer *verſus* Milton, *Pariſhes*.

S. C. 2 Salk. 528, 529.

A Child was born at Cunmer, the Father, while the Child was under Seven Years of Age, removes to and gains a Settlement in Milton; and this was held a Settlement for the Child: And it was ſaid by the Court, That if a Father be ſettled in a Pariſh, and dies, and after his Wife dies in Childbed, he ſhall be there ſettled.

Where a Settlement for the Father gains a Settlement for his Child. L L. of the Poor, 74, 75.

If Proceedings be ex Officio in the Spiritual Court; yet if they don't give Copy of Articles, they ſhall be prohibited quouſque: Notwithſtanding the Reſolution in Moore, per Cur', and granted Prohibition. It was in the Caſe of ----- & Bennoyer. Vide Show. 158, 172. Fareſt. 148. 1 Sid. 65, 332. 1 Ro. 80. 2 Ro. 318.

Prohibition if no Copy of Articles out of Spiritual Court.

Domina Regina *verſus* Browne.

HE was indicted at Hull for Forging a Cocket for quinq; Sarcinas Lini, Anglice Five Packs of Linen Cloth; and this was removed up by a Certiorari, and after Trial a Motion was made in Arreſt of Judgment, for that it was too incertain; and that it was urg'd, that much ſtronger Caſes than this had been adjudged good, as 2 Lev. 125. duas Sarcinas Canapis, Anglice two Bundles of Hemp, 1 Lev. 303. for Parcel of Thread: Trover for Study of Books; for it is enough ſufficiently to deſcribe the Thing in which they were contained.

Motion to arreſt Judgment for Incertainty of *quinq; Sarcinæ*, &c.

Holt, Ch. Juſt. Detinue lies for a Box of Writings, and if any of them concern Lands, it will be prudent to name it, for that ſhall ouſt the Defendant of his Wager of Law; but it ſuffices that the Things which it contains be certain enough; and if any new Action be brought, Defendant ſhall ſay, That a former Action was brought for the ſame by the Name of ſo many Bundles, &c. and the Queen had Judgment.

It is ſufficient if the Things containing be certain enough.

Garden

S. C. 1 Salk. 194. Garland *verſus* Extend. No Coſts *pro* Defendant if he have Judgment on Demurrer to a Plea in Abatement. Ante 84. Poſt 198.

Garden *verſus* Exon.

PER Cur', There ſhall be no Coſts for a Defendant upon Judgment upon Demurrer to a Plea in Abatement, for the Statute is to be intended of a Judgment upon Demurrer upon the Merits of the Caſe; for if there were Judgment of reſpond' Ouſter for Plaintiff, he ſhould have no Coſts: Ideo a pari; and the Caſe of Thoms and Lloyd was quoted, where the ſame had been reſolved before.

Wife indicted by Huſband, admitted *in Forma Pauperis.*

A Feme Covert was indicted by her Huſband for poiſoning his Cows with bruis'd Glaſs put in their Grains; and ſhe was admitted in Forma Pauperis, though the Court ſaid, The Huſband could not convict her.

Where 'tis a Contempt to charge a Priſoner.

Per Cur', If a Perſon be in Execution for a Fine, it is a Contempt for any to charge him with a Civil Action without Leave of the Court; but the Court will hardly diſcharge the Action, though they will puniſh the Contempt.

If a Perſon is likely to become chargeable to a Pariſh. 2 Salk. 491, 492, 514.

Per Cur', It is a good Cauſe in an Order of Seſſions to ſay, That the Party is likely to become chargeable to the Pariſh, or that he does not rent a Tenement of 10 l. a Year; and they may remove any Man that does not rent 10 l. a Year let him be worth ever ſo much, for his having a Freehold of his own is foreign; and if he has any, it ought to come of his Side upon the Appeal.

Note; Under this laſt Head may be reduced ſeveral Caſes lately adjudged, and which are now Reported in a Collection of Caſes and Reſolutions touching Poors Settlements and Removals, pag. 15, 24, 194, &c. viz.

1. Their being likely to become Chargeable muſt be in the adjudication of the Order, and not in the Recital only, except ſo averred by the Juſtices. The Queen againſt the Inhabitants of Rockville, Trin. 12 Annæ.

2. It muſt be directly ſo averred, Therefore are likely to become Chargeable, as we are credibly informed, is ill. Great and Little Waltham. Eaſter 1711.

3. So whereas J. S. is likely to become Chargeable not ſaying to what Pariſh, is ill. The Queen againſt the Inhabitants of Bradford, Trin. 1711.

4. Whereas J. S. intruded into Royden, and was laſt legally Setled at Hoxden, is ill, it not being ſaid he was likely to become Chargeable, Hill. 1712.

As to the Point of Renting 10 l. per Ann. See divers Caſes in that Collection, viz. Rudwick and Cheddingford, Mich. 1710. The Pariſh of Farnham, in the ſame Term. The Pariſh of Sedgemore, Eaſter T. 1711. St. Saviour's Southwark, Mich. 1714, i. e. 1 Geo. So Northdibley, &c. Eaſter, 11 W. 3. St. Mary Guilford & Cranley-Hill, 2721. St. Johns & Ampwell, Trin. & Mic. 1722.

DE

Term. Sancti Hill.

Anno 2 Annæ, in B. R.

Coram Holt, *Chief Juſtice*,

Powell,
Powys,
&
Gould,
} *Juſtices.*

Domina Regina *verſus* Guy.

A Mandamus was directed to the Official of ------ to ſwear in A. and B. Church-wardens of the Pariſh of ------ To this a Return was, That they were not duly choſen; and now a Rule was made for a peremptory Mandamus, for he ſhould have complied with the Writ as far as he could, and have ſworn one of them, if the Truth were that one of them only had been duly choſen, or elſe have returned, that neither of them was choſe.

Mandamus to ſwear in Church-wardens. Vide Fareſl. 83. 1 Vent. 267. Carth. 118. Vide poſtea 97, 98.

But it was objected, That this could not be done; for by the Cuſtom of the Pariſh the Parſon was to chuſe one, and the Pariſhioners the other: And the Pariſhioners inſiſted on it, That they ſhould chuſe two, and did propoſe two, and the Official could not tell which of them two to ſwear.

Object. Upon Cuſtom of the Pariſh.

Holt, Ch. J. Then you ſhould have made a ſpecial Return, That the Pariſh claims a Right to chuſe two, and that theſe Perſons had an equal Number of Voices, that the Parſon had choſe his Man, and ſo you could not ſwear either of the Pariſhioners Men; or if the Pariſh unanimouſly choſe two jointly, when in Truth they had a Right but to chuſe one, that would be void as to both; and in that Caſe you might return generally, That neither of them had been choſen; and ſo where two have an equal Number of Votes. And at laſt, by Direction of the Court, it was conſented to, to try the Cuſtom in a feigned Action.

What Return ought to have been made.

Vide 2 Salk. 431, 432, 434, &c.

Vide ante 30. Poſt 114, 169, 178.

—— *verſus* Cowper, a Juſtice of Peace.

Upon Juſtices of Peace falſe returning Inquiſition, and the *Affidavits* thereof.

AN Inquiſition of Forcible Entry was removed hither by Certiorari, commanding the Juſtices to ſend all Inquiſitions of Forcible Entries made upon J. S. and the Juſtices returned an Inquiſition of an Entry made by B. upon J. S. and now Affidavits were offered to give the Court Satisfaction, That the only Inquiſition before the Juſtices was an Inquiſition of a Force by A. and that the Precept was, to ſummon a Jury to inquire of a Force againſt J. S. by A. and that they did not inquire of any other Force.

How to be heard, &c.

Per Cur'. We cannot hear Affidavits againſt the Return, which is Matter of Record, in order to make Reſtitution, but we may do it in order to have an Information filed againſt the Juſtices for this Abuſe: Or, if the Return be falſe, you may have your Action of Falſe Return. And here Day was given to ſhew Cauſe why an Information ſhould not be filed againſt them.

Action lies.

Vide antea.

Holt, Ch. J. took this Exception to the Inquiſition, That it alledged the Party to be ſeized in Fee of a cuſtomary Eſtate ad Voluntatem Domini, but did not ſay dimiſs' & dimiſſibil'.

S. C. poſt 266.

Garibaldo *verſus* Cagnoni.

Arreſting one going from Court. Vid. 1 Vent. 11. 2 Mod. 181. Poſt 96, 173.

G. Came to Court to confeſs an Indictment for an Aſſault upon C. and as he was going Home, C. gets him arreſted for the ſame Aſſault; and upon Motion and Affidavit of this Matter, an Attachment Niſi was granted againſt him, and before the Day he diſcharges G. and now coming to ſhew Cauſe, the Rule was ſet aſide, becauſe the Affidavit did not charge him to have Notice that G. came to Court to confeſs the Judgment, for otherwiſe he could not be in Contempt for the Arreſt.

—— *verſus* Catchmade.

1 Sid. 464. a. Hob. 617. Vide 1 Vent. 65, 73. 1 Inſt. 118. a.

Per Cur'. IF a Contract be for four Pounds, and a Plaintiff, to give an Inferior Court Juriſdiction, will ſplit it into ſeveral Actions, a Prohibition ſhall go.

Domina Regina *verſus* Corbett.

Poſt 204.

THE Juſtices of Peace made an Order upon the Defendant, that he ſhould pay B. ſo much Money for Labour and Work done, without ſo much as ſaying that he was his Servant; and it was quaſhed: For, per Cur', this might be Carpenter's Work, &c. and the Juſtices have only Power in Caſes of Wages of Statutable Servants, viz. Servants in Husbandry, and they would be very tender of quaſhing ſuch Orders.

Juſtices of Peace, their Authority concerning Wages. Vide 1 Salk. 406. 2 Salk. 475, 680.

Sutton's *Caſe*.

S.C. Ante 57. Vid. 1 Salk. 21 Fareſl. 50.

HE had been Marſhal of the Court, and for Non-attendance another was ſworn into his Place, but (as the Court declared) without Prejudice to his Right to the Office, for that was left to the Law. Now the new Marſhal, to get Poſſeſſion, makes a Forcible Entry into the Priſon; and Brotherick moved in Behalf of Sutton, that the Court, in regard of the Power they had over their Officer, would interpoſe, and quiet the Poſſeſſion 'till the Title were legally ſettled; and the rather, for that it would look diſreſpectful in him to apply to an inferior Juriſdiction to have an Inquiſition of Forcible Entry, and that the Juſtices would hardly dare to meddle in it, by reaſon of its immediate Dependency on the Court: And tho' a new Marſhal were ſworn in, yet the former was liable to all Eſcapes of Priſoners charged in his Cuſtody, and doubtleſs they would be many in this Diſorder.

Marſhal turned out for Non-attendance, and new Marſhal gets Poſſeſſion by Force.

Cur'. It cannot be diſreſpectful to us, that any ſhould uſe the Remedy the Law gives him. And here you would have us hold Plea of Forcible Entry by Parol, whereas the Court has no original Juriſdiction of Forcible Entry: Et currat Lex, for it is a Queſtion of Right between two contending Officers; and as to the Inconveniency of Eſcapes, the Court ſaid, that he was ſo uſed to ſuffer voluntary Eſcapes, that they could not imagine he feared any Danger that Way. Vide Fareſly's Rep. 50.

He feared no Eſcapes.

Jenkins & Ux' *verſus* Plombe. *Vid. poſtea* 181.

S. C. 1 Salk. 207.

INdebit' by Husband and Wife Executrix, declaring, quod cum the Defendant was indebted to them ut Executor of J. S. for ſo much Money received by him to their Uſe as Executor, he promiſed to pay it, &c. Non aſſumpſit, And at Trial the Plaintiffs were nonſuited, and the Queſtion was, Whether they ſhould pay Coſts upon the Statute of 23 H. 8. And per Darnell, Serjeant, They ſhall; for this Action is brought by them in their own Right, and upon a Contract

Wife Executrix, and Husband and Wife declare as Executors, *ſur Indebit' aſſumpſit.* If upon Nonſuit, they ſhall pay Coſts.

tract with themſelves, viz. the Receipt of the Money to their Uſe, and in which they ought not, at leaſt need not, name themſelves Executors; and the naming the Plaintiff Executor when it is not of Neceſſity, ſhall not exempt him from paying Coſts. Vid. Latch 220. Hutt. 78, 79. And for a Foundation to this Diſtinction, he relied on the Book of 2 H. 7. 15. where the Difference is taken between an Action brought upon the Executors own Poſſeſſion, and where upon the Poſſeſſion of his Teſtator; and upon this he would reconcile the Caſes in 3 Lev. 60, 375. 2 Lev. 165. If Executor bring Trover for Trover and Converſion in the Time of his Teſtator, or upon Trover in Time of Teſtator, and Converſion in his own Time, he ſhall not pay Coſts: So upon an inſimul computaſſet with the Executor for Debt due to the Teſtator the Executor ſhall not pay Coſts.

4 Mod. 244. Vid. 1 Inſt. 241.

Holt, Ch. J. If the Receipt were ſince the Teſtator's Death, and by Appointment or Conſent of the Executor, there the Action muſt have been brought by him, not as an Executor; for the Receipt by his Appointment is a Receipt by himſelf. Then if the Receipt be without the Executor's previous Appointment, yet the bringing this Action is an Aſſent to the Receipt, and makes it a Receipt in his own Right: So that in either Caſe the Debt ought to be looked upon as a new Debt, contracted ſince the Death of the Teſtator. And this Receipt muſt be intended to have been in the Executor's own Time, becauſe the Receipt is laid to have been to the Executor's Uſe; and he concluded that there was no Room for the Executor here to declare as Executor: If there be a Receipt by Appointment of Executor, it is immediate Aſſets in the Executor's Hands, and by bringing this Action, it is in the ſame Manner. And if Executor or Adminiſtrator bring Trover upon their own Poſſeſſion, they ſhall pay Coſts. Yet there if Adminiſtrator had called himſelf Adminiſtrator, and it is ſo entred on Record, and has Judgment, and after Adminiſtration is repealed, the Defendant would be relieved by Audita Querela, becauſe it would appear on the Face of the Declaration that he had been ſued under that now repealed Adminiſtration. And the naming himſelf Executor here is not of Neceſſity, any farther than to ſhew how the original Right came. If Executor account with the Teſtator's Debtor, indeed thereby a new Action accrues, but ſtill it is in the Right of the Teſtator, and no new Contract is made, but only an Aſcertaining of what was due before. If Judgment and Execution be in the Teſtator's Life, and Eſcape in Executor's Time, upon a Nonſuit in Action by the Executor for this Eſcape, he ſhall not pay Coſts; but if he had Judgment and Execution in his own Time, and an Eſcape had happened, for which he brings an Action and is nonſuited, he ſhall pay Coſts.

If the Receipt was ſince the Teſtator's Death, &c.

Vide poſtea.

If to be looked upon as a new Debt.

1 Vent. 109, 110.

Trover upon Executor's own Poſſeſſion, he ſhall pay Coſts.

Vid. Sir Tho. Jones 170.

Action upon Account with Executor.

Powell. Where the Thing ſued for is Aſſets in the Executors or Adminiſtrators before Recovery, there they ſhall pay Coſts upon the Nonſuit: Or when the entire Cauſe of Action ariſes in his own Time. And it was agreed to have been adjudged, that for Rent accruing in

1 Vent. 109, 110. Coſts upon Aſſets, &c.

Executor's own Time, the Executors nonsuited should pay Costs; as also that in Covenant with Testator, and Breach in Time of Executor, should pay Costs. Quære per me, If there be any Difference upon this Account, between Covenant for Rent upon Covenant made with Testator, and Debt for Rent upon a Lease with him? Vide Hob. 283.

And it was agreed by the whole Court, That the Statute, by the Words thereof, does not distinguish the Case of an Executor from any other Case; but it was by an equitable Construction resolved so by the Judges for this Reason, Because the Nature of Cause of Action does not lie in their Privity or Knowledge. That the Statute does not distinguish the Case.

And Holt, Ch. J. said, That it has been held, that if the Plaintiff's Declaration were so bad, that the Plaintiff, in case he obtained a Verdict, could not have Judgment, there, if he were nonsuit, he should pay no Costs; and therefore this Action being by Husband and Wife upon the Possession of the Husband only, so that if there had been a Verdict, he could not have Judgment, therefore he could have no Costs: But he said, the contrary had been resolved. 1 Cro. 175. Hob. 219, 284. If the Plaintiff could not have Judgment after Verdict.

And the Case being moved again to Day, and the Case of Elwis & Mocato in this Court, Pasch. 2 Annæ, was quoted for the Plaintiff, which was several Counts by a Plaintiff Executor, one whereof was an Insimul computassent, and being nonsuited, per Cur', paid no Costs; which Case was now again agreed, because there was no new Cause of Action, but a new Action upon an Ascertaining of an antient Cause, which Ascertaining leaves it still a Debt of the Testator's. 1 Salk. 314. Fares. 48. Vid. Hob. 80. No Costs where no new Cause of Action.

And it was agreed now by the Court, That the Case of 2 H. 7. 15. was a good Foundation for this Case; for there it is agreed, That Feme Executrix cannot give the Goods of her Testator away without Consent of the Husband, and if he consents to it, then it is he that gives it, so the Wife here cannot appoint one to receive this Money, but if he consents, then it is his Appointment. If Husband consents to the Wife's Appointment.

And if an Executor appoint another to receive a Debt of his Testator, and he receive it, it is now the same Thing as if he had actually received it himself, and then it would be Assets in his Hands, and by Consequence appointing another to receive who will not repay, is a Devastavit.

And Holt, Ch. J. strongly inclined, That the bringing of this Action was such a subsequent Agreement as would make it Assets in his Hands from that Time, by the Rule of Omnis Ratihabitio, &c. But he agreed no more would be Assets in his Hands than he recovered, and not as much as was received or declared for, and even for that he would not be liable till after Judgment, but immediately after Judgment, and before Execution, he is liable: Whereas where one sues as Executor, tho' he has Judgment, yet till Execution, the Thing recovered is not Assets in his Hands. And as if the Husband had actually appointed the Defendant to receive, he alone ought to bring the Action in his own Name; so here the Ratihabition amounting to an Appointment, he ought to bring it alone: As if a Man enter into my Land, and take the Profits thereof, I may, if I please, charge

charge him in Account as my Bailiff, though there never was any Privity between us till the Action brought.

And where it was objected, That if the bringing the Action should amount to an Appointment, then by bringing the Action, the whole would Assets in his Hands before any Recovery.

Nonsuit sets the Matter at large again, &c. Vid. Hob. 36. Vid. postea. A *Devastavit.*

He answered, That would not follow; for they being nonsuit, the Matter is set at large again, and he has Liberty to sue the original Debtor; but if he had Judgment, and no Execution, or ever like to have any, yet his bringing the Action, and having Judgment, would discharge the first Debtor, and by Consequence be a Devastavit in him; for by the Judgment he makes the Defendant his Debtor, who never owed any Thing to the Testator.

2 Lev. 189. 3 Keb. 597, 615, &c.

And he quoted the Case of Norden and Levit, Anno 77. which was this: Executor brings Trover for a Conversion in the Life of his Testator, and the Party being arrested and insolvent, he takes a Covenant from him for the Payment of so much Money in Satisfaction: And it was held, That forasmuch as this did extinguish the original Cause of Action, it was an immediate Devastavit, which Judgment was affirmed by the House of Lords; a fortiori, would it be in our Case, the extinguishing of the Original Debt by Judgment against the present Defendant would be a Devastavit, and upon Judgment, not the Administrator de Bonis non, but the Administrator of the Executor, should sue Execution.

Costs to be paid upon Nonsuit. 1 Vent. 119. Hob. 288. contra. Post 181.

If Executor lose the Testator's Goods out of his Possession, and declares that he was possessed of so much Goods as Executor to J. S. and upon the Evidence it appears that they were his own proper Goods, he shall be nonsuited, and pay Costs. Vide Hutt. 214, 220.

If one as Administrator bring Trover upon his own Possession, and is nonsuited, he is condemned in Costs: After Administration is revoked, he shall by Audita Querela be relieved against the Costs. And this was the Case of Turner versus Davis, 16 Car. 2.

Where Relief by *Audita Querela.* 1 Mod. 62. 2 Saund. 148. 3 Keb. 668.

And it was laid down for a Rule, That where an Executor brings an Action in which he need not name himself Executor, there if he be nonsuit he shall pay Cost. 2 Cro. 361, 229.

But Powell and Gould seemed contra, for this was an Action to make Assets, and not for the Recovery of what is so already; and immediately after the Receipt, there was no Assets accrued to the Executor.

If no Assets, no Costs. Vid. Hutt. 78. Lat. 220. 2 Cro. 229, 350, 361. Cro. El. 403. Vide 3 Lev. 60. 1 Vent. 109, 110. contra.

But Holt, Ch. J. said, That in the Case in Cro. Car. 29. reported to be Three against One, as it is in Hutton, is Two to Two: However, he was of Opinion there ought to be no Costs, for the Ward never came to the actual Possession of the Executor, and could not therefore be Assets in him; as if Testator's Goods be taken and converted after Death of Testator, before they come to the actual Possession of the Executor, they are not Assets; and therefore if he be nonsuit in Trover for them, it were hard to make him pay Costs. Et adjournatur.

Domina Regina *verſus* Watton.

IN the Caption of an Inquiſition of Forcible Entry, it was ſaid, Juratores jurat' & onerat' ſuper Sacramentum ſuum, &c. And to this Brotherick excepted, for that it does not appear what the Jury were ſworn to do, whether they were an Inqueſt of Inquiry, or a Petit Jury: And tho' it might not be neceſſary to ſay, That it was Ad Inquirendum pro Corpore Com'; yet at leaſt it ought to appear that they were an Inqueſt: And the Court ordered Precedents to be ſearch'd.

Motion to quaſh an Inquiſition of Forcible Entry for Want of Words *Ad Inquirend'*. Vide 1 Salk. 260, 261, 353, 2 Salk. 450.

And Harcourt, at another Day, inform'd the Court, That moſt Inquiſitions in King Charles II's Time that wanted theſe Words, Ad Inquirendum, were quaſhed.

To which Holt, Ch. J. anſwered, That he had known Inquiſitions quaſhed for it; but ſince it was a particular Offence, and at the Suit of the Party by the Statute, by his Conſent none ſhould ever be quaſhed for it; and in no Indictment is it ever ſaid what the Jury is to enquire of, but only, Ad inquirend' pro Dna' Reg' pro Corpore Com. And as to the Want of the Words, Ad inquirend', in Caſe of Petit Jury, you only ſay, Elect. triat' & jurat', without ſaying, Ad triandum Exitum: And here it is ſaid, Jurat' & onerat' dicunt ſuper Sacr', and it does appear that they were ſworn to preſent, becauſe there is no Iſſue joined; and the Reaſon why in Preſentment at the General Quarter-Seſſions it is neceſſary to ſay, Ad inquirendum pro, &c. is becauſe their Commiſſion is ſuch, and the Jury muſt enquire according to the Commiſſion; but here their Commiſſion is by a Statute: And if it were an Indictment for Riot upon the Statute of H. 4. it might perhaps be held well, without the Word Inquirend'. And the Inquiſition was confirmed per Cur'.

That this is a particular Offence at Suit of the Party, &c.

Inquiſition confirmed.

Parker *verſus* Sir Wm. More.

S. C. 2 Salk. 626. Vide 5 Mod. 95, 450. That a retaking an Eſcaper on a *Sunday* by Judge's Warrant is lawful. Vide ante 21, 22, 63. Poſt 96, 154, 254.

HE was taken up upon a Judge's Warrant, for eſcaping out of Priſon, on a Sunday; and the Queſtion was, Whether this being on a Sunday were ſuch Service of Proceſs as was againſt the Act of 29 Car. 2. c. 7? And though the Court of Common Pleas conceived it was, and had diſcharged ſome for that Reaſon; yet now the whole Court of King's Bench held this Taking to be in the Nature of a freſh Purſuit, that is, a further Force and Means added to a freſh Purſuit by the Act; and it is no Original Proceſs; for a Commitment upon it is but the old Commitment continued down, and the Gaoler or Party might have taken him upon a freſh Purſuit upon a Sunday before this Statute. And Holt, Ch. J. beſides ſaid, That if the Court relieve him, it muſt be by Audita Querela; for it being on Sunday, is a Fact traverſable. But cæteri, If there were no more in it, we would do it upon Motion, but would not relieve in this Caſe.

Note; On an Eſcape out of either Counter, the Action muſt be againſt both the Sheriffs of London. Carth. 145.

Lidford

Vid. 1 Salk. 8.

Lidford *verſus* Thomas.

Motion to diſcharge one arreſted on a *Sunday* without Warrant, &c. Q. 2 Keb. 777, 838.

EYre moved to have the Defendant diſcharged out of Cuſtody, for that he had been arreſted on a Sunday by Proceſs out of this Court; but in Truth it appeared that he was taken without any Warrant on a Sunday, and kept lock'd up till Monday Morning, and then a Writ was got.

1 Mod. 56.

False Impriſonment. 1 Mod. 56. Hetl. 19. 5 Mod. 95.

Per Cur'. If you were impriſoned without a Warrant, you have your Remedy by False Impriſonment; but then let them ſhew Cauſe why Attachment ſhould not go againſt them. And it was ſaid by Gould, That Attachments have gone frequently in ſuch a Caſe; and ſo was the Rule here.

Arreſt. Vid. poſt 173. Ante 90.

Holt, Ch. J. ſaid, That after Arreſt the Bailiff ought to carry the Party to the next Gaol, if he does not deſire to be carried to a Place for to ſend for his Friends.

Vide 1 Salk. 75, 380. 5 Mod. 96. 1 Keb. 933. Officers indictable.

Per Cur'. If a Man be made an Officer by Act of Parliament, and misbehave himſelf in his Office, he is indictable for it at Common Law, and any publick Officer is indictable for a Misbehaviour in his Office.

Domina Regina *verſus* Dyer.

S. C. 1 Salk. 181. Vide ante 41. Exception to an Indictment of Entry for not ſaying *Manu forti.*

AN Exception to an Indictment for an Entry into Land was, That it was not ſaid to have been Manu forti, as the Words of the Statute are. But per Cur', At Common Law one was indictable for entering into Land whereinto his Entry was not lawful, tho' there was no Force; but Statute forbids Force in entring or detaining, even where Entry is lawful: And here they would not quaſh the Indictment.

Vide ante 86.

Horner *verſus* Bonner.

Tithes. If Prohibition for barren Ground. Ante 86.

SUit was for Tithes: A Prohibition was moved for, ſuggeſting the Land to have been barren Ground cultivated, and therefore ought to be exempted ſo long, &c.

Cur'. If Land yield any Profit before, as Wood, &c. it is not within the Statute; for it ought to be ſuapte Natura ſterilis. Of Tithes of barren Cattle, ſee Skin. 560, 561. See alſo ibid. 51, 239, 341, 356. Carth. 70, 143, 264, 304, 392, &c.

Domina Regina *verſus* Paroch' de Littleport.

S. C. 2 Salk. 531. Vide ib. 525

Mandamus for reimburſing an Overſeer turned out. Vide ante 97. Carth. 118, 393, 450, 469, 362.

TAwney ſome Years before had been Overſeer of the Poor of that Pariſh, and had diſburſed ſeveral Sums of his own Money for the Relief of the Poor before any Rate made: After, and before the End of his Year, he was turned out by the Juſtices of Peace, whereby he loſt the Opportunity of reimburſing himſelf what he had advanced out of the Poor's Money. And now a Mandamus was directed to the Church-wardens, Overſeers, &c. to make a Rate for reimburſing him what he had been out of Pocket on Account of the Poor. To which they returned, That the Pariſh did never agree to his Diſburſements, and that his Accounts were not allowed by the Juſtices of Peace.

If ſuch a Writ lies in this Caſe.

Eyre, for the Pariſh. 1. This Writ does not lie in this Caſe; but it ſhould be, 1ſt, To the Juſtices of Peace to ſettle his Accounts.

2. Tho' it be uſual for Overſeers thus to advance Money, yet the Law gives them no Remedy to come at it again; for the Statute does not enable them to charge the Pariſh with any Debt, but he is firſt to raiſe the Money, and then to employ it. And a Conſtable was bound to give Money for the Removal of Vagrants, and ſo were Surveyors of High-ways under a Neceſſity of advancing Money, yet they had no Remedy for it till 14 Car. 1. and W. & M.

What Remedy, againſt whom, and when.

3. If there had been any Remedy, it ſhould have been againſt the immediate Succeſſor; for you will not ſuffer an Examination upon a Forcible Entry after three Years Time, as was adjudged in Harris's Caſe.

Vide ante 77, 87.

4. The Writ ought to have fixed them to a Sum certain, and not to have left it to the Diſcretion of the Overſeers and Tawney. Vide laſt Term, Queen *verſus* Chaſey.

Argument *pro* Remedy.

Wells contra. When the Overſeers have advanced Money for the Relief of the Poor, now they become in the Stead of the Poor a Charge for ſo much to the Pariſh; and in caſe of a Baſtard-Child, they ſhall be allowed what they have laid out to the Midwife, or Maintenance of the Child, before any Order made. And the Caſes objected, where a Law was fain to have been made on Purpoſe for Reimburſement, they are nothing like this; for here the Pariſh is by the Law chargeable to the Relief of the Poor, but there it was not chargeable by any Means.

Econtra, That the Officer begun the wrong Way.

Holt, Ch. J. The Queſtion is, How the Law ſtands? The Statute appoints a Method for the Relief of the Poor, viz. That the Church-wardens and Overſeers, and ſuch Inhabitants as they ſhall call to them, ſhall make a Rate: But here the Officer begins the wrong Way, that is, advances Money without any Rate made; and this is the Way to oppreſs the Pariſh with too great a Charge: And if any ſudden Charge comes after a Rate made, there ought to be a

How the Order for a Rate ought to have been, and how to account. Vide 2 Salk. 525, 531, 533.

new Rate made for that, tho' I do not say but a Rate may be made after the Poor are relieved; but then the Order ought to be for levying the Money for the Poor, and not for the Overseer, tho' it is reasonable the Overseer should thereout satisfy himself for what he before laid out; but still the Overseers must account with the Justices for what they have received, and what laid out: And this is not like the Case of a Bastard-child, for there is no Method of raising, or of laying the Money out in that Case as is here.

Mandamus if the Justices refuse to approve the Rate.

Powell accord. I would help you if I could; it is true, there may be such an Exigency as would not admit of the Delay of a Rate; and there the Overseer may advance, and ought to have a Rate in convenient Time, and have it approved as it ought by the Justices; and if they refused to approve, there a Mandamus had been proper: But still that Rate ought to be a Poor's Rate, and not to reimburse himself, but that is his own Business, when he gets the Money: But the Overseer is obliged to advance no Money 'till Rates be made and the Money raised; and by the Statute a Rate ought to be made once a Month.

Rates when to be made.

Obj. If Necessity be not in the Case; and if the Sum levied ought to be certain.

Now this Term it was urged, That by the Statute of 43 Eliz. by which Overseers of the Poor are appointed, he is to be chose Yearly at Easter; and immediately before any Rate can be made, here will be a Necessity for Money; for Justices of Peace make Orders upon Overseers to relieve such a Person without taking Notice whether there be Money or not, and Indictments have been frequent for disobeying such Orders: And Dalton's Justice of Peace was quoted, where it is said, an Order of Sessions for refunding an Overseer had been allowed of: And as to the Objection, That it is not to levy any Sum certain, it could not be otherwise; for if a Mandamus were to levy 30 l. and but 20 l. due, it would be a good Return to say, That there was not 30 l. due: Quod Holt negavit, & vid. ant. Queen *versus* Guy, pag. 89.

Resp. That Overseers need not advance their own Money. See Carthew 160, 362.

Holt, Ch. Just. Overseer need not advance a Farthing of his own Money, for the Church-wardens and Overseers of the Poor may make a Rate whether the Parish will or not, so it be confirmed by Justices of the Peace; and if any refuse to pay such Rate, it may be levied by Distress, and there ought to be a Monthly Rate, because Possessors are to pay, and Possessions frequently change.

The Writ quashed.

And per tot' Cur', the Writ of Mandamus was quashed. See the Cases touching Mandamus's in Carthew 92, 118, 168, 170, 173, 226, 293, 393, 417, 448, 450, 457, &c. And Skinner 64, 290, 293, 310, 368, 546, &c. 669, &c.

S. C. 1 Salk. 380. Poſt 182, 289. Pop. 132. 2 Rol. ab. 75. Noy 105.

Domina Regina *verſus* Daniell.

Indictment for perſwading and cauſing an Apprentice to leave his Service.

HE was indicted, for that he quendam R. S. Servant and Apprentice of one B. of London, a Shopâ & Domo, & a Servitio præd' B. diſcedere & ſeipſum abſentare procuravit allexit perſuaſit & cauſavit.

1 Exception, That here's no Averment of leaving his Service.

Brotherick excepted, That there was no Averment, that the Servant had left the Service; and though in ſome Caſes, if one adviſe or perſwade another to an ill Thing, if the Thing be done in purſuance of ſuch Advice, the Adviſor ſhall ſhare in the Offence; yet in no Caſe the bare giving Advice, or endeavouring to perſwade one to do an ill Thing without more, is puniſhable: But he agreed, That if ſeveral conſpire and confederate together to do an ill Thing, though nothing more be done, it will be indictable, becauſe the Meeting together in order to ſuch Confederacy is unlawful: Vid. Poph. 134. Vaughan's Caſe. 2 Roll. Abr. 75. 4. And all that is charged here might be, for prevailing with this Servant to go with him to the next Door to drink a Pot of Ale. 11 Co. 98. If a Freeman of a Corporation or Borough does endeavour, intend or conſpire, with others, to do an Act that tends to the Prejudice of the Corporation; yet if there be no Act done, it is no good Cauſe of Diſfranchiſement, nor of Indictment; a fortiori, it will not be a good Cauſe here, where the Endeavour is only to the Prejudice of a ſingle Perſon in one particular Inſtance: And the Rule is, Non officit affectus niſi ſequatur effectus. Even in a Conſpiracy there muſt be ſomething done in purſuance of it. And the ſtrongeſt Caſe of this Kind was the Caſe of the K. *v.* Starling; Indictment for meeting and conſpiring together how to impoveriſh the Farmers of the Exciſe; but the Reaſon why that was held indictable was, becauſe ſuch a Thing would affect the publick Revenue; and if the Conſpiracy were, that none ſhould buy Coffee from B. and no more done, it would not bear an Indictment: So if Confederacy were to way-lay a Man, and kill him, or rob him.

In Conſpiracy.

See 11 Co. 98 b. Bagg's Caſe, & 1 Ro. R. 226.

But Holt, Ch. Juſt. denied the two laſt Inſtances.

2. Not ſaid for what Time.

2d Exception was, That it was not ſaid how long he had withdrawn, in caſe any Abſenting or Withdrawing be underſtood, which ought not to be; for whatever is eſſentially neceſſary to maintain an Indictment, muſt be directly and clearly charged, and not only by Inference.

R. That 'tis imported, and the Matter indictable.

King contra. The Words, Cauſing, Procuring, &c. are very ſtrong, and neceſſarily import a Withdrawing; and he quoted a Precedent of this Kind out of Raſtal. tit. Indictment: And ſure this is a Matter indictable, for it breaks that Truſt that is between Maſter and Apprentice, with very ill Example, and publick Influence to all the Apprentices in England.

Ch. J. doubted whether it were an Offence indictable.

Holt, Ch. Just. doubted whether it were an Offence indictable, because it was only a private Wrong to the Master; and that inticing, &c. a Man to do a Thing, did necessarily import, that the Thing was done; and the Case of Starling was direatly of a publick Nature, and levelled at the Government; and the Gist of the Offence was its Influence on the Publick, and not the Conspiracy, for that must be put in Execution before it is a Conspiracy: If two or three confederate and agree to indict a Man of a Crime of which he is not guilty, that very Meeting and Agreement is an ill and unlawful Act, but not indictable perhaps; but if Meeting be to rob or kill, it may be indictable; but even there advising one to rob or kill, without something be done thereupon, is not indictable; And if a Man commit any Offence under Treason or Felony, and another desire him to withdraw from Justice, or do receive or harbour him in his House, &c. it is no Offence punishable, no more than it is to protect a Man in his House from Arrests in a Civil Action; and since you do not say for how long Time the Absence was, if there were no more in it, how can the Court apportion the Punishment to the Offence?

Vid. ante 48, 55. 1 Vent. 206. 2 Vent. 25.

Bare advising to rob or kill, not indictable.

Time of Absence material.

Post 137, 185. Hob. 219.

Holt, Ch. Just. agreed, A Conspiracy to charge one with a Bastard-child, is indictable; but if one should advise another to do it without more, it would not.

Arg. That the Matter is indictable, and a total Withdrawing imported.

Powell. I thought this Matter indictable, because there are many Acts of Parliament concerning the Regulation of Apprentices and Servants, and that to run counter against any of those Acts, was Matter indictable; for it becomes a publick Concern, that they should be kept in good Order: If one prevail with a Wife to leave her Husband, he is indictable for it, though it be of no more publick Nature than this, because it is a Breach of the common Society of Mankind; and this tends to destroy the publick Trust and Confidence that ought to be between Master and Servant; and in respect whereof, the Law makes it a greater Crime in a Servant to kill his Master than in another, for it is Petit Treason in him, and only Murder in another: And he quoted the Poulter's Case, 9 Co. where bare Conspiracy without more was held indictable. Then let us see the Manner of laying it, and I think it is well enough, for the Case will lie for procuring a false Return, with alledging, that a false Return was made; and though there be no certain Time of Absence laid, it is discedere a Servitio, and that shall be a final and total withdrawing.

That bare Conspiracy was held indictable. 1 Sid. 68. 1 Lev. 62. 9 Co. 55. Mo. 813. Cro. Car. 15. 2 Bulst. 271. 1 Jo. 93. Lat. 79 Hard. 196.

Gould accord' with Powell in omnibus.

If indictable, whether a *Continuando* ought not to be.

Brotherick. Every Violation of the Law, every common Trespass, is in malum Exemplum, but not indictable; and as to the Continuance of Absence, if a Man lays a common Trespass done at such a Day, it shall not be intended to continue farther without a Continuando: Sure then it will be hard to intend an Offence laid in an Indictment to be committed at a certain Day, to continue longer than is expressly laid: And he said, That if at Common Law one had bound himself for a Year, and another had prevailed with him to absent

ſent himſelf from that Service, Indictment would not lie for it: Indeed, if this were the Caſe of an Apprentice compellable to ſerve by Act of Parliament, it were the ſtronger againſt me; but for a bare Apprentice, that is only under an Obligation of his own making, it is very hard to maintain it.

I

Holt, Ch. Juſt. If a Servant for a Year, or at Will, kill his Maſter, it will be Petit Treaſon; and yet to intice ſuch a Servant to leave his Maſter, would not be indictable: So that Reaſon fails, for the Reaſon why it is Petit Treaſon, is becauſe of the Breach of Duty, and not of the continual Obligation of Service. Where to intice a Servant, not indictable.

The Caſe was moved again this Term, and the whole Court unanimouſly reſolved, that the Indictment was ill as to the Manner, for Want of an expreſs Allegation, that the Servant did abſent; for tho' a Cauſe cannot be without an Effect, and that it is ſaid cauſavit him to leave his Service, yet in Indictments it ought to be expreſly ſaid, that the Effect did follow; and ſo it was in the Caſe of the Queen *v.* Tracy before: F. N. B. was quoted, That Treſpaſs might lie for ſeducing a Servant; and the Court ſaid, There might be a Difference between a Servant and an Apprentice, and they would not reſolve if the Matter of this Indictment were ſufficient or not; and Judgment arreſted Niſi before the End of the Term. And the laſt Day of Term, Holt, Ch. Juſt. ſaid, He was not ſatisfied, that to ſeduce one's Servant away was indictable, but to perſwade him to embezil his Maſter's Goods was; but then, whether 'twere neceſſary to alledge that he had embezilled them, for he ſaid the Indictment might perhaps be for the evil Act of Perſwading. *Per Cur'*, The Indictment is ill for Want of an Expreſs Allegation of Abſenting. Vid. poſt, 289. 1 Salk. 380. Vide ante 30. Poſt 114, 171. And Judgment arreſted *Niſi*; but no Reſolution as to the Matter.

But note; Here it was ſaid, That the Servant did embezil; but no Venue was laid, ſo Judgment was arreſted. Judgment arreſted for want of a Venue.

Ireland's *Caſe*.

RAymand moved to bring Principal, Intereſt and Coſts, into Court, and to be relieved againſt the Penalty. Wherefore the whole Penalty of a Bond ought to be brought into Court. Vide ante 11. 25, poſt 153.

Montague urged, That in this Caſe they would not relieve in Chancery, unleſs the Party Obligor would pay a Debt barrable by the Statute of Limitations; and inſiſted on the like Benefit here, this being an equitable Motion; but the Court would not hear of it, but made the common Rule.

Note; The whole Penalty muſt be brought into Court, becauſe Intereſt and full Coſts are to be taxed; and one may have the Remnant out immediately. Vide ante 11, 25, 60. Poſt 153. 2 Salk. 583, 596, 597. See the Stat. 4 & 5 Annæ c. 16.

Croſſe

Croſſe *verſus* Bilſon.

S.C. 1 Salk. 3. *Intr. Trin.* 2 *Ann. Rot.* 146.

In Replevin, Plea in Bar, With an *abſq;* *hoc* Repl' to an Iſſue, Demur to the Replic', and concludes in Abatement. Judgment final in C. B. for the Plaintiff.

REplevin for taking his Mare in quodam Loco, vocat' The King's Highway: The Defendant Cognovit Captionem Damage Feſant, in quodam Loco, vocat' the Queen's Highway, as Bailiff to the Lord L. whoſe Freehold the Place where, is, abſque hoc, That he took Equam præd' in præd' Loco, vocat' The King's Highway; prout the Plaintiff adverſus eum narravit, & hoc paratus eſt verificare, unde petit Judicium & Return' &c. Plaintiff comes and ſays, Quod cognoſcere non debet, quia dicit quod dicto tempore quod, &c. cepit Equam præd' in præd' Loco tunc vocat' The King's Highway, modo & forma prout præd' Plaint' allegavit, and hoc petit quod inquiratur per patriam. The Defendant demurs, and concludes, Unde (ut prius) petit Judicium, & quod Narratio præd' caſſetur; Judgment final in Com' Banc' for Plaintiff, and affirmed upon Error.

Error in B.R.

Holt, Ch. Juſt. The whole Point of the Caſe, take it the ſtrongeſt that can be, is, after a Plea in Bar, and a Replication, the Defendant demurs to the Replication, and concludes in Abatement, and ſure there Judgment final ought to be given; and they all agreed, That all the Matter of Conuſance in the Plea was waived by the abſque hoc; and the Conuſance in a different Place from where the Declaration lays the taking, is in truth Matter only proper in Abatement; but the Concluſion turning it into an Avowry, makes it a Plea in Bar, as all Avowries are, and final Judgment is always given upon them, if they go for the Avowant. They alſo agreed, That where Matter in Abatement is pleaded in Bar, and concluded in Bar, Judgment final ought to be given. So where the Commencement of a Demurrer is in Bar, tho' the Concluſion be in Abatement. 1 Lev. 312.

1. That all the Matter of Conuſance is waived by the *abſq; hoc, &c.* Show. 169, 1 Salk. 3, 5, 93, 94.

2. That where Matter of Abatement is pleaded in Bar, *&c.* Judgment final ought to be. 2 Cro. 202, 253. Show. 4. Lut. 42. 1 Mod. 239. 1 Sid. 189. Show. 155.

But it was objected, That the Demurrer being ill concluded, viz. in Abatement, and contrary to the Bar, it was to be looked upon as if there were no Concluſion at all, and it would be a Diſcontinuance, and Judgment ought to be by Nil dicit.

To which the Court anſwered, that the Concluſion to the Demurrer was, Unde petit Judicium (ut prius), and that is well enough, and according to the Concluſion of the Plea in Bar, and the ſubſequent Words, & quod Narr' caſſetur, being inconſiſtent, ſhall be rejected.

Judgment affirmed.

So per tot. Cur', the Judgment was affirmed.

If a Repleader can be upon a Demurrer. Vide ante 2. Vi. Cart. 193. and Note, 9 *H.* 6. 25. is contrary to the Record. 3 Lev. 20, 440.

Note; Here Powel poſitively ſaid, That a Repleader could never be upon Demurrer, but is always after Iſſue; though the old Books ſeemed to make a Queſtion of it, yet there were 20 Authorities in the new Books of it: And yet Brotherick ſeem'd as earneſt of a contrary Opinion at the Bar, tacente Holt, Ch. Juſt. & Cur. Reliquâ.

Alſo, No Repleader can be upon a Writ of Error. Vide 2 Keb. 769, 789, 825.

Note,

Note; In the Debate of this Caſe at the Bar, it was agreed, That the Matter of this Plea was Matter in Abatement, viz. a Variance in the Places.

That in this Caſe the Matter was Abatement, *viz.* a Variance. 1 Rol. ab. 781. 3 Mod. 248.

2. That in Replevin the Defendant is both Actor and Defendant. As Defendant, he may abate the Plaintiff's Writ, and that were vain for him to do if he could not have a Return, and therefore he muſt proceed from his Plea in Abatement to make Conuſance; for his Action being a Claim of Right to diſtrain, he ought to make Title to it againſt the Plaintiff in the Replevin who claims Property in the Diſtreſs.

Where Defendant claims Property. Vide ante 69. 81. 1 Salk. 94. Vide 2 Lev. 92. 1 Vent 127. 3 Cro, 896. 2 Cro. 519.

Yet this Rule would be explained, viz. If the Defendant in Repleſin claim Property in himſelf, he ſhall have Return without Conuſance, becauſe his Plea deſtroys the Plaintiff's Title: So if he lays Property in a Stanger, and make no Conuſance, if that Matter be admitted by the Plaintiff, there ſhall be a Return without Conuſance; for in that Caſe, by the Admittance, the Plaintiff's Property is deſtroy'd. But in all Pleas that do not ſhew the Property out of the Plaintiff, there muſt be a Conuſance made, and the Plea is what only is anſwerable, and not the Conuſance; for to traverſe that would be a Diſcontinuance. 8 Ed. 4. 41. b. Cro. El. 372. Mich. 2 W. & M. in B. R. Hall *verſus* Foot. 1 Salk. 93. Vide ib. 94.

If Plea be in Bar, and concludes in Abatement. Show. 4, 155. 4 Cro. 202. 5 Mod. 130. 3 Keb. 181. Vide 1 Vent. 136.

If a Man plead Matter in Bar, and conclude in Abatement, it ſhall be taken for a Plea in Bar from the Nature and Reaſon of the Thing; for the Plaintiff can have no Writ, if he has not a Cauſe of Action, and therefore the Court will take the Plea to be in Bar, 37 H. 6. 24. a. 36 H. 6. 24.

If the Plea be Matter of Abatement, and concludes in Bar. Show. 4, 155. 1 Lut. 34, 35.

If one pleads Matter of Abatement, and concludes in Bar, Et petit Judicium ſi Pl. Actionem habere debet, tho' he begin in Abatement, and the Matter be alſo in Abatement, yet the Concluſion being in Bar, makes it a Bar; and the Reaſon is, becauſe you admit the Writ by concluding ſpecially againſt the Action. 18 H. 6. 27. 32 H. 6. 17. b. 36 H. 6. 18. 22 H. 6. 53. b.

How the Defendant in Replevin may take Advantage of a Variance. Vide poſt 157.

And here Holt, Ch. J. ſaid, That in Replevin if the Defendant will take Advantage of a Variance in the Place where the taking is laid, from that in which really it was, he muſt plead it in Abatement, and begin either Petit Judicium de Breve, & de Narr', quia dicit the Cattle were taken in ſuch a Place, abſque hoc, that they were taken in the Place in the Declaration. Then indeed he comes, Et pro Retorn. habendo diſtinctly, he ſays, He avows the Taking in the Place mentioned in the Inducement of his Traverſe, Damage feſant, or for Rent, &c. To which no Anſwer is to be given, but all is to depend on the Plea in Abatement; and it is a proper Concluſion in Replevin to ſay, Unde petit Judicium & Return. Averior', without ſaying any Thing of Damages, for they are given by the Statute. Vide Stat. 17 Car. 2. c. 7. 1 Salk. 205. 1 Sid. 380. 1 Lev. 255. 1 Vent. 40. Ray. 170.

Concluſion.

Ogden

S. C. 2 Salk. 696.

Ogden *verſus* Turner.

To ſay one ſtole a Deer, without averring it tame, not actionable. Vide ante 23, 24.

CAſe for theſe Words: There goes *Ogden*, who is one of thoſe that ſtole my Lord S.'s Deer. Againſt the Action was offered, That Words ſpoke are not like Words in Deeds, for they are Fortius verſus proferentem in Deeds, &c. but otherwiſe in caſe of Action for them. Hob. 77. 1 Ro. Ab. 70 N° 50, 54. Not actionable to ſay that he ſtole a Deer, without averring it to be a tame one; or if that were averred, without alledging that he knew it to be a tame one. And here it is not averred that a Deer was ſtolen from my Lord, as it ought; as if it be ſaid A. poiſon'd B. without averring him dead, not actionable.

Obj. It muſt be underſtood ſo or ſo, and therefore actionable.

Vid. 1 Vent. 4. 1 Sid. 396, 397, contra.

Contra. It was urged, That this muſt be underſtood of a tame Deer, of which Felony may be committed, and then without Queſtion it will bear Action; or it will be underſtood of a Deer in a Park or Place where Deer are kept, and then it comes within the Puniſhment of the Statute of 3 & 4 W. & M. c. 10. againſt Deer-ſtealers, whereby they are to pay 30 l. and Impriſonment, or Pillory and Impriſonment; therefore, quacunque via data, the Action will lie. And the Caſe in 4 Co. was inſiſted on, that to ſay of a Woman, That ſhe has a Baſtard, is actionable; becauſe it brings her within the Danger of the Statute of 18 El. Vid. 2. Sid. 7. 21. Palmer 298. 1 Ro. Ab. 37, 34, 38. 1 Cro. 436. and if the Defendant had indicted the Plaintiff here, after Acquittal he might maintain an Action for it.

1 Jo. 196. 1 Cro. 140.

Yel. 9.

2 Cro. 58, 59. Yel. 64. 2 Vent. 265. Vide 1 Cro. 140. 1 Ro. Ab. 60. 1 Jo. 195.

Cur. Words which of themſelves are actionable, without regard to the Perſon, or foreign help, muſt either indanger the Party's Life, or ſubject him to infamous Puniſhment; and 'tis not enough that the Party may be fined and impriſoned, for if one be found guilty of any common Treſpaſs, he ſhall be fined and impriſon'd; yet none will ſay, that to ſay one has committed a Treſpaſs will bear an Action; or at leaſt, the Thing charged upon him muſt in it ſelf be ſcandalous; and this here is, That he ſtole a Deer, which is Feræ Naturæ, ideo not ſcandalous. To ſay ſuch a one burnt a Barn, without ſaying that it was Part of a Manſion-houſe, or had Corn in it, not actionable; and the Caſe of Sir Lionel Walden in 2 Vent. was carried too far, and happen'd in a dangerous Time, when the Kingdom in general were more furiouſly enraged againſt Popery; The Words were, L. W. is a Papiſt, and goes to Maſs. And the Penalty by the Statute is a pecuniary one, and the Pillory is only for want of Money, ſo is not the direct Penalty given by the Statute. And beſides, Holt, Ch. J. ſaid, That Pillory upon this Account did not make the Perſon infamous, but he would remain a good Witneſs nevertheleſs. And to ſay, that one has hunted in a Park without Leave of the Owner, and killed a Deer there, which ſubjects him to the Penalty of the Statute de Malefactoribus in Parcis, or to call a Man a Papiſt ſimply, would not bear an Action. And he ſaid, That to ſay of a

young Woman that she had a Bastard, is a very great Scandal, and for which, if he could, he would encourage an Action; but it is not actionable, because it is a Spiritual Defamation, punishable in the Spiritual Court. So it is to call a Man a Heretick: And he denied the first Reason given in Anne Davis's Case, 4 Co. 17. a. Et per tot. Cur. Querens nill capiat per Billam.

Vid. postea. 2 Sal. 696.

Quer. nil capiat per Billam.

Note. Per Cur. If Feme Covert be arrested, and it be clear and notorious that she is covert, common Bail ought to be received; but if it be doubted, she ought to find special Bail.

When Bail by Feme Covert, ante 17. Vide ante 42, 61. S. C. 1 Salk. 379, Post 301.

Anonymous.

A Was indicted for deceptive coming to B. as sent from C. to * whom B. owed Money, to call for and receive the Money; and receiving the Money, ubi revera C. never did send him.

Indictment for coming as sent by another to receive Money, &c.

Per Cur. If he had come with a false Token, it had been criminal, and ideo indictable; but the Question is, Whether this be such a Cheat as is indictable? As playing with false Dice is, for that is such a Cheat as a Person of an ordinary Capacity cannot discover; but this is an Indictment to punish one Man because another is a Fool. Per Cur. Let it stay.

Vid. 33 H. 8. c. 1. Punishable by any corporeal Punishment except Death.

Anonymous.

Bailiffs broke a House to execute their Process, and the Court would not grant an Attachment, but bid the Party bring his Action of Trespass. Where the Bailiff may break open a House, &c. Vide Cro. El. 753, 908, 909. Cro. Car. 386, 544. Cro. Jac. 280, 486, 556. 5 Co. 91, 92, 93. 7 Co. 6, 126. 2 Co. 66. 11 Co. 82. 12 Co. 131. 4 Bulst. 146. Hob. 62, 263. 2 Rol. 294. Ow. 63. Yel. 28. Goldsb. 79, 233. 4 Leon. 41. 1 Rol. 182. 1 Jo. 429, 430. Cumberba. 17, 327, 342. Post 173, 210, 211.

Tresspas lies against Bailiffs for breaking a House, &c. Hard. 2. Style 447. 2 Co. 32, 33. Moor 606. Dy. 36. Pal. 53. S. C. 1 Sal. 6. V. 1 Mod. 286.

Lett *versus* Mills.

THE Defendant pleaded in Abatement, that Suscepit Ordinem Militarem, & jam Miles existit; and upon Demurrer it was resolved, That Suscepit Ordinem Militarem was a very proper Way of expressing that he had received the Order of Knighthood. Vid. Stat. de Militibus.

Abatement that he received Order of Knighthood; good.

2. Miles, without Addition, is to be understood of a Knight Bachelor, which is Part of a Man's Name.

3. That there needs no Venue where he was dubbed a Knight, because any thing that does concern the Condition of the Person shall be tried where the Action is laid.

1 Saund. 49. V. 2 Saund. 8. acc. 40, 41.

4. That if a Knight be sued, and not so called, it is a good Plea in Abatement.

But it not being said that he was a Knight Tempore Exhibitionis Billæ, or after the last Continuance, the Court ordered a Respond' ouster. Post 306.

But a *Respond. ouster* for ill Pleading.

Bill againſt Attorney, when to be filed. Poſt 114, 175.

Note; Here it was ſaid, That a Bill filed againſt an Attorney muſt be filed in full Term, and it is not enough it ſhould be on any of the Eſſoin-Days. Of an Attorney's Privilege, ſee Carthew 57, 126, 147, 377, ante 26.

S. C. 1 Salk. 236.

The Counteſs of *Bridgwater*'s Caſe, *verſus* his Grace the Duke of *Bolton*.

Special Verdict upon a feigned Iſſue out of *Chancery*. Vide 3 Mod. 228. 1 Lev. 212. 2 Vent. 285, 286. Aleyn 28. 2 Danv. 527.

SPecial Verdict upon a feigned Iſſue out of Chancery (Whether the late Duke of Bolton did by his Laſt Will deviſe certain Fee-Farm Rents to J. Earl of Bridgwater in Fee) found, That the ſaid Duke, at the Time of his Death, was ſeized of ſeveral Lead and Coal Mines, and ſeveral Mills in the County of Weſtmorland, and of divers Fee-Farm Rents in Berkſhire, and of divers other Lands and Tenements, and made his Will in hæc Verba:

1. He gives ſeveral Lands and Tenements to the Lord W. Pawlet, with Remainder to the firſt and every other Sons in Tail, &c. He further gives him 8000 l. to be paid by his Executors. Then he gives to J. Earl of Bridgwater, his Son in Law, 5000 l. and all his Mines which he held of the Earls of Burlington and Thanet, &c. And then comes the Clauſe in Queſtion.

The Clauſe in Queſtion as to the Reſidue of the Eſtate. Skinner 194, 562, &c. Poſt 111. 1 Sal. 234, 236.

All which I give and deviſe to my ſaid Son in Law J. Earl of *Bridgwater*, his Executors and Aſſigns, together with all my Plate and Jewels, and all other my Eſtate, real and perſonal, not otherwiſe diſpoſed by this my Laſt Will, for to be given by him to his Children as he ſhall think convenient, I ſolely truſting to his Honour and Diſcretion, &c. that he will give them ſuch Proviſion as will be neceſſary for them.

A Clauſe as to Fee-Farm Rents.

And another Cauſe was, Whereas I have contracted for the Sale of my Fee-Farm Rents, my Will is, That if my Debts ſhall not be ſatisfied out of my other Eſtate, my Executors (whereof the Earl was one) ſhall and may ſell ſome Part or all of them for Payment of them, notwithſtanding the Rents are not deviſed by this my Laſt Will.

This Caſe having been three ſeveral Times argued at the Bar, now the Chief Juſtice delivered the Opinion of the Court thus:

Four Things are conſiderable upon this Will.

1. If the Fee-Farm Rents paſs by the firſt general Words.

1. Whether by this Clauſe, whereby the Reſidue of the Duke's Eſtate, both real and perſonal, is deviſed to the Earl of Bridgwater, the Fee-Farm Rents do paſs by Vertue of the general Words, Reſidue of all my real and perſonal Eſtate, leaving out the Words, not otherwiſe diſpoſed of, &c?

2. Sup-

2. Suppoſe they do paſs, Of what Eſtate? Whether in Fee or only for Life? 2. For what Eſtate.

3. To conſider the Words, not otherwiſe diſpoſed of, together with the former Words. 3, 4. The latter Words, and other ſcattered Words, to be conſidered.

4. Whether, conſidering other Clauſes ſcattered in the Will compared with this, the Rents will thereby paſs?

1. As to the firſt Matter, the Duke of Bolton, after ſeveral Diſpoſitions in his Will, gives his Perſonal Eſtate to the Earl of Bridgwater, and then gives the Reſidue of his Eſtate, Real and Perſonal to him: Sure the Rents paſs by the Word Eſtate, for that Word is ſufficient to paſs a Freehold as well as a Chattel. 1. That the Word *Eſtate* will paſs a Freehold as well as a Chattel.

The Word Eſtate is a Genus Generaliſſimum, predicable of two Species that have their Difference, whereby they are divided, that is, Eſtate Real, and Eſtate Perſonal. 'Tis *Genus generaliſſimum*, predicable of two Species.

Eſtate Real is Genus ſubalternum, and has its Species too; that is, Eſtate Real in Fee, or for Life.

And ſo is Eſtate Perſonal in like Manner to be branched into Chattel real, and Chattel perſonal; and it has that Difference of a Chattel real, not becauſe it is a real Eſtate, but becauſe it has a real Extraction. A Man ſeized in Fee makes a Leaſe for Years, Leſſee for Years has a Chattel real, becauſe his Eſtate is derived out of a real Eſtate; but ſtill it is not a real Eſtate, for it is a teſtamentary, and deviſable by Will at Common Law by the Owner: So that if it were of Lands in Knight's Service, or in Capite, the Owner could not deviſe the Land for a Term; but if he had made a Leaſe for Years of it, then it became a Chattel in the Leſſee, and conſequently deviſable. So that the Words Real Eſtate cannot be ſatisfied without a Freehold at the leaſt paſs, for a Chattel real is no real Eſtate. And this is no new Queſtion; for Vid. 1 Ro. Ab. 854. Style 493. That the Word Eſtate comprehends both, viz. Freehold and Chattels real and perſonal, eſpecially if the Words Real and Perſonal be added.

Obj. It is true, by a Deviſe of a Man's Eſtate real and perſonal a Freehold would paſs, if theſe Words come not accompanied with other particular Words which expreſs a Species of an inferior Nature, and which only can extend to a Chattel; and there the Generality of this Word, Eſtate, ſhall be reſtrained and explained by the precedent particular Words, according to the Rule in 2 Co. 46. 1 Saund. 160. 2 Saund. 411. and Abundance of other Books. *Obj.* Rule that the general Words ſhall be reſtrained, &c. by the precedent particular Words.

R. True, but not where the ſubſequent general Words put a proper Difference, and take a higher Species than mentioned in the precedent Particulars.

Anſwer. The Rule is good and general, eſpecially where the particular Words comprehend and expreſs a Thing of an inferiour Nature to the general Words ſubſequent; and that the general Words are put without their dividing Differences; for there indeed the Generality of them ſhall be controlled by the Bounds of the particular precedent Words: But where the general Words do put the proper Difference of Particulars, and beſides, take a higher Species than the Particulars mentioned before, as in this Caſe it does by the Word Eſtate, which is a higher Word than mentioned in the precedent Particulars, and Real and Perſonal the proper Difference, there the general Words ſhall over-reach the Particulars before; as if in the Archbiſhop of Canterbury's Caſe in 2 Co. the Words had been, And all Eccleſiaſtical Perſons of ſuperiour or inferiour Rank, they would have taken in Archbiſhops, Biſhops, &c. Vid. 1 Cro. 447. 1 Roll. Abr. 834. A Man ſeized in Fee of Lands, and of other Lands by Mortgage not forfeited, deviſes firſt all his Lands in Fee to A. and all the reſt of his Goods, Chattels, Eſtates, Mortgages, Debts, &c. to C. It was held, That no Freehold paſs'd, and very rightly; for there the Word Eſtate came with particular Words, without putting the due Difference as is done here.

Obj. That the Word *Reſidue* relates to the perſonal Eſtate before.

Poſt 111.

R. It may relate to the Freehold before.

Objection. The Word Reſidue is a Word of Relation, and therefore to be confined by its Relation to ſomething given before: And whatever is before given is perſonal, therefore the Word Reſidue is to be underſtood of perſonal Eſtate.

Anſwer. 1. This Word Reſidue is not to be underſtood as only applicable to the next immediate Clauſe of Deviſe to the Earl of Bridgwater. 2. Suppoſe it were ſo, yet that would not hinder the Earl from taking an Eſtate of Freehold, for it muſt refer to all the other Clauſes whereby an Eſtate is before given; and an Eſtate of Freehold is deviſed before, why then may not Reſidue relate to it? Suppoſe a Man deviſes the Manor of Dale to A. and the Heirs of his Body, and has other Lands, and deviſes the Reſidue of his Eſtate to J. S. and his Heirs, ſhall not both the Reverſions paſs, and relate to the firſt as well as the laſt, as alſo his other Lands? Therefore the Word Reſidue, if it muſt relate, muſt relate to Eſtate both real and perſonal. But for Argument ſake, ſuppoſe it ſhould only relate to a Thing of the ſame Kind that is deviſed to the Earl before in this Clauſe: A Man has an Eſtate conſiſting of two Parts, that is, real and perſonal, his perſonal Eſtate is as much Part of his general Eſtate as his real Eſtate is; and gives ſome, ſuppoſe by his Will, of his perſonal Eſtate away, and in the ſame Will gives the Reſidue of his Eſtate real and perſonal away, ſhould not this paſs the Freehold as well as the reſt of his perſonal Eſtate? Sure there is no Doubt of it.

Vid. Hob. 65.

Obj. This Clauſe comes under an *una cum* with Chattels.

But Objection. This Clauſe is not only in company with a Clauſe that gives no more than a perſonal Eſtate, but alſo gives it to him, his Executors and Aſſigns; therefore coming with that Clauſe, [All which I give to the ſaid Earl, his Executors and Aſſigns, together

with my Plate and Jewels, and all the reſt of my Eſtate real and perſonal ;] ſo coming under an una cum, with Chattels, with the legal and proper Words of Limitation for Chattels, no more than a Chattel ought to paſs by them.

Anſwer. Let us firſt conſider how this Clauſe [Reſidue of all his real and perſonal Eſtate] is to be applied ; whether we ſhall take it in an Accuſative governed by the Verb [Do,] or in the Ablative, by the Una cum : And I think it an Accuſative, and not an Ablative, and that even in Latin it will be good Grammar ſo, in this Manner ; Omnia quæ do & lego J. C. B. una cum Gemmis & Argent' : Et totum reſiduum Statûs mei realis & perſonalis : And this is good Senſe and Grammar, and conſiſtent with the Meaning and Intent of the Teſtator. But ſuppoſe it be put in the Ablative, the Freehold in the Rents will paſs ; as if a Man has a real and perſonal Eſtate, and deviſes his perſonal Eſtate, Una cum his real Eſtate, the one and other paſs as fully as if there were expreſs Words of Deviſe or Grant to both of them : Hob. 174, 175. Mo. 880. Stukely & Butler's Caſe : A Man makes a Feoffment in Fee of the Manor of D. una cum the Manor of S. and makes Livery ſecundum formam Chartæ, both ſhall paſs, though it be under an una cum : A Man is poſſeſſed of a Term for Years of ſuch a Houſe, and he deviſes his Term for Years una cum his Houſe called B. which is Fee ; they ſhall both paſs ; and there is no Difference between where Words are particular, and where they are general, if the general Words cannot be ſatisfied without paſſing the real Eſtate, as here they cannot.

R. It may well be governed as an Accuſative by the Verb *Do.*

But ſuppoſe it be put in the Ablative, the Freehold will paſs, and here the general Words cannot otherwiſe be ſatisfied.

2. In caſe a Freehold in the Rents do paſs ; Of what Eſtate, whether Fee, or for Life ? and we all hold an Inheritance paſſes to the Earl of B. 1. If a Man be ſeized in Fee, and deviſes his Eſtate, the Inheritance ſhall paſs without any other Circumſtance to manifeſt his Intent, meerly by deviſing his Eſtate : Without this Conſtruction the Words of the Will cannot ſtand ; for the Word Eſtate implies a Fee-ſimple, for that is the general Eſtate that every Man is ſuppoſed to be ſeized of. 1 Inſt. 9. Eſtate comes from Stando, becauſe it is fix'd and permanent, and imports the abſoluteſt Property that a Man can have. It is true, an Eſtate for Life is an Eſtate, but it is with an Addition ; and Eſtate in a Deed muſt be intended of an abſolute Fee-ſimple ; Ideo in a Will, &c.

If a Freehold paſſes, an Eſtate of Inheritance paſſes.

Eſtate implies a Fee-ſimple, it comes from *Stando, &c.*

Moſt certainly in Grants it would not paſs a Fee, becauſe the Law appoints, that let the Intent of the Parties be ever ſo fully expreſſed and manifeſted in Grants, without the Word Heirs, a Fee ſhall not paſs : Feoffment to J. S. to have to him in Fee-ſimple, which Words can have no other Senſe than to paſs an Inheritance, yet an Eſtate only for Life ſhall paſs ; and yet Fee-ſimple in Pleading is that which deſcribes the Inheritance, as ſeiſitus in Dominico ſuo ut de Feodo : But in a Will it is not ſo ; and the Reaſon is, becauſe a Will for Lands is a new Conveyance created by the Statute of 32 H. 8. c. 1. 7. 1. whereby a Man is enabled to deviſe all his Socage-Land at his Will and Pleaſure : Now when a Man manifeſtly ſhews his Intent, that the Deviſee ſhould have the Inheritance, or a greater

In Grants it will not paſs a Fee without the Word *Heirs.*

But otherwiſe in a Will.

greater Eſtate than for Life, the Statute that impowers him to devise his Eſtate at his Pleaſure, ſhall make his Diſpoſition good, without tying him up to the Forms of Common Law; and this is agreeable to the Common Law in Caſes where Eſtates were deviſable by Cuſtom; for there expreſs Words of Limitation are not neceſſary, for Deviſe of ſuch Lands to a Man, & Sanguini ſuo, paſſed an Eſtate Tail.

The Words are, *All my Eſtate*, and muſt be conſtrued a Fee. 1 Sal. 234, 236. Cro. Car. 129. 293. 1 Jon. 195. Vid. Hob. 75. See the caſe of Bertie and Faulkland 3 Chan. Caſes And not a leſs Eſtate.

In the next Place, there are Words of Relation; it is not only the Eſtate, but my Eſtate: The Duke of B. was ſeiſed in Fee of theſe Rents, and he deviſes his Eſtate, that is, he gives that Eſtate that was his, and that muſt be conſtrued a Fee; for if a Man asks the Queſtion, What the Duke gives the Earl? The Anſwer is, his Eſtate: If it be ask'd, What Eſtate? It will be anſwer'd, Fee. Now to conſtrue this to be only for Life or in Tail, would directly contradict the Teſtator's Words; for then an Eſtate for Life would not be the Duke's Eſtate, but a new and a leſs Eſtate; for it was an Eſtate in Fee, and you would have an Eſtate for Life paſs, which would be a new Eſtate, And though there be no Difference between deviſing his Eſtate, and deviſing all his Eſtate, yet the Word [all] makes the Deviſe much more comprehenſive; and if he gives all the Reſidue, he muſt give a Fee-ſimple, for an Eſtate for Life were not all; for every Eſtate in Fee conſiſts both of Freehold and Inheritance, and therefore if he did not give the Fee, he did not give all.

That the Word *Eſtate* comprehends the Thing and Intereſt, &c.

Object. The Word Eſtate is underſtood not of the Intereſt which a Man has, but of the Thing itſelf: If a Man gives by Will all his Eſtate in ſuch a Houſe, then the Intereſt paſſes; but if he deviſes all his Eſtate without aſcertaining in what, the Thing, and not the Intereſt, ſhall paſs.

But I don't think ſo; for the Word Eſtate does in Truth comprehend the Thing and Intereſt; for it is impoſſible one ſhould have the original Intereſt in a Thing, and not have the Thing itſelf, and ſtill the Word in its propereſt Senſe imports the Intereſt. Suppoſe I covenant with I. S. to convey him all the Covenantor's Eſtate in Middleſex, Covenantor makes him a Charter by Words of Grant of totum Stat. &c. Will any Man think the Covenant ſatisfied? No ſure, for that obliges him to convey a Fee-ſimple; therefore if he will perform his Covenant, he muſt go in his Grant beyond the Words of the Covenant. We know in Pleading the Word Eſtate imports a Fee, as in a Formedon the Tenant pleads that J. S. was infeoffed with Warranty, cujus Statum the Tenant has; that ſhall be underſtood of a Fee.

Eſtate in Pleading imports a Fee.

If the Deviſe had been of his Fee-farm Rents, a Fee-ſimple would have paſs'd.

But for another Reaſon this muſt be a Fee: And here I will quit the Word Eſtate, and ſuppoſe the Deviſe to be of his Fee-farm Rents; and ſo I hold a Fee-ſimple would paſs as this Deviſe is, for this Reaſon: For the Earl is injoined to make Proviſion for his younger Children out of the Eſtate deviſed to him. Suppoſe a Man ſeiſed of the Manor of Dale, deviſes it without any Limitation, to make Proviſion for J. S. in ſuch Manner as he ſhall think convenient, and declares, that he leaves it intirely to him? Sure a very good Fee will

Vid. Hob. 65.

paſs, for in all Caſes where Lands are deviſed to a particular Purpoſe, and that the Death of the Deviſee may prevent that Purpoſe, there the Deviſee wall have Fee; and that is Collier's Caſe in Co. 6. And if here the Duke had appointed a certain Sum to be paid, it had been within the expreſs Words of Collier's Caſe; but though that be not done, yet here is a Truſt repoſed in him; and how can he diſcharge that Truſt if he has only an Eſtate for Life? Deviſe to a Man to diſpoſe at Will and Pleaſure, is a Fee, Latch 144. and this is to diſpoſe as he pleaſes. Mo. 57. Pl. 165. Deviſe of Land to his Wife to diſpoſe thereof upon her ſelf and her Children; held that ſhe had Fee ſubject to a particular Truſt for the Children.

Rule of a Deviſe to a particular Purpoſe. 6 Co. 16. Cro. El. 378. 3 Chan. Reports, 102, 103, &c. And here is a Truſt repoſed.

3. We will conſider this Clauſe as qualified by the Words, Not otherwiſe diſpoſed of; that is, taking it for granted that a Fee paſſes, by the Words, the Reſidue of all my Eſtate real and perſonal, how will it be if the Words, Not otherwiſe diſpoſed, be added? And it has been inſiſted on, that theſe Rents are otherwiſe diſpoſed of by the Will; for the Duke deviſes, That his Executors, if Occaſion ſhall be, ſhall ſell any Part, or all of them, for Payment of his Debts and Legacies: So this is ſaid to be Diſpoſition enough, to make them out of the general Clauſe of the Will. But ſure if this Authority given to the Executors be not a Diſpoſition, then the Rents are not exempted out of the Words of the general Clauſe; and it is plain, that giving an Executor Power to ſell, is no Diſpoſition; for the Executor in this Caſe takes no Eſtate, but only has an Authority, which when executed, and the Executor in purſuance thereof makes a Sale of the Rents, then and not before are they diſpoſed of, and excepted out of the general Clauſe of the Will; but if the Executors don't ſell, or if there be no Occaſion for them to ſell, in which Caſe they cannot ſell, then there is no Diſpoſition. 2 Vent. 285.

R. To the Words, (*Not otherwiſe diſpoſed.*)

That giving an Executor Power to ſell, is no Diſpoſition.

One ſeiſed of divers Meſſuages in ſeveral Pariſhes, deviſes ſome of them in Fee, and ſome for Life, and then deviſes all his Meſſuages not before diſpoſed of; and held the Reverſion of the Houſes deviſed for Life would paſs. Indeed, the Executors, in Caſe of Deficiency, are enabled to diſpoſe of theſe Rents; but if they don't, or if there be no Occaſion, they are not diſpoſed of, and therefore given to the Earl. Aleyn 28.

In Caſe of Deficiency, Executors might diſpoſe.

A. ſeiſed of the Manor of Dale, and other Lands, deviſes Part of them for ſix Years, and then deviſes the reſt; it was held, that by the Word Reſt, the Reverſion of the Part deviſed for Years paſs'd.

By the Word *Reſt* a Reverſion may paſs; ante 106.

If a Man ſeiſed in Fee of ſeveral Lands and Tenements in Dale, deviſe all his Lands to B. and his Heirs; but if my perſonal Eſtate be not ſufficient to pay my Debts, then I Intend that Black-acre ſhall not paſs; if the perſonal Eſtate be ſufficient, it ſhall paſs.

It is plain the Executor had not Power to ſell them, but upon a Condition precedent; that is, in caſe his Debts and Legacies could not be paid within ſix Months after his Death; and pray how comes the now Duke of Bolton to claim them if they were diſpoſed of by the Will? If they are diſpoſed of, he can have no Claim; if not, they are deviſed to the Earl: But who ſhall have them during the ſix Months,

The Executor had not Power to ſell, but upon Condition precedent.

'till it be known whether they ſhall be diſpoſed of or not? Sure the Earl ſhall, for 'till then they are not diſpoſed of.

And where in another Clauſe of the Will the Duke takes Notice that he has not diſpoſed of theſe Rents by theſe Words, Notwithſtanding that I have not deviſed them by this my Laſt will.

Anſwer. It is plain from what has been ſaid, that by the general Words they are diſpoſed of; but then what can be the Meaning of theſe Words? It muſt be, notwithſtanding that they are not particularly deviſed to that Purpoſe, or otherwiſe than generally, and it is no new Matter to reject looſe Words out of a Will, rather than the Intent of the Teſtator ſhould be fruſtated: Hob. 65. So theſe Words may be rejected here.

They were not otherwiſe diſpoſed than generally.

As to the Intimation that a Sale of theſe Rents were contracted for.

But ſome will ſay, Sure it was not the Intent of the Duke to deviſe theſe Rents to the Earl, ſince he takes Notice that he had contracted for the Sale of them, and the Deviſe to the Earl could not have prevented the Contract's taking Effect.

Anſwer. It is plain, notwithſtanding the Sale or Contract, he did deviſe them; for if the Debts and Legacies were not paid within ſix Months, he deviſes his Executors to ſell them; and in caſe he, with whom the Contract is made, does not perform, then he deviſes to the Earl; and if the Rents had been ſold according to the Contract, it had been no Prejudice or Diminution of the Earl's Legacy, for the Surpluſage after Debts and Legacies paid would come to him as Reſiduary Legatee.

As to the laſt Clauſe of the Remainder of the Rents, &c.

4. Conſidering the laſt Clauſe of the Will, whereby he orders theſe Rents in caſe of Deficiency, &c. to be ſold, and the Remainder thereof, after the Debts and Legacies paid, to go to the Earl: I ſay, conſidering this Clauſe, with other ſcattered Clauſes in the Will, the Rents thereby will paſs.

Some Doubts have been made, whether the Word Remainder of my Rent be ſufficient to paſs theſe Rents: 1. Becauſe a Remainder is a Reſidue of ſomething; ſo that if there be nothing ſold, nothing can be a Reſidue, or a Remainder: This depends upon the Conſtruction of the Word Remainder, whether there be a Neceſſity to ſell to make a Remainder. But I don't think the Word Remainder here is to be taken for a Remnant of a Totum, when Part is extracted from it; for if the Rents are not ſold, then they remain unſold; and the Word [Remainder] ſhall be underſtood for the Rents remaining unſold.

Remainder here, how to be taken.

Remainder of a Thing created *de novo*, good. 1 Lev. 144. Cart. 52. 2 Keb. 29, 55, 84. 2 Salk. 577. Plo. 35. a. 15 E. 4. 9. contr.

This Word Remainder made ſome Diſpute, which laſted for above an Age: It was a great Queſtion, Whether there could be a Remainder of a Thing created de novo? For there cannot be a Remainder of a thing that never had been before: Since a more reaſonable Conſtruction has been made. Plowd. 35. 1 Sid. 285. A Man by Deed grants a Rent to A. and the Heirs of his Body, Remainder to B. and his Heirs, good Remainder.

Devise is here of the Fee-farm Rents, to make thereout such annual Payments as Devisee pleases; if it were a Sum in gross, it would be a Fee according to Collier's Case, 1 Bulst. 75. Mo. 152, 852. Palm. 392. 2 Cro. Spicer's Case, 527. 6 Co. 16.

If only an Estate for Life had come to the Earl, the Security of Payment of the Annuities must be diminished, and can it be intended but that the Duke intended the Security should continue as long as the Annuities were to be paid? Which could not be, if the Earl had only an Estate for Life; for suppose they, to whom the Annuities are payable, should out-live the Earl? If only an Estate for Life, the Annuities would be diminish'd, &c.

Et per tot' Cur', Plaintiff had Judgment. Judic' pro Quer'.

Carleton *versus* Mortagh.

S. C. 1 Salk. 268. Post 206. Error for Want of an Original, and a Release of Errors pleaded. Post 174, 206, 235. 1 Salk. 267, 269, 270. V. Hob. 164. 1 Cro. 84. Moor 700. 1 Leon. 22.

WANT of an Original was assigned for Error, and a Release of Error pleaded: The Doubt was, Whether the Court, after a Release of Error pleaded in this Case, might award a Certiorari ad informand' conscientiam, to be certified if there were an Original to support a Judgment for a just Debt? And it was agreed, The Party could not demand it of Right after this Plea, and Diversity was endeavoured at, between where the Party himself does expressly confess or admit a Thing, for there the Court ought not to desire any further Information; but where the Admittance is not express, but implied, or by nient dedicere, it is otherwise.

Against which, Holt, Ch. J. put this Case: In Annuity, Riens arriere is pleaded: The Jury find, that there was no Rent behind, and it appears to them that there was no Grant; yet they cannot find a Non Concessit contrary to the Admittance of the Party: And he said, If Error be assigned which in Truth is no Error, and the Defendant plead a Release of Errors which is found against him, yet the Error assigned being bad, Judgment shall be affirmed, because the Issue taken upon the Release was impertinent. Hob. 54. V. 2 Lev. 234. If Error be assigned, which in Truth is no Error, and the Release is found against the Defendant, &c.

And Powell quoted 8 Ed. 4. 8. by Litt' & Moyle v. Danby. That upon a Release of Error, if it be found against the Defendant, yet the Court shall proceed to examine the Judgment; but if it be found for the Defendant, the Judgment shall be to bar the Plaintiff of his Writ; but if there be no Error at all, and the Release be found against him, Judgment shall be affirmed: And it was put in the Paper to be spoke to solemnly. Judgment shall be affirmed.

And at another Day, Ward quoted 1 Roll. Abr. 789. E. 7 Ed. 4. 16. Bro. Err. 165. 6 Ed. 4. 3. 8 Ed. 4. 8. 9 Ed. 4. 32. 1 Jo. 352, 373. 2 Cro. 415. all upon the same Opinion with 8 Ed. 4. 8. before quoted by Powell.

And being moved again the last Day of Term, Holt, Ch, J. said, If the Plaintiff in Error assigns that for Error particularly, which is not so, or the general Error, and the Defendant plead not in nullo est

Why may not a *Certiorari* be awarded *ad informand' Conſcientias*, concerning an Original. 1 Salk. 269, 270. Poſt 206.

Erratum, but a Releaſe, which is either inſufficiently pleaded, or if well pleaded, upon Iſſue found againſt him, there the Court ought not to reverſe the Judgment without examining if the Error be good: Now why ſhould not we have a Certiorari ad informand conſcient', though the Party of Right cannot demand it? Vide 5 Co. Biſhop's Caſe, 1 Jo. 139. Suppoſe want of Original be aſſigned for Error, and it be returned, that there is no Original of that Term, the Defendant in Error, if there be an Original of another Term, ought to make ſuch a Suggeſtion on the Roll, of an Original of another Term; for if he plead in nullo eſt Erratum, he is thereby concluded from making ſuch a Suggeſtion: Yet the Court may award a Certiorari, becauſe there may be an Original of another Term: Sed adjournat' till next Term. Vide poſtea 206.

Adjournatur.

Privilege pleaded.

An Attorney of the Common Pleas pleaded to the Juriſdiction of the Court. Vide 1 Salk. 1, 2, 4, 30.

If Matter of Fact be pleaded in Abatement. 2 Salk. 515, & 545.

Per Cur'. He ſhall not be ſworn to his Plea, nor need the Writ of Privilege be ſet out at large: And if Matter of Fact be pleaded in Abatement, and found againſt the Defendant, Judgment final ſhall be given.

If Property be altered upon a Sale by falſe Inſinuations. Vid. ant. 105. 1 Salk. 379.

A Man comes to a Merchant, or other Dealer, and by falſe Inſinuations, and Account of himſelf, prevails with the Merchant to ſell him Goods upon Tick.

Holt, Ch. J. ſeemed to incline, that that was not ſuch a Cheat as would alter the Property.

Domina Regina *verſus* Tracy.

Ante 30. Poſt 178, 169.

After an Indictment, &c. how Defendant's Plea may be received.

PER Cur', After an Indictment by the Grand Jury, a Plea is not to be received in the Office, without the Defendant gives Security to try it at his own Charges; but if the Defendant comes into Court, and pleads, his Plea ſhall be received, but he ſhall be committed if he does not give Security to try it: If the Defendant gives Security to try it, it muſt be at his own Charge; if he goes to Gaol, it muſt be at the Proſecutor's Charge.

Emerton *verſus* Selby.

S. C. 1 Salk. 169.

Preſcription of Common for Cattle levant and couchant, good to a Meſſuage or Cottage, &c. 3 Keb. 44. Vide 1 Bulſt. 50. 2 Brownl. 101. Vaugh. 253.

A Lowry was for Common, ſetting forth a Preſcription of Common, for Cattle levant and couchant, upon ſuch a Cottage.

Per Cur', It is good to a Meſſuage or Cottage, for Cattle levant or couchant; but it has been queſtioned in the Year 1653, whether it could be good of Common ſans Number; and the ſame has been of late in the Common Pleas, but nothing done in it. And a Cottage implies a Court and Backſide, for Cottage with leſs than four Acres of Land, is againſt the Statute of 31 El. c. 7.

And Holt, Ch. J. ſaid, He had known Levancy and Couchancy tried in an Iſſue before Hale; and that Hale ſaid, the Fothering Cattle in the Backſide would ſuffice; and Judgment here for the Avowant. Vide 1 Salk. 169. Co. Lit. 5. b. Co. Ent. 649. 2 Inſt. 736. Fothering the Cattle ſufficient.

And per Cur'. It would be hard to defeat it, in caſe it were preſcribed to Common ſans Number.

Morgan *verſus* Tomkins.

IF there be an Outlawry upon an Indictment, and that is after ſet aſide, the Judgment ſtands good and open to proceed upon: But if Judgment be upon an Indictment by Nil dicit, or any other Judgment by the Court, and that be reverſed, all is ſet at large, and there is an End of the Indictment: And it has been held in Keelyng's Time, That if a Forcible Entry were traverſed, yet there ſhould not be a Reſtitution, in the Caſe of the King *verſus* Carle. But the contrary has been held ſince, and before; and that there is no Way to prevent Reſtitution, but by Certiorari, or pleading that the Party had Poſſeſſion for three Years before. Vide Stat. 39 El. Per Cur' omnem. If an Outlawry upon an Indictment be ſet aſide, &c. Forcible Entry traverſed. Reſtitution prevented.

Per Holt, Ch. J. Upon an Habere facias Poſſeſſionem, the Execution is not compleat 'till the Bailiff deliver the Poſſeſſion, and is gone. Execution upon *Hab' fac' Poſſeſſion'*. Antea 27. Poſt 298.

Per Holt, Ch. J. If a Man lays a Day in his Declaration that is not material, and the Defendant by his Plea makes it material, and then the Plaintiff in his Replication varies from the Day in the Declaration, it will be a Departure; otherwiſe if the Day had not been made material by the Plea. If a Day not material in Narr' is made material by Plea, &c.

Walden *verſus* Holman.

S. C. 1 Salk. 6, 7.

HOlman was ſued by the Name of B. H. and pleaded in Abatement, That he was baptized, and always known by the Name of J. Abſque hoc that he the ſaid J. was ever called, or known by the Name of B. H. Plaintiff replies, That he was known by the Name of B. from the Time of his Baptiſm. To which the Defendant demurs: And it was urged, that the material Part of the Plea was, That he was baptized by the Name of J. and if ſo, the Plaintiff ought to anſwer that; for if the Defendant were baptized by the Name of J. he could not be known by any other Name of Baptiſm; for one can have but one Name of Baptiſm; and the Abſque hoc coming after that, which is a material Plea, is frivolous, and therefore not to be regarded: And to this Opinion Powell ſtrongly inclined, for that he thought to ſay that he was baptized by another Name, without more, was a good Plea in Abatement, and therefore the reſt was nugatory. Abatement for *miſnomer*, with a Traverſe, Repl' & Demur'. Vide Cro. El. 897. Cro. Jac. 558. 2 Brownl. 48. Poſt 225. Noy 135. 2 Roll. Abr. 135. 4 Mod. 347. *Obj.* That the Traverſe was frivolous.

R. He had here made his Name J. but an Inducement to the Traverſe of B.

How a Man may plead, tho' he never was baptized. V. 1 Inſt. 3. a.

New Name may be by Confirmation. Vid. 5 Co. 43. Pop. 57. Noy 135. Cro. El. 57, 222. Cro. Jac. 558. 1 Brownl. 47. 1 Keb. 427. 14 H. 7. 11. 3 H. 6. 26. 2 Roll. Abr. 135.

Holt, Ch. J. & reliqua Cur' contra, for admitting that it might be relied upon for a Plea, that he was baptized by ſuch a Name, yet that is not done here, but it is only made an Inducement to a Traverſe; which Matter of Traverſe is not immaterial, but would be a good Plea in Abatement; for it is a good Plea in Abatement for a Defendant to ſay, that he was known and called by ſuch a Name, tho' he never was baptized, as many Thouſands in England never were: nor is it true to ſay, That one baptized by the Name of J. cannot be known by another Name, as well as Sir Francis Gawdy acquired a new Name by his Confirmation, without, as Holt, Ch. J. ſaid, loſing his Chriſtian Name; at leaſt he ſaid he was not ſatisfied that his Name of Baptiſm did ceaſe, upon his taking a new Name of Confirmation, as Powell would have it.

Bro. Miſnomer. 2, 4, 7, 43. Reſpond. Ouſter.

And Brotherick at the Bar remembred a Caſe wherein he was of Counſel; in which it was held, That it is not a good Plea in Abatement for a Defendant to ſay, That he was baptized by another Name, without ſhewing likewiſe that he was always known by it; and not put the Plaintiff to ſhew how his Name was altered to enable him to ſue them.

And Darnell, Serjeant, affirmed the ſame Thing: And Judgment to anſwer over.

Roſwell *verſus* Pryor. M. 13 W. 3.

S. C. 2 Salk. 459, 460.

In Caſe for Stopping the Plaintiff's Lights. 1 Vent. 237, 239. Poſt 314. 9 Co. 58. 1 Mod. 55. V. Hob. 131. Hatt. 136.

CASE for Stopping Plaintiff's Lights: Declaration was, That the Plaintiff was poſſeſſed of ſuch a Meſſuage for a certain Term of Years, & habuit & habere debuit ſuch and ſuch Lights thereunto; and Queſtion, Whether this was a good Declaration, without ſaying, It was an antient Meſſuage with antient Lights?

V. 2 Lev. 194. 1 Vent. 274. Poſt 313, 314, 193, 194.

Holt, Ch. J. If a Man has a vacant Piece of Ground, and builds thereupon, and that Houſe has very good Lights, and he lets this Houſe to another; and after he builds upon a contiguous Piece of Ground, or lets the Ground contiguous to another, who builds thereupon, to the Nuſance of the Lights of the firſt Houſe: The Leſſee of the firſt Houſe ſhall have an Action upon this Caſe againſt ſuch Builder, &c. for the firſt Houſe was granted to him with all the Eaſements and Delights then belonging to it; and it was agreed, That formerly the Way was to declare of antient Lights, and antient Meſſuage, but now that was altered. Vide the Caſe of St. John *verſus* Moody, per Cur'.

1

Elwis

Elwis *verſus* Lombe.

ERror of a Judgment in Treſpaſs in the Common Pleas, where it was for Vi & Armis taking away ten Mattocks of the Plaintiff in R. Defendant as to Nine pleads Not Guilty; and as to the Tenth, Actio non, quia Locus in quo is his Liberum Tenementum, and that the Mattocks was there Damage feſant. And upon general Demurrer, the ſingle Queſtion was, Whether this general Way of pleading Liberum Tenementum, without ſhewing any further Certainty, were good? And Judgment was for the Plaintiff in the Common Pleas.

Error in Treſpaſs in *C. B.* for taking the Plaintiff's Mattocks, and *Liberum Tenementum* pleaded. 1 Keb. 433. 2 Keb. 57. 3 Keb. 286. 3 Lev. 203, 204.

And now Salkeld argued for the Plaintiff in Error, the general Error being aſſigned. Either the Liberum Tenementum muſt take in all the Vill of R. viz. That all the Vill is the Freehold of the Defendant, and then without Queſtion the Plea will be good; or it muſt be taken of a particular Place not certainly known or deſcribed within R. and take it to be the laſt, and ſo the more ſtrongly againſt him, yet it will be well, eſpecially upon a general Demurrer.

1. The Plaintiff, in his Replication, might have aſcertained the Place with the ſame Advantage to himſelf, as if the Defendant had done it in his Plea, by making a novel Aſſignment.

2. The Bar is as certain as the Declaration, and leſs Certainty is required in a Bar than in a Declaration, eſpecially when the Bar is a Common Bar.

3. Where-ever the Plaintiff may be general in his Writ and Count, the Defendant may be as general in his Plea; and if the Plaintiff looks for more Certainty, he himſelf muſt make it in his Replication. Before the Statute of 27 El. the old Books run both Ways; that is to ſay, the Locus in quo is an Acre of Land in Dale, Liberum Tenementum of Defendant, as they would have us have done here; or elſe generally Liberum Tenementum, as we have ſaid. 39 H. 6. 6. a. is full in Point for me. 4 Ed. 3. 11. b. Fitz. Bar. 20. that in Clauſum fregit, or de Bonis aſport', ſon Franktenemen', is a good Plea.

Where *Son Franktenement* is a good Plea.

Indeed, ſome Books take this Difference, That where the Plaintiff ſhews the Certainty of his Title, there the Defendant ought to be certain and particular in his Plea, and to aſcertain the Place; otherwiſe where the Plaintiff does not ſhew the Certainty of his Title. And in ſuch Caſe, if he plead Liberum Tenementum generally, he need not ſhew any more Certainty; but if he plead Freehold by Deſcent, Gift, &c. he muſt ſhew Certainty of Place. 3 H. 6. 34. 5 H. 7. 38. ſeem indeed againſt me for Treſpaſs for taking the Plaintiff's Cattle. Defendant pleaded, That the Locus in quo was his Freehold, and that he took them Damage feſant, and held bad; for they compared the Damage feſant to the making of a Title, but that Damage feſant

Where it ought to be more certain.

ſeſant is not traverſable, but a Conſequence of the Freehold's being his.

The Reaſons given in the Books for the foregoing Diverſity are Two, and both of them fail:

Where *Liberum Tenementum* is traverſable, or not. 8 Co. 47. b. 48. 3 Lev. 203, 204.

The firſt Reaſon is, That Liberum Tenementum generally is not traverſable; but Liberum Tenementum by Feoffment of J. S. &c. is traverſable, therefore it ought to be alledged ſo as to be traverſable. But that Liberum Tenementum generally is traverſable. Vide Dyer 23. b. 2 Cro. 59. Cro. El. 137, 812. Raſt. 548.

The Second Reaſon given is grounded upon the Firſt, that being not traverſable, the only Uſe of it is to force a Replication; but that cannot be good, for ſince it is traverſable, it is in the Plaintiff's Power to traverſe it, and not to reply. And there is no Plea of any other Uſe but to force a Replication, but ſuch as are allowed by Law as ſuch, to avoid Prolixity of Pleading; as, Performavit omnia, Non fuit damnificatus, &c.

That where the Plaintiff is general in his Count, the Defendant may be as general in his Plea.

But the true Reaſon why Liberum Tenementum generally is a good Plea, is, That where the Plaintiff is general in his Writ or Count, the Defendant may be as general in his Plea; and if the Plaintiff will have more Certainty, he muſt make it in his Replication.

Difference of Demurring ſince 27 El.

Now to conſider this Caſe ſince the Statute of 27 El. of Demurrers, before which there was no Difference between Matter and Form as to Point of Demurrer: Though, before that Statute, one might demur ſpecially; but it was never ſafe or neceſſary ſo to do, in any Caſe except that of Duplicity, becauſe if one had demurred ſpecially, he could have inſiſted on nothing elſe but what he had ſpecially ſhewn for Cauſe in his Demurrer; whereas if he had demurred generally, he was left at large to inſiſt upon any Thing except Duplicity. Nor was this any Way inconvenient, for while all the Pleadings were Ore tenus at the Bar, tho' the Demurrer were general, yet the Matter was ſo ſcanned, that the Court and Parties well knew what the Cauſe of Demurrer was. But after that Way of Pleading came to be diſuſed, the Court nor Party could not know it; and for that the Statute was made which reſtores the Common Law, ſo far that People may know what a Demurrer is for, whether for Matter or Form; for if the Demurrer be for Matter, the Entry is, Quia Materia in Placito, &c. minus ſuff', &c.

Vide 1 Salk. 219.

1 Saund. 337.

1 Vent. 240. V. Hob. 232.

There are indeed ſome Exceptions to the Rule, That a Circumſtantial Fault in a Plea will not vitiate upon a general Demurrer: As where a Deed is pleaded, and no Profert made of it. But the Reaſon of that is particular, viz. That by pleading a Deed without a Profert, you put a great Difficulty upon the Party to anſwer it. Vide 9 Co. Treſham's Caſe. 1 Lev. 132, 190. and the Caſe of Horne *verſus* Linne, H. 12 W. 2. in this Court. Replevin and Avowry for Rent, Replic' de Injuria ſua propria, abſque hoc, That there was any Thing behind.

1. Held,

1. Held, That this was such a Plea as would force an unnecessary Replication, and for that would be bad upon a special Demurrer, but good upon a general one.

Where a Plea would force an unnecessary Replication.

Besides, the Plaintiff might have ascertained the Matter by a new Assignment, whereof the true Reason is given in Plowd. 84. that where the Plaintiff is general in his Writ or Count, the Defendant may be as general in his Plea.

Vide 8 Co. 120, 133. 9 Co. 37. Cro. C. 209. Co. L. 303. Herl. 174. 11 H. 7. 24. 7 Co. 25.

There are two Ways of Pleading Liberum Tenementum, the one without any Manner of Certainty, the other with a Certainty.

Two Ways of pleading *Liberum Tenementum.*

1. If there be any Certainty, as that the Place where is Black-acre, Liberum Tenementum of him, then the Way to reply is to make a new Assignment.

2. If there be no Certainty, the Way is to ascertain the Place, and to make himself a Title to it in the Replication. Vide Old Book of Ent. 43. Rast. 648. 3 H. 6. 34. Dyer 23.

And this can be no Prejudice to the Plaintiff, for the Affirmative being upon the Defendant, he must make Title to the Place where the Taking is, or he is gone; for which he quoted Lane's Case, Hill. 4 Car. 1. in Judge Godbolt's Manuscript: Trespass Quare Clausum fregit in A. B. and C. Defendant pleaded, That the Locus in quo was Black-acre, White-acre, and Green-acre, his Freehold; and Issue thereupon: And because the Defendant could not prove his Freehold in them, as alledged, Verdict against him. For the Court said, That though it be usual for the Defendant to lay a feigned Place in his Plea, to force the Plaintiff to a new Assignment, yet it is dangerous so to do; for if Issue be taken thereupon, and he cannot prove his Plea, he is gone.

Cur'. You don't consider that you are in a transitory Action, in which there is no such Thing as a Locus in quo: If it had been a local Action, without Doubt the Pleading had been good. If a Man declare Quare Clausum generally, in such a Will, the Defendant may plead Liberum Tenementum, and if the Plaintiff traverse it, it is at his Peril; for the Defendant, if he has any Part of his Land in the whole Town, shall justify it there; and therefore in that Case, the better Way is to make a new Assignment.

Cur'. You are in a transitory Action, and don't consider it.

Sed vide Dyer 23.

But now there is a fix'd Course established in the Common Pleas, as was also in this Court formerly, That in local Actions the Plaintiff shall ascertain the Place in his Declaration, to prevent such general Pleas, and a Polirity of a new Assignment; and the Defendant is confined to the Place ascertained in the Declaration: But here the Defendant, by pleading of Damage feasant, has made that local that was at large before, and therefore he ought to ascertain it at his Peril.

Vide Hob. 176.

And

And they all agreed, That if a Man bring Treſpaſs for taking his Cattle in Black-acre on ſuch a Day, and the Defendant juſtifies the Taking at another Place Damage feſant, the Plaintiff may make a novel Aſſignment, if there were two Takings: So if there were two Batteries on one Day, and the one were on the Plaintiff's own Aſſault, and the other not, if the Defendant will juſtify one de ſon Aſſault demeſne, he may make a new Aſſignment of the other Battery.

Vide Hob. 104.

Judgment affirm'd.

Et Judic' affirm' per tot' Cur'.

Clement *verſus* Scudamore.

S. C. 1 Salk. 243. Vide Noy 106. 1 Mod. 96, 97, 102. 2 Sid. 61. Mar. 54, 45. Godb. 166. Dyer 196. 4 Leon. 242. Co. Lit. 110, b. 140. Cro. Jac. 198. Cro. Car. 411. Special Verdict, That a Man had five Sons, and the youngeſt died, living the Father, leaving a Daughter.

SPecial Verdict, finding that the Lands in Queſtion were Copyhold Lands, Part of the Manor of Croyden in Surrey, of the Nature of Borough Engliſh, and that the Cuſtom of the Manor was, That all Copyhold Tenements of that Manor did and ought to deſcend to the youngeſt Son and his Heirs: That one F. W. had Iſſue five Sons, the youngeſt whereof died, living the Father, leaving Iſſue a Daughter. After the youngeſt Son's Death, the Father purchaſed the Lands in Queſtion, and is thereunto admitted, to have and to hold according to the Cuſtom of the Manor, and after died ſeized, and the Fourth Son entred; upon whom the Daughter of the Fifth Son entred, and made Leaſe to the Plaintiff: So the Queſtion was, Whether the Daughter of the youngeſt Son, dying in the Life of the Father, has good Title as Repreſentative of her Father, who, if he had lived, would have inherited as Heir to his Father? And Holt, Ch. J. who delivered the Opinion of the Court; We are all of Opinion, the Daughter has good Title.

Per Cur'. Borough Engliſh deſcends to the youngeſt Son, and his Daughter has good Title.

1. It is to be conſidered, that where this Cuſtom of Borough Engliſh is for the youngeſt Son to inherit, that by this Cuſtom the youngeſt Son is put into the Room and Stead of the eldeſt Son at Common Law; for as an Inheritance by Common Law ſhall go to the eldeſt Son, ſo by this Cuſtom it ſhall go to the youngeſt, without any Difference: Therefore ſince this Cuſtom alters the Deſcent from the eldeſt to the youngeſt Son, there is the ſame Reaſon that the Repreſentative of the youngeſt ſhall take, as there is at Common Law for the Repreſentative of the eldeſt: And there ought not to be any Difficulty herein, for it appears (tho' Coke be of a contrary Opinion) that all the Lands in England before the Conqueſt, and for ſome Time after, were generally Gavelkind. Vide Lamb. Saxon Law 167. Selden's Notes in Eadmerum.

That formerly all Lands were generally Gavelkind, but ſince altered.

But ſoon after the Conqueſt, for the better Strength and Support of the Crown, Knight-Service Tenure was introduced, and the Courſe of Deſcent altered, and the whole was made deſcendible to the eldeſt Son, to the Intent that theſe Tenants in Knight-Service, who

who by their Tenure were to wait on the King in his Wars, might do it with more Dignity and Grandeur: So in this Instance the ancient Saxon Law was then altered; but notwithstanding that hereby the eldest Male was preferred before the youngest, and the Male always before the Female, yet the Right of Representation remained even to this Day.

Vide Hale's Hist. Leg. cap. 11. p. 230, 231, &c.

That the Right of Representation remains.

2. This Right of Representation has been considered in all Countries and Nations: By the ancient Law of Israel, Ch. 26, 27 of Numbers, an Account is given of this Matter of Representation; it was a Law that the Male should inherit all, but upon Failure of them the Female; and it was a Law, as some say, brought out of Egypt, but always practised, that the eldest Son should have a double Share; but this was not only quatenus he was eldest, but as he was Representative too: Vid. Seld. de Successionibus, c. 23. that Daughter should in that Case have a double Portion; so that Representation was always practised by Greeks and Romans, even by the Law of the 12 Tables.

Right of Representation practised in all Countries and Nations.

But in the third Place, this Right of Representation has not only Room in Inheritances descendible according to the Course of the Common Law, but holds also in Inheritances descendible according to Custom: For in case of Gavelkind, which now we know to be the Custom of Kent, if a Man have three Sons, and purchase Land in Gravelkind, youngest Son in Life of the Father dies, leaving Issue a Daughter, no Doubt the Daughter shall inherit; but if the Purchase had been to the Father, and Heirs Male of his Body, the Daughter had been excluded per formam Doni; but the Custom making it discendible to Heir Male, makes Room for Representative of him; and there is no Difference between Gavelkind and Borough-English, but Secundum majus & minus; in Gavelkind all the Sons take all; in Borough-English the youngest takes all; and the Law takes Notice of both these Customs; for which he quoted the Case of Fane v. Barr, in the Common Pleas, Hill. 1659. Rot. 773. Custom was for a Copyhold to descend to the youngest Son, and not to the eldest Brother: A Copyholder surrendered the Land to another and his Heirs; but before Admittance Surrenderee dies, leaving two Sons; and the Question was between the two Sons; and adjudged that the eldest Son should be admitted, because the Custom was, that the Estate should descend to the youngest Brother, and there was no Estate in the Ancestor to descend; and therefore the eldest Son must have taken as Purchaser: But according to the Report I have of the Case, the Court said, That if the Custom had been laid to have been Borough-English, the eldest had been excluded, for the Law takes Notice of Borough-English and Gavelkind Customs. In this Case, the Custom as found is so far from excluding the Daughter, that it expressly comprehends her; for the Custom is, that the Land is of the Nature of Borough-English, and did and ought to descend to the youngest Son, and his Heirs. So that it is not only that it ought to descend to youngest Son, but also to him and his Heirs, though it had been

That it holds in Inheritances descendible according to Custom. Vid. Noy 15. Dyer 5. b. 1 And. 191. 2 Lev. 87.

Difference between *Gavelkind* and *Borough-English*, and the Law takes notice of both. Vid. Stat. 31 H. 8. c. 3. 18 E. 6. c. 1.

Nota.

How the Right of Entry ſhall deſcend.

the ſame Thing to me; for if Father be diſſeiſed, or make a Feoffment during Infancy, this Right of Entry ſhall deſcend to the youngeſt Son, and if he die before Entry, it ſhall deſcend to his Daughter, though the Father died not ſeiſed of the Land. 8 Co. 43. Jo. 361. 1 Cro. 410.

Heir ſhall have his Age, or Parol ſhall demur.

If there be Deſcent of Land in Borough-Engliſh on Heir under Age, and real Action is brought, he ſhall have his Age, or Parol ſhall demur, as it would in Caſes of Inheritance at Common Law; and what Reaſon can there be, why it ſhould have thoſe Qualities, and not the other Qualities as repreſentative Right? And he approved of the Opinions of Berkly and Brampſtone in the Caſe of Reeves & Malſter, 1 Cro. 410. for he ſaid, If the other Opinion had prevailed it would beget Abundance of Confuſion, but following the other would ſettle Things upon a laſting Foundation. Et Jud' for the Daughter.

Judgment for the Daughter.

Vi. 1 Sal. 97, 99.

Grovenor *verſus* Soame.

Sheriff takes one Bail-Bond upon a Debt by three jointly and ſeverally. Plaintiff takes an Aſſignment, and would have Sheriff amerced: Agreed the Bond was not according to the Statute. V. 1 Vent. 55. 1 Saund. 60. 1 Mod. 33, 240, 244. 2 Saund. 60, 154. 1 Vent. 85. V. antea 47.

ONE Joint Bill of Middleſex againſt three, with an Ac etiam ſuper ſcriptum obligatorium, by them jointly and ſeverally: The Sheriff took one Bail-Bond for the Appearance of them three; and there being no Appearance, the Plaintiff took an Aſſignment of the Bond, and now would have the Sheriff amerced.

Firſt, it was agreed, That the Bail-Bond was not according to the Statute, being for a Joint Appearance to ſeveral Actions.

And Holt, Ch. Juſt. ſaid, It had been adjudged in Ch. Juſt. Glyn's Time, that if the Sheriff takes inſufficient Bail, and has not the Party at the Return of the Writ, an Action would lie againſt him; but the contrary has been held ſince in the Common Pleas: It was indeed always agreed, that Action would not lie for taking inſufficient Bail; but it was not ſettled, whether it would not lie for taking inſufficient Bail, and not having the Party at Return of the Writ; for though the Statute commands him to take reaſonable Bail, yet if he has not the Party, he ſhall be amerced, and the Statute does not exempt him from that: The Writ was, in placito Tranſgr' ac etiam Billæ, and Bail-Bond was to appear in placito Tranſgr' only, and held good in Hale's Time: And though all the Clerks ſaid, They knew the Sheriff amerced after Aſſignment of Bail-Bond, yet Holt, Ch. Juſt. ſaid, He had known it denied; Et per reliquos Juſtic': If one accept of Aſſignment, and the ſame are given as Bail to Action that were Bail to Sheriff, he cannot deny them: But per Holt, Ch. Juſt. If the ſame that were Bail become Bail to Action, and he except againſt them, and they do not juſtify, he may go on with Amerciaments againſt the Sheriff.

If ſame Bail be to the Action after Aſſignment, Plaintiff may except againſt them.

Judgment ſigned after Releaſe pleaded, and *Oyer* denied.

Per omnes Clericos. If Releaſe be pleaded, and the Plaintiff crave Oyer of it, and Defendant will not grant it, Plaintiff may ſign Judgment for Want of a Plea. Vide Morris's Caſe. 2 Salk. 497. Con'. Vide ante 27, 28.

Sir Samuel Aſtry's Caſe.

S. C. 2 Mod. 651. 1 Salk. 651.

HE being Maſter of the Crown-Office, and having been abſent from the Exerciſe of his Office for a conſiderable Time, being fractus Senio, a Sci. fac. was brought againſt him; and Iſſue being joined, he now moved for a Trial at Bar, which the Attorney General oppoſed as a Matter of Prerogative, that the Queen might try her Cauſes at Niſi prius, or at Bar, as ſhe pleaſed.

Maſter of the Crown-Office upon a *Sci. fa.* againſt him, and Iſſue, moved for a Trial at Bar.

Cur'. It is the common Right of any Gentleman at the Bar, to have a Trial at Bar, and it never has been denied in the Caſe of an Officer of the Court: And though Mr. Attorney may have any of the Queen's Cauſes tried at Bar, and is not bound to conſent to a Niſi prius, yet we are not ſatisfied that he ought to have a Niſi prius where Trial at Bar is reaſonable, without Conſent; for the Statute of W. 2. cap. 30. which was the firſt Statute of Niſi prius, ſays, That if Matter require great Examination, it ought to be at Bar: Et adjournat' and nothing ever was done in it.

2 Inſt. 424. *Per Cur.* It was a common Right of Barreſters and Officers. Vi. 1 Cro. 248. 2 Salk. 625, 651. 2 Keb. 133, 164. Vide 2 Inſt. 421 to 426. Adjournatur.

Cuddon, *Chamberlain of* London, *verſus* Provoſt.

RETURN was upon a Habeas Corp', that London is an ancient City, &c. that Time out of Mind there was an ancient Beam kept at the Charge of the City for the Weighing of all ſuch Goods as were uſually bought or ſold by Weight in London, at which all Foreigners ought, and Time, &c. uſed to weigh all ſuch Goods, &c. And then ſets forth their Cuſtom of making By-Laws for Explanation of their Cuſtom, and a By-Law made at ſuch a Time, the ſame as in the Caſe of Bernardiſton, 1 Lev. viz. That every Foreigner who ſhould ſell Goods uſually ſold by Weight, without having firſt weighed them at the common Beam, ſhould pay 13 s. 4d. for every — Weight, that Defendant being Foreigner, &c. And all the Exceptions taken in that Caſe were inſiſted on here: And yet the Court after great Conſideration awarded a Procedendo, according to the ſaid Caſe in Lev. 14, 15.

Vide poſt 177. Return of a By-Law to pay for not weighing Goods ſold by Foreigners at the ancient Beam of the City of *London*. *Bernardiſton's* Caſe. 1 Lev. 14, 15. *Procedendo* awarded.

Cudden *verſus* Eſtwick.

S. C. 1 Salk. 143.

UPON a Habeas Corp. from London, the Return did ſet forth Cuſtom of London, that Time out of Mind there was an ancient Company of Free-Porters in London, and a Cuſtom to make By-Laws, for the better governing of the ſaid Company; and in purſuance thereof, an Act of Common Council inflicting ſuch a Penalty on any that ſhould imploy any not free of the ſaid Company in Portage-work, and that the Defendant did, &c. So the Doubt was, whether ſuch a By-Law, inflicting a Penalty upon Strangers for imploying one not free, were good? For it was agreed, that a By-Law that none but a Free-Porter ſhould do the Work, would be good, with a Penalty; and in Reference to By-Laws in general, a Difference was taken between a private Corporation or Company, and a great City

Upon a By-Law return'd concerning the Company of Free-Porters in *London*, &c. *Q.* If it will bind a Stranger imploying one not free, and a Difference taken.

or Borough; for the former can only make By-Laws to bind their own Members, and touching Matters that concern the Regulation of the Trade, or other Affairs of the Company: But great Cities and Towns, as London, Briſtol, York, &c. can make By-Laws for the better Ordering and Meneging ſuch Town, and that Law will bind Strangers to the Freedom of the Town, while within ſuch Towns, and they are bound to take Notice of ſuch Laws at their Peril: And this Diverſity was agreed to by the Court.

Great Cities can make By-Laws to bind Strangers while there.

Holt, Ch. Juſt. It is true, every Foreigner that comes to a Place is bound to take Notice of the Law of the Place; but here lies the Hardſhip, that you lay a Penalty upon a Man if he don't take Notice, whether a Porter is free or not free, and there is no Way for him to know it.

And at laſt it was adjudged, that no Procedendo ſhould go; and that the By-Law was void to bind a Stranger, who could not have an Action againſt them for not keeping a ſufficient Number of Porters, nor againſt the Porters for not ſerving him: And an Act of Common Council, inflicting a Penalty for buying from any but a Freeman, would be void.

Procedendo denied becauſe this By-Law void to bind a Stranger, and why.

Note; In the Argument of this Caſe, it was ſaid, that Cuſtom againſt Reaſon is void, becauſe it deprives the Subject of the Common Law, which is his Birth-right; and the Reaſons by which a Cuſtom is ſupported, are generally theſe:

Cuſtom againſt Reaſon is void.

1. Becauſe the Party bound by it, has ſome Benefit by it.
2. That the Party who claims the Advantage of it, is at ſome Charge by reaſon of it.
3. That it may have a reaſonable Commencement, or ſuppreſs Fraud.

Three Reaſons to ſupport a Cuſtom.

And the two firſt of theſe Reaſons held in the Caſe of Toll-travers, and Toll-through. Vid. 5 H. 6. 26.

Queen *verſus* Langley.

Vide 1 Mod. 35.
2 Keb. 594.
3 Mod. 139.
1 Sid. 65, 144.

HE was indicted for theſe Words ſpoke to the Mayor of Salisbury, You Mr. Mayor, I do not Care a Fart for you: You Mr. Mayor are a Rogue and a Rascal: And that the Indictment lay, it was urged, that the Words tended to the Diſparagement of the Government, whoſe Officer this Perſon was. But to the contrary it was ſaid, That firſt it was not laid, that he was then in the Duty of his Office, or that he was a Juſtice of Peace. 2. As to the Diſparagement upon the Government, a Diverſity was taken between Elective Officers, and ſuch as are nominated by the Queen; for the Corruption of the firſt cannot reflect upon the Government.

Indictment for Words ſpoke to the Mayor of *Salisbury* in Diſparagement of Government.

Vide 2 Salk. 425.
2 Lev. 200.
1 Vent. 16, 327.
2 Jo. 229.
Fareſt. 28.

And

And Cur'. He might have forc'd him to find Sureties for his Good Behaviour, or committed him: Vid. 3 Mod. The King *v.* Darby, Cro. El. 78. Mo. 347. 3 Cro. 689. They also agreed, That whatever is a Breach of the Peace, is indictable, as sending a Challenge; but that these Words were not a Breach of the Peace, but only occasional, and tending towards it: And after great Deliberation, they adjudged the Words were not indictable; for it is not as much as said, that he was in Execution of his Office, or a Justice of Peace; indeed if they were put in Writing, they would be a Libel punishable either by Indictment or Action; but they are but loose unmannerly Words, like those spoke of an Alderman of Hull, When he puts on his Gown, Satan enters into it, adjudged not indictable in Kelynge's Time: Style 250. You are a forsworn Mayor, and have broke your Oath, not indictable: And binding him to his Good Behaviour is sufficient to secure the Authority of Mayors; but that must be done instantly, according to Doctor Bonham's Case.

That he might have bound or committed him. 3 Mod. 139. 1 Sid. 65. 2 Cro. 58. Hob. 62. The Words not indictable, and why. *Alit'*, If put in Writing. Vide Hob. 121, 215. Vide Postea. 8 Co. 116. 118, &c.

And Holt, Ch. Just. said, That Words that directly tend to Breach of Peace, may be indictable; but otherwise, to encourage Indictments for Words, would make them as incertain as Actions for Words are.

Words directly tending to Breach of the Peace, indictable.

Berwick *versus* Andrews.

S. C. 1 Salk. 314.

ERror of a Judgment upon Nil dicit in the Common Pleas; the Case was; Executor brought an Action upon a Judgment obtained by the Testator, suggesting a Devastavit in the Life-time of the Testator: And it was objected, That this carried it a Step farther than Wheatly and Lane's Case in 1 Saund. for there the Action was brought by the Party to the Judgment, and to whom the Wrong was done: Whereas this is, first, by one that is no Party to the Judgment; for if he would sue Execution upon this Judgment, he must have first made himself Party by a Judgment on a Sci. fac'; and next by one to whom the Tort was not done, and this is a personal Tort that ought to die cum Persona, and that this Matter ought not to go a Step farther: Vid. 1 Vent. 313. 2 Lev. 145, 209. 3 Keb. 735, 797. That such Action will not lie upon a Bond suggesting a Devastavit; and it being for a Wrong done to Testator, an Action ought not to lie for it for the Executor, no more than it would lie against an Executor of an Executor de son Tort, till 30 Car. 2. c. 7.

Error of a Judgment upon *Nil dicit* in C. B. 1 Saund. 219. 1 Sid. 397. 1 Lev. 231, 255. Recovery against the Defendant, and Judgment *de bonis Testatoris*; then Action brought by the Executor on the first Judgment, and suggests a Wasting, the Debt not satisfied.

Mountague contra; Relied upon the Reason of the Case of Wheatly and Lane, and that of Cluther *v.* Thin. 2 Sid. 102. N. Lutw. 208, 210.

Holt, Ch. Just. The Defendant is the Party against whom the Recovery is, and Judgment is de bonis Testatoris against him; and it is suggested, that he has wasted: This is what the Plaintiff's Testator might have done. Sure if Escape were in the Life-time of Testator,

For Escape in Testator's Life, Executor may have Debt against Jaylor.

Vide Lutw. 66, 412. N. Lutw. 26, 124, 181, 208, 209. Vi. 2 Lev. 110.

Teſtator, the Executor may have Debt againſt the Jaylor for it; but ſuch Action would not lie againſt an Executor, nor would this Action lie againſt the Defendant's Executor here, as was adjudged in this Court in Hale's Time, becauſe it is a perſonal Tort, which dies with the Perſon; and it was compared to the Caſe of an Eſcape by the Sheriff, for which Debt does not lie againſt his Executor, tho' it does againſt himſelf; but in Caſe of Eſcape, the Action always lies for the Executor, even where it is in his Teſtator's Time; and ſhall not the Executor of a Parſon have Debt againſt a Pariſhioner for not ſetting out Tithe? Vid. 1 Sid. 407. the Cauſe why he ſhall have Debt, is, becauſe it is an Injury done to his Right; and therefore within the Equity of the Statute of Ed. 3. De bonis aſportat', and a Quare Impedit lies for an Executor upon that Statute, in caſe he brings it within ſix Months after the Avoidance; and upon this Judgment, he might have ſued a Sci. fac', and after Judgment therein have a Fi fac. ſuggeſting a Devaſtavit. Now this Action is in Lieu of a Sci. Fac'.

Vide Antea.

1 Vent. 30, 31. & lib. ibi citat.

Vide Lutw. 670, 671, &c.

1 Salk. 310, 314.

That it is within the Equity of the Stat. *De bonis aſportat'*, 4 *E.* 3. *c.* 7.

Powel. Hale uſed to ſay, That this Action ought not to be ſuffered but when there was a Judgment to ſupport it; and this is within the Equity of the Statute De bonis aſportat'.

Gould and Powys accordingly: And the Difference is where it is a Tort annexed to Goods, then it is within the Statute, becauſe it ariſeth ex delicto, mixed with a Right.

If Executor may have Caſe for a falſe Return.

And Powel ſaid, That the better Opinion was, that Caſe would not lie for an Executor for a Falſe Return of a Proceſs of Execution.

Holt, Ch. Juſt. I have known the contrary adjudged.

But then an Exception was taken to the Declaration, That it was not alledged that the Debt was not ſatisfied, but only that the Teſtator nor Plaintiff could not have Execution of the Judgment; but it may be they were ſatisfied without Execution.

Foundation of this Action.

Holt, Ch. Juſt. The Foundation of this Action ſtands upon Two Things, viz. The Debt not being ſatisfied, and the Waſte; and in all Actions of Debt, it is incumbent upon the Plaintiff to ſhew, that Debt is due.

Obj. What if the Plaintiff had been paid, and Iſſue upon the *Devaſtavit.*

Powel. If the Plaintiff had been paid, the Waſting the Aſſets could be no Devaſtavit as to him; and if Iſſue were taken upon Devaſtavit or not, the Defendant might give Payment to Plaintiff in Evidence.

Quod Holt negavit; Because the Wasting the Assets, the Debt being not satisfied, is the Cause of Action; and if the Debt be paid, the Issue ought to come upon that, that is a Nihil debet, which may well be pleaded, though this be a Debt upon a Judgment, because this is Matter of Fact; and if you traverse the Devastavit, you admit the Non-payment: And he compared it to the Case of Debt against a Sheriff for an Escape, you must shew the Debt not to be satisfied: And suppose a Defendant in Execution does pay the Plaintiff, and no Satisfaction is entered on Record, and the Sheriff suffers him to escape, and Debt is brought against him for it, he cannot take Advantage of that Payment: And at last, the Record of the Case of Wheatly and Lane was brought into Court, agreeing exactly with this Declaration. And the Plaintiff had Judgment.

1 Saund. 38, 219.

That Case of *Wheatly* and *Lane* agrees. 1 Saund. 216. 1 Sid. 397, 1 Lev. 231, 255. S. C. 1 Salk. 119. 2 Sal. 642, 3.

Russell *versus* Corn.

FAlse Imprisonment by Husband and Wife, for the Imprisonment of Wife, per quod negotia domestica of the Husband per Spatium ---- remanserunt infecta ad grave damnum of both: It was moved in Arrest of Judgment, That the Business of the Husband remaining undone, could not be ad damnum of Wife, and that the Action for that ought to be by Husband alone; as if the Husband concludes per quod Solamen & Consortium amisit, he must conclude ad damnum of him alone: But it was answered, That here the Action being well brought, and conceived for the Imprisonment, what came under the per quod would only be taken for Aggravation; as if Words in themselves actionable be spoke of Wife, and Husband and Wife bring the Action, and conclude per quod the Husband lost his Customers, it will be well; for the Words being in themselves actionable, per quod shall be taken for Aggravation.

False Imprisonment brought by Husband and Wife, by which the Husband's domestick Concerns remain'd undone, *ad damnum* of both, and well. Vid. Post 149. 2 Cro. 123. *Per quod, &c.* is only for Aggravation. 1 Salk. 119. 2 Salk. 642.

Quæ omnia Cur' concessit: Et per Holt, Ch. Just. Matter may be laid by way of Aggravation in Trespass for breaking his House, and beating his Servant, without saying per quod Servitium amisit; no Action lies for the Master for Battery of Servant without per quod, yet it may be well put in as an Aggravation; but if you make two several Counts of it, one of them, viz. for beating Servant, will be bad: Suppose a Man gets another's Maid or Daughter with Child, no Trespass lies for it; but if he that has done it came into the House without the Owner's Leave, he may put the getting his Daughter with Child in for Aggravation, or he may omit it, and give it in Evidence within the alia Enormia,

Matter may be laid in Aggravation of Trespass, which in it self does not bear an Action. Show. 180. 1 Salk. 119. 1 Keb. 787.

Judgment was for the Plaintiff, Nisi Causa, the first Day of next Term. Vid. Newman *v.* Smith in B. R. Pasch. 5 Annæ R.

2 Salk. 642. Judgment *pro Quer' Nisi.*

DE

Termino Paſchæ,

Anno 2 Annæ, in B. R.

Coram Holt, *Chief Juſtice*,

Powell,
Powys,
&
Gould,
} *Juſtices.*

Queen *verſus* Lane.

Vide 1 Salk. 67. 2 Salk. 613. Poſt 220. *Contra pacem* omitted in an Indictment. 4 Mod. 145, 146, 164. 5 Mod. 425.

INdictment was for exerciſing the Trade of a Barber without Service of Seven Years. The Exception was, That it was not laid contra Pacem. And tho' Holt, Ch. J. thought it well enough, becauſe laid contra Form' Stat'; yet by the other Three it was quaſh'd, for every Breach of a Law is againſt the Peace, and ought to be ſo laid.

Smith *verſus* Aiery.

Vide 1 Salk. 22, 23, 344. *Indeb' aſſump'* lies not for Money won at Play. 5 Mod. 13. 1 Lutw. 180.

IN Action for Money won at Play, there were two Counts, one ſetting forth a ſpecial Agreement to play at ſuch a Game, and mutual Promiſes of Payment, as it ought to be; the other was, That in Conſideration that the Plaintiff ſuch a Sum had won of the Defendant at Play, he promiſed to pay it: And here it was reſolv'd, That an Indebit' aſſumpſit did not lie for Money won at Play; for that Action never would lie but where Debt would lie, and it never was heard that Debt was brought for Money won at Play.

2. That the Second Count was bad, for at that Rate one may declare, that Defendant was indebted to him, upon a certain Agreement, in ſuch a Sum of Money, and that in Conſideration thereof he promiſed to pay, which would doubtleſs be bad; for he ſhould ſpecially ſet out ſome Agreement whereby a Debt was raiſed, as for

Goods ſold and delivered, &c. An Indebit' can never be upon mutual Promiſes; But general Aſſumpſits lie on mutual Promiſes. See Carth. 479. Skin. 196, 218.

Nor upon mutual Promiſes.

1 Vent. 53, 152.

And Holt, Ch. J. quoted a Caſe in my Lord Hale's Time, where it was held it would not lie upon a Bill of Exchange againſt the Acceptor.

Vide Hard. 486, 487. 3 Lev. 118. 1 Lev. 298.

And per Holt, Ch. J. There is no Way in the World to recover Money won at Play but by Special Aſſumpſit.

Poſt 131. Nel. Lut. 510. Special *Aſſumpſit.*

Per Cur'. Notwithſtanding the Caſe of Eccleſton *verſus* Linne, in the Exchequer Chamber, it has been held frequently, both here and in Common Pleas, ever ſince, That this Action of Indebit' would not lie for Money won at Play.

V. 5 Mod. 13. 1 Lut. 180.

3. They held clearly, That any Thing in the firſt Count, which was right, could not help any Defect in the Second; for tho' they both were put in one Declaration, yet they were as diſtinct as if they had been in two ſeveral Actions.

If firſt Count will help the ſecond. Vide contra. Verdict.

4. Tho' it was objected that this was after Verdict, whereby the Jury had found that Plaintiff had won Money of Defendant, which could not have been without a ſpecial Agreement, and mutual Promiſes between them; and if what the Jury muſt neceſſarily have found had been alledged, it would have been well, and therefore the Verdict did cure.

Yet tota Cur' ordered Judgment to be ſtayed till the Plaintiff moved further.

And Parker moved for Judgment at another Day, alledging, That mutual Hazard ſufficed to raiſe a Debt; and for Caſes cured after Verdict, quoted 1 Vent. 109, 123.

Holt, Ch. J. The Action ought to be brought upon the Agreement of the Parties. 'Tis true, when two agree to play for ſo much Money, that is an actual Promiſe; but if either win, there is no Debt ariſes thereupon, for nothing but a meritorious valuable Conſideration can raiſe a Debt, and it is an Error to think that every Contract which obliges one to pay Money does raiſe a Debt: As if A. promiſe C. to pay him a Debt due to C. from B. and it be for good Conſideration, A. is thereby bound to pay it, but yet it is not a Debt upon him. And if he after had come, and in Conſideration that I am bound to pay you the Debt of B. I promiſe to pay you, an Indebit' would not lie thereupon. And Indebit' has been brought for a Tenant right Fine, which I never could digeſt.

How the Action ought to have been. Vide poſtea. 1 Vent. 9. Vide antea. 1 Vent. 51. Videt' contr.

Conſideration to raiſe a Debt. Fareſl. 12. Vid. Hob. 18, 88.

And Gould quoted 2 Vent. 175. the very Caſe; and Methwin and Andrews's Caſe in the Common Pleas.

Per tot' Cur', Judgment was arreſted.

Judgment arreſted.

Anonymous.

In Ejectment Plaintiff delayed by Injunction till the Term ended. V. 1 Salk. 322. Poſt 288. See Carth. 3, 204, 288, 391, &c. Vide poſt 222, 309.

IN Ejectment the Term was made for five Years; and after Verdict for the Plaintiff, he was delayed of Judgment and Execution, by Injunction in Chancery, till the Term incurred. And now it was moved to renew the Term, and the Caſe of Dangdell and Greenvill was quoted where it was done, and that they uſed to do it frequently in the Exchequer.

Cur'. We cannot do it without altering the Record.

And Gould ſaid, they had held in Sir John Roll's Caſe, That it could be done by Conſent, but not otherwiſe.

And Holt, Ch. J. ſaid, He conſidered there wanted a Clock-houſe over-againſt the Hall-Gate, and the Motion was denied.

Parkins *verſus* Woollaſton.

S. C. 1 Salk. 321. Poſt 139. Writ of Error no *Superſedeas* till Notice.

CApias on a Judgment returnable ſuch a Day, and Non eſt invent' returned, but not filed. A Writ of Error was taken out before the Day of Return of the Capias, but not allowed till that very Day, nor any Notice thereof to the Plaintiff's Attorney.

Vide poſtea 139. 1 Vent. 30. cont'. 1 Sid. 44, 45.

And the Court ſaid, that the Opinion in ſome Books was, That a Writ of Error was a Superſedeas to avoid Execution from the enſealing thereof, tho' not to puniſh the Officer till Superſedeas comes to him; and of this Opinion is Rolle: But that the Law now is taken, that it is not a Superſedeas till Notice to the Plaintiff's Attorney, and that the Allowance thereof is ſufficient Notice, or that actual Notice be before Allowance.

What Notice. Vide antea.

And they held, That if Writ be executed before Notice of Writ of Error, the Return or Perfection thereof may be after: And if a Capias be returnable ſuch a Day, an Execution of it, ſedente Cur', that Day is good, ſecus not. So that they were all clear, That if a Writ were returnable as of Yeſterday, but not actually returned, and Writ of Error is allowed or notified to Day, yet the Return may be made and filed to Day.

Execution of a *Capias ſedente Cur'*.

Cro. El. 761.

Where Writ of Error is allowed the ſame Day the Execution is returnable, &c.

And if Writ of Error be allowed or notified, ſedente Cur', the Day on which the Writ of Execution is returnable, (becauſe it comes ſedente Cur', while the Writ of Execution is executable, and there cannot be well a Fraction of a Day) there it ought not to be returned or filed, but is ſuperſeded: But if it is not notified till after the Court is up, at which Time the Execution is executable, there a Return may be of the Writ, and that may be filed: And according to that Diverſity it was ordered to be filed here. Per Cur'.

Note; It was upon a Sci. fa. againſt Bail, and no Capias againſt Principal pleaded.

Per Holt, Ch. J. & Cur'. In Action by an Aſſignee of Bankrupt by Commiſſioners on a ſimple Contract, the right Way is to lay the Promiſe to have been to the Bankrupt; except there be an expreſs Promiſe after Aſſignment made to Aſſignee. And the Way of declaring of a Promiſe to the Aſſignee is very inconvenient, and a Means to ouſt the Defendant of the Benefit of the Statute of Limitation: For if Goods were ſold five Years before the Aſſignment by Bankrupt, and then the Debt is aſſigned, and a Year paſſes, Aſſignee declares on a Promiſe to himſelf, it will not be a good Plea to ſay, that the Defendant non aſſumpſit infra ſex Annos to the Bankrupt, for that does not anſwer the Declaration. And if he plead non aſſumpſit infra ſex Annos to the Plaintiff, it will be againſt him; for if there be any Promiſe transferred by the Act, it is only upon the Aſſignment; and the Intent of the Statute was only to transfer the Action, and nothing elſe. Indeed if after Aſſignment another receives the Money, Action will lie for the Aſſignee upon a Promiſe to himſelf, becauſe the Receipt of Money after Aſſignment is a Contract with him, and every Contract or Agreement, per Holt, Ch. J. is an expreſs Promiſe, not in Word, but in Deed, which is as ſtrong; and there is no ſuch Thing as a Promiſe in Law, and that Acceptance of a Bill of Exchange is an expreſs Promiſe to pay it.

Action by an Aſſignee of a Bankrupt by Commiſſioners, &c. how to be laid. 2 Show. 238. 1 Keb. 1, 289. 1 Lev. 17. Fareſt 83, 96. 3 Lev. 69, 191. Carth. 149. See Skin. 21, 22, 30, 149, 270, 293.

If another receive the Money after Aſſignment. V. 2 Saund. 239. 1 Vent. 16. Vide antea 29, 30, 81, 129.

Mrs. Dennis *verſus Doctor* Lane.

SHE was a Widow, and had a Daughter who was an Heireſs to 800 l. per Annum, to whom the Doctor made Love; whereupon the Mother forbad him her Houſe; yet he came at another Day, and meeting the Mother upon the Stairs, notwithſtanding ſhe then again expreſly forbad him to go forward, yet he puſhed on to the young Woman's Chamber in a rude Manner. This Behaviour frightened the Daughter's Mother ſo much, that ſhe ſent for Friends to conduct her Daughter to London; of which the Doctor having Intelligence, came with three others, and followed the Daughter, and came to the ſame Inn where they lodged at Night, and took up the adjoining Rooms to the Mother and Daughter, whereby they put the Mother into Fits for Fear: And the next Morning, as they were taking Coach, the Doctor aſſaulted the Gentleman that put the Lady into her Coach, and purſued them again that Day, and gave out that he would force the Daughter from them, ſo that the Mother was fain to hire Men to guard the Inn that Night. This Matter was tranſacted in March was Twelve-months.

Doctor *Lane* bound to the Peace for his Rudeneſs to the Mother of an Heireſs, &c.

And the Doctor, the laſt Aſſizes at Hereford, meeting the Gentleman who was the principal Manager of the Family, and helped to guard the Daughter to London, he being a Barriſter at Law, and a near Relation to the young Lady, in his Gown, aſſaults him, and beats him ſeverely with a Cane; whereupon the Judge of Aſſize bound him to appear the firſt Day of this Term in this Court: And upon all this Matter being put together, and an Oath by her,

Freſh Occaſion given upon an old Grudge.

that ſhe believed the Aſſault upon her Kinſman to be in Purſuance of the Deſign upon her Daughter; and that ſhe was informed he threatned her, and endeavoured to corrupt her Daughter's Maid, to facilitate his ſtealing the Daughter.

Per Cur'. The Doctor's coming in that Manner, in Deſpight of the Mother's Prohibition, and againſt her Will, was good Cauſe to require the Security of the Peace; and ſo was the enſuing Behaviour of the Doctor upon the Road.

Vide antea.

Demand of Security ought to be freſh after the Fray given, &c.

2. This Demand of the Security of the Peace ought to be freſh after the Fray or Cauſe of Fear given, and therefore if it had not been for the new Aſſault upon the Kinſman, the Court would not bind him to the Peace here; for the ſuffering conſiderable Time to paſs before the Demand of Security, is a great Sign that the Party was not afraid. But here there being an old Offence, which one ought to give Security of Peace for, and a freſh Occaſion given, which gives probable Reaſon to believe the old Grudge continued, the Court ordered him to give Security to keep the Peace, and took his own Recognizance in 200 l. and that of two more in 100 l. each, but refuſed to bind him to his Good Behaviour, becauſe of the Length of Time, though they declared, if they had come when the Matter was freſh, they would have bound him to his Good Behaviour, and in a much greater Sum.

How the Cauſe of Binding ought to appear, &c.

Note; All the Cauſe of Binding to the Peace ought to appear in the Articles which are ſworn by the Party, and read in Preſence of the other; and one that gives Security of Peace, muſt ſtand upon his Recognizance for a Year and a Day, and the Condition of Recognizance is to keep Peace towards all the King's Subjects, and particularly towards the Perſon that demands it.

Shuttle *verſus* Wood.

Debt upon a Recognizance given in C. B. Vide 2 Salk. 564, 600, & 659. Shuttle *verſus* Wood.

DEBT upon a Recognizance given in Common Pleas brought in this Court.

And Raymond moved to have the Action diſcharged, for that the Defendants had ſurrendered the Principal even before the Action commenced. And now by a Rule of Court here, if Debt be brought upon a Recognizance of this Court, the Defendant has eight Days in full Term to render the Principal, whereby the Defendants have now equal Advantage in the Caſe of Debt, and Sci. fa. upon a Recognizance.

V. Hob. 195. Aleyn 12. 1 Cro. 312.

To which it was anſwered by Dee, That tho' that be a Rule in this Court, yet there is no ſuch Rule in the Common Pleas; and this being upon a Recognizance of the Common Pleas, we muſt do in it as would be done there if the Action were brought there.

And ſo ſaid the whole Court, That he ſhould have the ſame Sauce here as in the Common Pleas. And formerly they would not ſuffer an Action upon a Recognizance in this Court, becauſe of the greater

Miſchief it would be to Defendant than a Sci. fa. But ſure the Action was always well maintainable, and our Rule is in Avoidance of that Miſchief.

And Raymond was directed to enquire how the Courſe of Common Pleas was, for they muſt guide themſelves thereby here in this Caſe.

Per Cur'. Antiently there could be no Proceedings on Bail-Bond till the next Term, and 'tis a great Grievance to put it in Suit till after a convenient Time, tho' it is otherwiſe practiſed in the Common Pleas by the Attornies, merely to make Work for themſelves. Of Proceedings upon Bail-Bonds.

Per Cur'. A Will, when clear, and the Intent of the Parties fully appears, is as much to be favoured as any Heir at Law. Will to be favoured.

Southers's *Caſe*.

SOuthers, Marſhal, was complained againſt by Whitacre, for that he wilfully ſuffered a Perſon brought up upon a Habeas Corpus, and committed in Court, to eſcape. Vide poſt 183.

And, per Cur'. If one be in Cuſtody upon a criminal, and alſo upon a civil Matter, and he would move himſelf up by Habeas Corpus, there ought to be but one Habeas Corpus either of the Crown-Side or of Plea-Side, and both Cauſes ought to be returned. But one *Hab' Corp'* tho' in Cuſtody upon a criminal and alſo a civil Matter.

2. The Marſhal, without more ado, is obliged to take Notice of all Commitments in Court. Vide of Commitments, 1 Salk. 272, 273.

Domina Regina *verſus* Town of Clitheroe.

Vide 2 Salk. 431, 432, 699, 701.

A Mandamus was to the Bailiffs of the Town, to ſwear in ſuch and ſuch Perſons into the Office of Bailiffs. The old Bailiffs of a Town oblig'd to return a *Mandamus*. Ante 25. Inſt. Leg. 194.

And Brotherick moved, that they ſhould not be obliged to make a Return, for they could not well do it, becauſe the Writ was not directed to them in their natural Capacities, and by their Names, and two other Perſons were Bailiffs, ſo that it would be hard to put them to make a Return.

But per Cur'. If you when Bailiffs have ſworn in others, who were not rightly choſen, you notwithſtanding continue Bailiffs ſtill, and therefore ought as ſuch to make a Return to the Queen's Writ; and they were ordered to make a Return.

And here Holt, Ch. J. ſaid, They might amend the Writ any Time before it was returnable; but they of the other Side could not, except to quaſh it till a Return thereto were made and filed. *Mandamus*, when amendable, &c.

Adams

Adams *verſus* the Tertenants of Savage.

S.C. Salk. 40. Poſt 199, & 226. 2 Salk. 601, 679. Fareſl. 15. *Sci. fac.* by Adminiſtrator to warn in Tertenants upon a Judgment obtained by the Inteſtate againſt S. at *Weſtminſter*. Vid. poſt 200, 206, 226.

THE Plaintiff brought a Sci. fac. againſt the Defendants, reciting a Judgment obtained by his Inteſtate againſt Savage in ſuch a Term and Year in the King's Bench at Weſtminſter, commanding the Sheriff to warn in all the Tenants of Lands whereof Savage at the Time of the Judgment was ſeized; and in the Count in the End of the Writ he ſhews, that his Inteſtate died ſo, &c. and Adminiſtration of all his Goods and Chattels were committed to him the Plaintiff by J. S. Archdeacon of Dorſet in the County of Dorſet, to whom it did belong to grant it. The Tertenants returned, traverſe the ſaid Savage's being ſeized of any of the Lands whereof they are returned Tenants, and found againſt them; and laſt Eaſter was Twelve-months, Darnell, Serjeant, moved in Arreſt of Judgment, That the Plaintiff in his Writ ſhews he has not Right to receive the Judgment, for this Judgment is Aſſets here at Weſtminſter, where the Record lies; and the Adminiſtration committed by the Archdeacon of Dorſet, which he ſhews for his Title, is utterly void, here being Bona notabilia out of his Juriſdiction.

Moved in Arreſt of Judgment.

Adminiſtration by the Archdeacon of *D.* cannot intitle the Plaintiff upon a Judgment obtained at *Weſtm'*. 1 Lut. 399, 400. 1 Salk. 39, 40. Carth. 148. 3 Mod. 324. Poſt 241, 242.

To this, Eyres offered for Anſwer; That though the Court will judicially take Notice of Eccleſiaſtical Diviſions, as that there are two Provinces, and ſo many Dioceſes in every Province, as they will do of all the ſeveral Counties of England; yet they cannot take judicial Notice within what Dioceſe ſuch or ſuch a Place is, no more than they will within what County ſuch a Hundred is: So they cannot take Notice here but that the Archdeaconry of Dorſet is within the Dioceſe of London, and then this may be an Adminiſtration well committed.

2. Since we have averred, That it belongs to him to grant it, and that he did grant it, you will give him that Credit as to believe that he did it well, at leaſt till the contrary appear, which cannot be here.

How Archdeacons may grant Adminiſtrations. 2 Mod. 65. 5 Mod. 225.

But per Cur'. We that ſit here, and hold the Queen's Courts, are bound to take Notice under what Eccleſiaſtical Juriſdiction we are; and if ſo, we muſt ſee that we are not under the Archdeacon of Dorſet; and by Conſequence, an Adminiſtration granted by him cannot intitle one to bring Action upon our Judgment: And Archdeacons as ſuch have no Power to commit Adminiſtration, though moſt in England do it, but not quatenus Archdeacons, but by a preſcriptive Right, and ſometimes they do by Peculiars, and ſometimes by themſelves; and in thoſe Caſes you muſt plead, cui Adminiſtratio in hac parte pertinuit: And here the Adminiſtration is abſolutely void, and ſo would be if committed by the Biſhop, whoſe Archdeacon this Man is. And ſuppoſe, as 'tis urged, we cannot take Notice but that the Archdeaconry of Dorſet is Part of the Dioceſe of London; yet at leaſt we muſt take Notice that the Place where we ſit here, is not of it: And the Adminiſtration quoad this Judgment is void.

How to be pleaded.

And this Term Brotherick moved for Judgment upon this Ground, viz. That tho' the Plaintiff has ſhewn a bad Title, yet the Writ of Sci. fac. being good, and he calling himſelf Adminiſtrator, and the Defendants not traverſing, or taking any Advantage of the Invalidity of the Adminiſtration, but pleading to the Merits, they thereby admit the Perſon intitled to ſue, and ſhall not come when the Right is tried againſt them, to controvert what they have before waved to inſiſt upon; but admitted it: And here if we had not ſaid any Thing, by whom Adminiſtration was committed to us, and they had thus pleaded over, it had been good: Vide Style 383, & Trin. 12 W. 3. in this Court, Gidley *verſus* Williams. 2 Mod. 65.

If the Defendants by their Plea have not admitted the Adminiſtration to be good.

Adminiſtrator brought Debt upon Bond to Inteſtate, ſetting forth, That G. was Adminiſtrator of ſuch an one, and that the Defendant did not pay to the Teſtator in his Life, or to G. the Adminiſtrator, ſince his Death; Non eſt factum: And Verdict for the Plaintiff, and Execution, that it did not appear Adminiſtration was committed to the Plaintiff. Vid. Sty. 283. Cro. Jac. 10. 1 Sid. 238. 2 Vent. 84.

But per Cur', That would be a fatal Exception upon Demurrer, but is helped by your pleading over, Non eſt factum; whereby you admit him capable to ſue: And as this Caſe ſtands, if we had ſaid only, that we were Adminiſtrators, or that Adminiſtration was committed to us, without more we ſhould have Judgment; then there being enough ſaid, that Adminiſtration was committed to us, the other Words, per Archdeacon of Dorſet, ſhall be rejected; and for rejecting Words that would vitiate Matter which was well without them, he quoted 3 Cro. 697. Leaſe was to begin after Death of Thomaſine Champman and Thomas Champman; and alledged, that præd' Thomaſine Champman and Thomas Champman were dead; and held, that becauſe præd' was enough, and the Addition of Surname was vain, therefore would not vitiate: Sir Thomas Jones 219. Dyer 240. Pl. 56. Parſon made a Leaſe, and was deprived by his Ordinary, from which Sentence he appealed to the Archbiſhop after Deprivation and before the Appeal, another is become Parſon, and makes a Leaſe: And in the Conteſt between the two Leſſees, the ſecond pleaded the Deprivation of the Leſſor of the firſt. To which they replied, That he had appealed from the ſaid Sentence to the Archbiſhop in Cur' Prærogativa ſua de Arcubus: And though the Court of Prerogative be not the Court of Arches, yet the Court held, That it ſufficed to ſhew an Appeal to Archbiſhop's Prerogative Court, and the reſt, rather than vitiate, ſhould be rejected: Vide Palm. 74. 2 Lev. 234. In Avowry for Rent, Avowant makes Title as Grantee of Reverſion, without ſhewing Attornment. Defendant pleads Rien arreare; and held, That though upon Demurrer the Want of ſhewing Attornment would be fatal; yet it would be well enough now, becauſe the Defendant admitted it by his Plea.

If Adminiſtration do not appear in Narr', 'tis fatal on Demurrer.

If Words that will vitiate, ought to be rejected. Hob. 117.

Upon an Appeal *in Cur' Prærogat' de Arcubus.*

In Avowry, and no Attornment ſhewn.

But

But Note; There is another Reaſon given for that Judgment, viz. That it was after Verdict, and ſo cured by the Statute; and he ſaid, the Judgment muſt be upon the Writ and Return, and not upon the Declaration; for by pleading over, they allowed that to be well.

Obj. That the Plaintiff has ſhewn but a bad Title.

To which it was anſwered by Darnell, Serjeant, That here they not only not ſhewed that they had a Title, but that they had a bad one: They took upon themſelves to ſhew a Title, and have ſhewed a bad one; and when they ſhewed and ſet out a bad one, the Court cannot intend that they have a good one; but to the contrary, that they have ſhewed the beſt they can. And he utterly denied, that a Miſtake in ſetting out that which was not neceſſary to ſet out, would not hurt; for if a Man will take upon him to plead a general Act of Parliament ſpecially, and fails therein, though he need not have ſet it out ſpecially, yet it will ſpoil all: And if they have Judgment in this Caſe, the Defendant would be liable to the Action of an Adminiſtrator of Archbiſhop.

Vide antea.

Vide antea. That if he had only generally alledged himſelf Adminiſtrator, &c. it might have been admitted.

Holt, Ch. J. If the Plaintiff had not ſet forth what Kind of Adminiſtration he claimed by, but only generally alledged himſelf Adminiſtrator of the Goods and Chattels of the Inteſtate, and that the Defendant had not put you upon ſhewing it by craving Oyer of the Letters of Adminiſtration, as he might have done, but pleaded over; that had been an Adminiſtration of the Plaintiff's having a Right of ſhewing as Adminiſtrator, as he had alledged. It is true, the Writ need not mention any Thing of Adminiſtrations being committed to the Plaintiff; but the Courſe is, to ſuggeſt upon the Roll after the Writ is come in, that Adminiſtration was committed to him, and to profert the Letters of Adminiſtration to ſhew it: But in Debt, or Sci. fac. on a Judgment here at Weſtminſter, which is local, you make yourſelf Title as Adminiſtrator by Vertue of Letters of Adminiſtration by Archdeacon of Dorſet, and without Doubt that is no good Title; and when you yourſelf affirm this to be your Title, how can we intend you have another? For of your own ſhewing, this is your Title, which is manifeſtly bad? And there is a vaſt Difference, where a Title does not appear fully for the Plaintiff, and the Party will not controvert with him about that, for there it may be well preſumed: If Party were not well ſatisfied of Plaintiff's Title, he would have inſiſted on it in due Time, and where the Plaintiff himſelf ſhews he has no Title, for there the Court has no Room for Intendment.

Where the Matter is indifferent, and Party pleads over, the Court will intend it well, but this ſhewing is abſolutely void.

Tota Cur' accord'. That where the Matter is indifferent to be well or ill, and Party pleads over, they will intend it well; and all the Caſes put by Brotherick were, where it was indifferent: And this properly is not an Imperfection in ſhewing of Letters of Adminiſtration, but it is ſhewing ſuch as are abſolutely void as to the Inteſtate's whole Eſtate, becauſe there are Bona notabilia.

Et ſic per tot' Cur' Jud' pro Defend': But doubted what Judgment to give, to quaſh the Writ, or bar the Action; and took Time to conſider of that: And after, before any Judgment entered, the Defendant moved for Coſts upon the Statute of 8 & 9 W. 3. the Words whereof are, That after Nonſuit, Diſcontinuance or Verdict for Defendant, he ſhall have Coſts.

Judgment *pro* Defendant, but doubted what Judgment.

And it was inſiſted on by Darnell, Serjeant, That if this had been a ſpecial Verdict 'till Court had determined the Point, it was not a Verdict for either Side; but now that they were of Opinion, Plaintiff ought to have no Judgment, it would be the ſame as if it had been a ſpecial Verdict, and then it would have been for the Defendant, and it is within the Miſchief remedied by the Statute, for here the Plaintiff knew, and ſhewed he had no Right to give the Defendant Trouble: And if this Sci' fac' had been brought by him as Adminiſtrator of J. S. and had recited a Judgment obtained by J. N. ſhould not we have Coſts?

Holt, Ch. Juſt. No; Becauſe out of the Words of the Statute, if Plaintiff had Verdict, as here: And our Judgment may be, licet Verdict be for Plaintiff, quia apparet Cur' that he has no Right to recover: Ideo conſid' quod nil capiat per Billam; and adjudged there ſhould be no Coſts. Vid. Reſiduum poſtea 199, 226.

V. 1 Vent. 33.

In a Caſe where Mr. M-----, formerly an Attorney of the Court, (now Counſellor at Law) was accuſed of foul Practice in his Profeſſion: The Court ſaid, Though he be now a Counſel, yet perhaps that will not diſcharge him from being an Attorney ſtill; and then we may get his Demands tared as ſuch: And does any Body think but a Counſellor at Law is a kind of Miniſter of Juſtice and Right, and, as ſuch, puniſhable for Misbehaviour in his Profeſſion?

A Counſellor, formerly an Attorney, accuſed of foul Practice.

And Holt, Ch. Juſt. ſaid to him, Will you have the Point tried, Whether a Counſellor at Law may commit Extortion? And with reſpect to the Circumſtances of this Caſe, ſaid, This was dragooning of People out of their Money.

Domina Regina *verſus* Beſt & al'.

S. C. 1 Salk. 174. Poſt 185.

THEY were indicted for Conſpiring to get Money unjuſtly, &c. from one A. and to bring about that wicked Purpoſe, falſò to charge him to be the Father of a certain Baſtard-child, &c. And that in purſuance of ſuch Conſpiracy, they did falſò charge and affirm him to be the Father of it: And the Exception was taken, That it did not aver that he was the Father of it.

That an Indictment for Conſpiracy lies before Acquittal, but Caſe lies not till Acquittal. Vide 1 Salk. 13, 14, 15. 2 Mod. 152, 306. Poſt 169, 185.

Per Cur'. The Giſt is the falſò, conſpiring to charge falſly; and it is ſaid further, that they did falſly charge, &c. and an Indictment lies for the Falſhood before the Party is acquitted of it; but Caſe lies not

Conſpiracy ante, 100. poſt 169,185. Carth. 417. Skinner 44.

'till Acquittal: And this was ſaid to be too frequent an Offence to be quaſhed upon Motion, that they would no more quaſh it than they would for Barretry, or keeping a Bawdy-Houſe; and it was denied to be quaſhed.

Kent *verſus* - - - - -

Error of a Judgment in Treſpaſs, whereas it was in Caſe a great Diverſity.

ERror of Judgment in Treſpaſs Vi & Armis in the Common Pleas, and the Writ was of a Judgment in Pl. Tranſgr' ſup' Cas'.

Per Cur'. It is no good Writ to remove the Record; for though Treſpaſs generally, and upon the Caſe, may be laid Vi & Armis, yet there is very great Diverſity between their Natures; the one is grounded upon the very unlawful Act, the other upon the whole Circumſtances of the Caſe.

V. Hob. 118. 8 Co. 160. b. Hob. 129.

But it was agreed, That if right Inſtructions had been given to the Officer that made out the Writ, and that were made out by Affidavits, they would amend by the Statute of 8 H. 6. c. 12. Sect. 2.

And per Cur'. The Defendant cannot move to quaſh the Writ 'till it be entered on the Roll, and he appear to it; and the Writ was quaſhed Niſi.

Intereſt upon a Bill of Exchange.

Per Cur. Intereſt upon a Bill of Exchange commences from Demand made; and therefore if there was no Demand made 'till Action brought, Defendant may plead Tender and Refuſal, and Uncore priſt, and ſo diſcharge himſelf of Intereſt; but if it be the Defendant's Fault that Demand could not be made, as if he were out of the Kingdom, there want of Demand ought not to prejudice the Plaintiff. Vide poſtea.

Lewis *verſus* Jones.

Writ of Error upon a Judgment in *Wales*.

UPON Writ of Error of a Judgment in Wales, the Placita were, &c. Ad magnam Seſs' Dni' Regis, &c. tent' coram A. & R. Juſt' Dnæ' Reginæ, and held a fatal Variance; but doubted, whether if they would amend below, a Certiorari ad Inform' conſcient' ought not to go.

And at another Day, a Motion was made by Williams for a Certiorari, that they might amend below, and certify it right up; but it appearing to the Court that a former Writ of Error had been brought, and a Certiorari and an Amendment of ſuch Faults as had been then diſcovered, and that this was the ſecond Writ and Faults, ſtill they ſaid, they would conſider well of it before they would ſend any more Certiorari's: For when would there be an End at this Rate? And gave Leave to move again, and it was after granted, Abſente Holt, Ch. Juſt.

Wells moved for a Mandamus againſt Golſon and others, Juſtices of Peace of Ipſwich, to iſſue their Precept to inquire of a Force, upon Affidavits of a Forcible Entry: And it was granted. *Mandamus* to inquire of a forcible Entry.

Parkins *verſus* Woollaſton.

S. C. 1 Salk. 321. Vid. ant. 130.

DEBT upon a Recognizance againſt Bail, and Plea that there was no Capias againſt the Principal: Replic', averring a Capias prout patet per Record', in the Common Pleas: Rejoinder, That there was a Writ of Error taken out, and allowed before the Capias was returned and filed; and on Demurrer adjudged, That the Rejoinder was a Departure from the Plea; for it is a new Matter, which does not agree with or inforce the Matter of the Plea, for the Plea is, that there was no Capias, and the Rejoinder ſays, there was a Capias, but it was ſuperſeded, and there is a great Difference between no Capias and a Capias ſuperſeded, for the ſuperſeding does not make it null, or no Capias, but only ſuſpends the Fruit or Effect of it; and one muſt diſtinguiſh between the Writ it ſelf, and the Effect of it. And this Capias, though ſuperſeded, is nevertheleſs a Writ, and therefore if after Allowance of it the Sheriff, before a Superſedeas ſerved upon him, execute it, the Writ ſhall excuſe him, which a void Writ could not do: And if the Writ of Error had been quaſhed before the Return of the Capias were out, then this Writ might be well executed. And the Caſe, 2 Lev. Vere & Smith, was allowed for Law; for it was Debt upon Bond to account for Money. Defendant pleads, That he did account: Plaintiff replies, That the Defendant had received 20 l. at ſuch a Time, of which he gave him no Account. Defendant rejoined, That he was robbed of them, whereof he gave Notice to the Plaintiff; and ſure that maintains his firſt Plea, for it was a legal Account of them: Et Jud' pro quer' per Cur. Debt upon a Recogn' againſt Bail. Plea, that there was no *Capias* againſt the Principal. Repl', that there was. Rejoin', that a Writ of Error was allowed before the Return of the *Cap.* &c. Vid. antea 130. 2 Lev. 5.

Note; It ſeemed ill for another Reaſon, becauſe the Allowance of a Writ of Error before the Return and Filing, if it were returned before, did not obſtruct the Filing. Vide antea 130. Vid. poſtea.

Leonard *verſus* Stacy. Vide ante 68.

TRESPAS for entring into the Plaintiff's Houſe, and taking away his Goods: Defendant juſtifies by Virtue of a Replevin out of the Sheriff's Court in London, and a Precept thereupon to J. S. an Officer, and Defendant came in Aid of him. In Treſpas the Defend' juſtifies in Aid of the Officer upon a Replevin.

Plaintiff replies, That before the taking away the Goods, he claimed Property in them, and gave Notice thereof to the Defendant; and the Queſtion upon a ſpecial Verdict was, Whether the Taking away after Claim of Property, and Notice thereof, did not make him a Treſpaſſer ab initio? Plaintiff replies by a Claim of Property, &c.

And

And held per tot' Cur', That he was a Treſpaſſer ab initio; for tho' the Claimer ought to be to the Sheriff or Officer, and that a Claimer to a Perſon that comes to Aſſiſtance be not enough to the making the Execution illegal, if the Officer does not deſiſt; yet if it be notified to him that comes in Aid that Claim of Property is made, he at his Peril ought to deſiſt.

Jud' pro Quer' per tot' Cur.

Heins *verſus* Hancock.

Denomination in Ejectment certified from *Ireland* upon a Writ of Error.

ERror of a Judgment in Ejectment in Ireland; and aſſigned for Error, That the Denomination of one of the Parcels was a [Kneave] of Land, which was ſaid to be an inſenſible Word; but upon Certificate of the Chief Juſtice of the King's Bench in Ireland, That it was a Denomination well known there, Judgment was affirmed.

If a Clergyman without Cure may have a Writ to diſcharge him from being Overſeer, &c.

Note; A Writ of Privilege was moved for to have a Clergyman, who appeared to have no Cure of Souls, privileged from the Office of Overſeer of the Poor.

And though Holt, Ch. Juſt. ſeemed againſt it, becauſe by him their Privilege of Exemption was only extendible to their Spiritual Revenues, and if in any Caſe they were perſonal, it was only from Common Law Offices, and ſpecially if they were without Cure, as here; yet the other three Juſtices were ſtrongly againſt him: But however, for his Lordſhip's Satisfaction, deſired it ſhould be ſtirred again, 1 Lev. 303. Archdeacon of Rocheſter had ſuch a Writ to diſcharge him from the Office of Expenditor for Rumney-Marſh.

1 Vent. 105. 1 Mod. 282.

Per Cur', If a Witneſs come voluntarily to give Evidence without a Subpœna, Conſideration ſhall be had of the Party's Charge in maintaining him.

Domina Regina *verſus* Pugh *& al'.*

Inquiſition taken for a Riot made *contra formam Stat'* generally, and good.

AN Inquiſition was taken before two Juſtices of the Peace againſt them for a Riot, upon the Statute of 13 H. 4. c. 7. And the Caption was, Inquiſitio capta pro Domina Regina in Com. H. ſup' Sacr'um, &c. duodecim probor' & legalium hominum, &c. qui adtunc & ibidem impannelat' Jurat' & Triat', &c. ad inquirend' de Riotis contra formam Stat', generally.

Brotherick took Exception, That in the whole Inquiſition there was not a Word of the Statute of 13 H. 4. and quoted Crompton Juſt.----& Lamb; That Precedents on this Statute did particularly

ticularly deſcribe the Statute, and ſhew'd the whole Proceedings of the Juſtices to be preciſely purſuant to it. Sed non allocatur. For per Cur', The Juſtices have Power to inquire of all Riots and Routs whatſoever by this Statute; and if a forcible Entry be made by three, (for fewer cannot commit a Riot) the Juſtices may inquire of it by the Statute of 13 H. 4. and fine according to the Statute of 8 H. 6. c. 9. and award Reſtitution; for a ſubſequent Statute that gives a greater Puniſhment, does not take away the Power given by a precedent Statute: And the Inquiſition may be taken any where elſe as well as upon the Place; but if the Information given to the Juſtices be, that the Riot continues, they ought to go and convict them, and record it upon the View, under Penalty of 100 l. but they may inquire, where the Riot does not continue, any Time within a Month.

Juſtices Power in Riots, &c. 2 Salk. 593, 594, 595. 3 Mod. 141. Hawk.'s P. C. 135.

Where ſuch Inquiſition may be taken, &c.

But per Holt, Ch. Juſt. If they will not inquire within the Month, they forfeit the Penalty; but notwithſtanding, they may inquire after, viz. when they have iſſued a Precept within the Month to inquire.

Juſtices to inquire within the Month.

And here per Cur', If a Number of People meet to do an unlawful Act, and after they have met, they do it not; that is an unlawful Aſſembly, but not a Riot.

Vid. Hob. 92.

2. Alſo, If they meet to do an Act that in itſelf is not lawful, but is not an Act of Violence or Force, and they do it, that is no Riot, but an unlawful Aſſembly; and upon this Foundation the aſſembling in Conventicles in the Time of King Charles II. by the better Opinion was held, no Riot.

Diſtinction between a Riot, and an unlawful Aſſembly. Skinner 119. Carth. 383. 2 Sa. 593, 595.

An Affidavit was made of a Reſcous of one taken by mean Proceſs, and thereupon an Attachment moved for.

Reſcous upon a mean Proceſs. Vid. poſt 173, 210, 211. 3 Lev. 46.

Per Cur'. Upon a Return of Reſcous it would go of Courſe.

But Holt, Ch. Juſt. would diſtinguiſh between this and the Caſe of Reſcous upon Writ of Execution; for there the Sheriff cannot return a Reſcous, and therefore the Court can have no other Ground for an Attachment but Affidavits, and ought to be contented therewith; but here a Reſcous might be returned, which being Matter of Record, and by Conſequence a better Motive, ought to be given to the Court: yet the Court ſeemed againſt him, and Rule to ſhew Cauſe why Attachment ſhould not go.

Rule for an Attachment (upon an Affidavit) *Niſi Cauſa.*

Touching the Difference of Reſcues on mean Proceſs, and thoſe of Perſons taken in Execution, ſee 1 Cro. 33, 77, 175. 2 Cro. 289, 360. Pop. 189. 3 Bul. 198. Dyer 212, 241. 3 Lev. 44, & 2 Sal. 586. Poſt 220. See alſo Inſt. Leg. 176, 394 to 400. See alſo 1 Hawk. ch. 65. Sec. 2, 11, 18 to 23.

Smith

S. C. 1 Salk. 315.

Smith *verſus* Harmon.

Plaintiff as Adminiſtrator ſues Defendant as Executor, the Inteſtate dying before Return of Writ of Inquiry upon an interlocutory Judgment. Vide 1 Keb. 55, 310, 477. 2 Keb. 548. 1 Sid. 131. Raym. 16, 55. 3 Keb. 160. 1 Salk. 8, 42. Q. Fareſl. 64, 65, &c.

THE Plaintiff as Adminiſtrator to J. S. ſues out a Sci fa. againſt the Defendant, ſetting forth, That his Inteſtate ſued the Defendant in this Court in an Action, &c. and that in that Suit taliter proceſſum fuit, that he recovered Damages againſt him; but that before the Return of a Writ of Inquiry of Damages, the Inteſtate died: That Adminiſtration was committed to the now Plaintiff, and the Writ commands the Sheriff to ſummon the Defendant to ſhew what he can, why Damages ſhould not be aſſeſs'd, and Judgment final for the Adminiſtrator, according to the late Statute of 8 & 9 W. 3. cap. 11. being An Act for preventing frivolous and vexatious Suits. Defendant is returned ſummoned, and appears, and as to the aſſeſſing of Damages, ſays nothing againſt that; but ſays, that when they are aſſeſs'd, that Plaintiff ought not to recover them, for that his Teſtator (for he was an Executor, and ſued as ſuch) did owe ſuch a Sum by Bond to A. B. who ſued the now Defendant upon the ſaid Bond, and recovered againſt him, and averred it to be a juſt Debt, and that he had Aſſets but to ſuch a Value, which, &c. To which Plea the Plaintiff demurs generally.

And now Pengelly, Serjeant, maintained the Demurrer for Two Reaſons:

1. This Matter is not pleadable within the Intent of the Statute, for the Act never meant to give a Defendant Leave to plead any Thing in Bar of the original Action, but only to put him in the Room of the firſt Defendant, or to enable ſuch a Continuance of the Suit as might have been if neither Party had died, and ſaves the Defendant the Advantage of any Error in Law on the Face of the former Proceeding, in order to ſtay final Judgment, as may appear by the very Words of the Act, which are: If any Plaintiff happen to die after an Interlocutory Judgment, and before final Judgment obtained therein, the ſaid Action ſhall not abate by reaſon thereof, if ſuch Action might be originally proſecuted or maintained by the Executor or Adminiſtrator of ſuch Plaintiff. And if the Defendant dies after ſuch interlocutory Judgment, and before final Judgment therein obtained, the ſaid Action ſhall not abate, if ſuch Action might be originally proſecuted or maintained againſt the Executor or Adminiſtrator of ſuch Defendant. And the Plaintiff; or if he be dead after ſuch interlocutory Judgment, his Executor or Adminiſtrator, ſhall and may have a *Sci. fac.* againſt the Defendant, if living after ſuch interlocutory Judgment, or if he died after, then againſt his Executor or Adminiſtrator, to ſhew Cauſe why Damage in ſuch Caſe ſhould not be aſſeſs'd and recovered by him or them; and if ſuch Defendant, his Executor or Adminiſtrator, ſhall appear at Return of ſuch Writ, and not ſhew or alledge any Matter ſufficient to *arreſt the final Judgment*, &c. that thereupon a Writ of Inquiry of Damages ſhall be award-

Words of the Statute 8 & 9 W. 3. Vide 1 Salk. 8.

awarded, which being executed and returned, Judgment final ſhall be given, &c.

Vide ante 142. 1 Sid. 131. 1 Mod. 5, 6. 1 Ven. 253. 1 Keb. 477. 2 Keb. 594. 3 Keb. 160, 466.

So that the Statute in this Caſe does only call in the firſt Defendant's Executor or Adminiſtrator to enable him to do whatever his Teſtator or Inteſtate might have done, had he lived; and if he had lived, he could not have offered ſuch a Plea as this; Ideo the Statute makes Uſe of the Word Arreſt of Judgment, which is a known Term in the Law: And when an Act of Parliament makes uſe of ſuch a Term generally, it ſhall receive the ſame Senſe that the Common Law takes it in, and no other. Hob. 97, 98.

The ancient Manner of Pleading in Arreſt of Judgment Hob. 162. Vide antea 24. 1 Cro. 514. 1 Keb. 55, 310. 1 Leon. 263. 4 Co. 39. Hob. 124. 1 Vent. 230.

By the old Books, after Verdict, the Defendant had a Day given him to plead in Arreſt of Judgment; and this was done formerly, like other Pleadings, Ore tenus at the Bar, but was always of ſome Error appearing on the Face of the Record: And if at ſuch Day the Defendant had made Default, then any Body, as Amicus Cur. might move in Arreſt of Judgment ſuch Matter as the Party himſelf might have pleaded. Vide 5 H. 7. 23. a. Ro. Ab. 716. 12 H. 4. 24. Raſt. Brief, a Precedent of a Plea in Arreſt of Judgment. Co. Ent. Err' 95. Vide 1 Vent. 347. which does not at all ſeem for him. Yel. 152. 2 Cro. 220. ſeems more to his Purpoſe.

What Miſchief may happen if this Plea be not allowed.

Obj. If he cannot plead this Plea, it will be of great Miſchief to him, for he cannot plead this interlocutory Judgment to the Bond, there being nothing yet certain; and if he cannot plead the Judgment upon the Bond to this, the final Judgment will be a Confeſſion of Aſſets, and a Devaſtavit in him.

To which he gave theſe two Anſwers:

1. It would not be a Confeſſion of Aſſets. Hob. 178. 1 Ro. Ab. 929. pl. 3. If Executor plead plene Adminiſtravit, and Plaintiff reply Aſſets, and Defendant relicta Verificatione cognovit Actionem, nec quin ipſe detinet, this is no Confeſſion of Aſſets.

2. He is not privy to the firſt Judgment, but it is given upon the Default of his Executor, and not his; and beſides, if by the Statute he cannot plead this Plea, without Queſtion the not doing of an Impoſſibility will not make a Man guilty of a Devaſtavit.

If now the Plaintiff's Right be of a ſuperior Nature to the Bond Debt.

2. He argued, that the Matter of the Plea, in caſe the Defendant might plead in Bar, within the Meaning of the Statute, was not a ſufficient Bar; for the Plaintiff's Right now being upon Record, is of a ſuperior Nature to a Debt by Bond, and therefore Debt by Bond recovered ſince the interlocutory Judgment is no Plea to it; for ſince the Statute, by the Judgment the Nature of the Debt continues altered; but at Common Law, if the Nature of the Debt was at all altered by the interlocutory Judgment, yet by the Abatement of the Suit before final Judgment, it reaſſum'd its firſt Nature again: But it is not ſo now ſince the Statute, for now the Party cannot reſort to the firſt Remedy by Action. Vide 3 Leon. 68. per Dyer & Manwood, That the Award of a Writ of Inquiry is a Kind of a Judgment: And he relied much on Burnett and Holden's Caſe, 1 Lev. 277. Ray. 210. None argued of the other Side.

Holt,

The Meaning of the Statute.

Holt, Ch. J. This Statute has now eſtabliſhed the interlocutory Judgment, and it never was the Intent of it that the Executor ſhould ſay more than the very Party might have ſaid, and its Meaning was to put the Executor in the ſame Condition with the Teſtator; and now he pleads in Bar of the Original Action, which lies not in his Mouth to do.

'Tis no Miſchief to Executor if Judgment be *pro Quer.*

The next Thing is, Where is there any Miſchief to the Executor? None at all, for Judgment ſhall here be given, that the Plaintiff ſhall recover de Bonis Teſtat', and in like Manner of Coſts; for the Judgment here ſhall not be as uſually, of Coſts of Goods of Teſtator ſi, ac ſi non of Executor's Goods; but ſuch Judgment ſhall be as ſhall only affect the Aſſets, becauſe it ſhall be juſt as if Judgment final had been againſt the Teſtator in his Life-time. Then if he be excluded from Pleading in this Caſe, he does not admit Aſſets, ſo he is as much at large as if the Judgment had been actually compleated in the Teſtator's Life; and ſure the Debt, the Right whereof now appears on Record, is of higher Nature than Debt upon a Bond, tho' the Quantum of it be not aſcertained. If an Indebit' be brought againſt an Executor, and he pleads that his Teſtator did covenant ſeveral Things, and that the Covenant was broke, and that the Damages thereof amount to ſo much, and ſhews that he has no more Aſſets, it will be a good Plea, tho' the Damages be not certain any more than here.

Vide 1 Leon. 44. 2 Keb. 223, 1 Lev. 165. 3 Lev. 114.

If an Executor voluntarily pay a Statute, before a Judgment had againſt his Teſtator, it is a Devaſtavit; but if, after Death of the Teſtator, Execution be taken out and executed, he may plead it to a Sci. fa. upon the Judgment, becauſe he could not hinder Execution: and that is, And. 208, 209. And he put the Caſe of Burnet and Holden: Teſtator had Judgment againſt him upon Aſſumpſit, and Sci. fa. againſt Executor thereupon. He pleads a Verdict againſt his Teſtator in his Life-time, and Judgment againſt him as Executor, upon 17 Car. 2. and Payment thereof, and held good Plea, and that now the Judgment was to be conſidered as given againſt the Teſtator himſelf. And Hale there ſaid, If the Judgment had been at Common Law againſt the Teſtator himſelf, after his Death it had been well pleadable by Executor till revers'd, for the Executor could not falſify it in Pleading.

Where voluntary Payment by an Executor is a *Devaſtavit.*

And Powel, agreeing in omnibus, put this Caſe in Account: Judgment is, Quod Def. computet, Sci. fa. lay for Executor before this Statute, yet the Party could plead nothing againſt the firſt Judgment.

That this *Sci. fa.* is not ſo good as it ſhould be.

And per Holt, Ch. J. This Sci. fa. is not ſo good as it ſhould be, for it ſhould be Sci. fa. ad audiend' Judicium, that is, giving them Day to come and hear Judgment of the Court.

And at another Day, none appearing for the Defendant, Plaintiff, per tot. Cur. had Judgment niſi in three Days, and the Rule was after made abſolute, Holt, Ch. J. declaring, that the ſecond Point was not in Queſtion here, but that they were very clear upon the firſt; and that the Executor could not plead a Releaſe here tho' to himſelf, and therefore the not Pleading of it would not be a Devaſtavit.

Vide ante 143, 144. 3 Lev. 114, 115. 1 Mod. 173. Vaugh 94.

Per Holt, Ch. J. The Gaol-Delivery of Middleſex is held within the City of London by Preſcription, but the Oyer and Terminer is not ſo, but at Hicks's Hall in the County of Middleſex; ſo that tho' of common Right the Gaol-Delivery ought to be within the proper County, yet Cuſtom and Uſage Time out of Mind may make it otherwiſe.

Judgment *pro Quer. &c.* Gaol Delivery of *Middleſex*, how held in *London*, *&c.*

Per eund. Commiſſioners to aſſeſs Taxes cannot compel the Inhabitants to come before them out of the Country; but if they will come voluntarily it will be well. An Ordinary commits Adminiſtration out of his Dioceſe or Province: Ordinary of Ireland may commit Adminiſtration here in England of Goods within his Dioceſe.

Authority of Commiſſioners to aſſeſs Taxes.

Domina Regina *verſus* Leich.

HE was indicted for a publick Nuſance to Billingſgate-Dock: The Indictment did ſet forth, That Billinſgate-Dock was a common Dock, to which all ſmall Ships coming with Proviſion to the Markets of London might come, but that no great Ship ought or uſed to come there: That notwithſtanding the Defendant brought a great Ship of 300 Tun into it, ad commune Nocumentum of all the Queen's Subjects, &c.

And it was excepted, on Motion for Quaſhing of this Indictment, that it was inconſiſtent to ſay that a Place is a common Dock, and that it would be a Nuſance for a great Ship to come there; for a common Dock in its Nature is free for all Ships.

Defendant indicted for a *Nuſance*, by bringing a great Ship into *Billinſgate* Dock. See 1 Hawk. chap. 75. per totu. and 2 Hawk. chap. 10. Sec. 59. and chap. 25. Sec 55, 61.

But per Cur. Why may there not be a common Dock only for ſmall Ships, as well as a common Pack and Horſe Way: And if a Man with a Cart uſes ſuch a Way, ſo as to plow it, and render it leſs convenient for Riders, will not that be a Nuſance indictable? Beſides, we never quaſh Indictments for Nuſances. But if a Nuſance be removed, and Party confeſſes it, it will be a great Mitigation of the Fine, that is, the Removal will, and it may in that Caſe be proper to offer Affidavits to leſſen the Offence to the Court, but not otherwiſe. And they put the Defendant to demur, which he did; quod Nota.

Defendant put to demur, and remove the Nuſance.

Williams *verſus* Jackſon.

What Notice ought to be given of Trials, and executing Writs of Inquiry.

UPON a Point, what Notice there ſhould be to Defendants, of Trials, and Executing of Writs of Inquiry, theſe Points were agreed by the Court:

1. That convenient Notice was as much neceſſary, and fit to be given, of the Executing of a Writ of Inquiry, as of a Trial.

1 Keb. 112. 1 Sid. 34, 231, 2 Lilly 151, 356. 2 Salk. 465, 647, 650. Inſt. Leg. 64, 143, 4, 293. &c.

2. That by a late Rule of Court, if a Writ of Inquiry or Iſſue be to be tried in London or Middleſex, and the Defendant live not above 40 Miles off, eight Days Notice will ſuffice; but if it be above 40 Miles off, there ought to be 14 Days Notice in either Caſe.

3. That the Reaſon is the ſame in all other Caſes, where the Parties are above 40 Miles diſtant from the Place where the Trial is to be, though they be Country Cauſes: Yet becauſe it is an ancient Rule, that eight Days Notice ſhould be ſufficient in all Country Cauſes, and that had been done in the Caſe now in queſtion, it being a Country Cauſe, the Execution of the Writ of Inquiry ſtood; and the Court ſaid, They would conſider of altering the Rule.

Why fifteen Days between *Teſte* and Return of Proceſs. 2 Salk. 599. 602.

And per Cur', The Reaſon why by Common Law there are fifteen Days between Teſte and Return to Proceſs, is, becauſe that was thought a ſufficient Time to come from any Part of the Kingdom to another, for at twenty Miles a Day a Man in fifteen Days will go all over the Land.

Sparks *verſus* Wood.

Plea to the Juriſdiction of an inferiour Court, tendred after the Court was up.

1 Vent 88. 181, 333. Raym. 189. 1 Mod. 63. 1 Sid. 464. 2 Mod. 197. 2 Inſt. 230. The Oath ought to be upon Tender of the Plea, 1 Vent. 181.

DEBT was brought in London: A Prohibition was moved for, and ruled Niſi, upon Suggeſtion that the Defendant had tendered for Plea below, that the Cauſe did ariſe out of their Juriſdiction, and offered to make Oath of the Truth of his Plea.

Now it was ſhewed, that he tendered the Plea after the Court was up, whereas it ſhould be in propria Perſona, and in Court; and tho' an Affidavit was offered here of the Truth of the Plea, and one Turner's Caſe, 4 Jac. 2. was quoted out of Lutwyche, where a Prohibition had been granted upon ſuch an Affidavit here above without Oath of it below: Yet per. Powel, Powys & Gould, abſente Holt, Ch. Juſt. the Rule was diſcharged; for in all Pleas that ouſt a Court of Juriſdiction, whether inferiour or ſuperiour, there muſt be Oath in that very Court of the Truth of the Plea. Quære, if they refuſe the Oaths.

Cragg

Cragg *verſus* Bowman:

At *Niſi prius*, *coram* Trevor, Chief Juſtice *de Banco*.

A Feme Covert had parted from her Husband by Conſent, who allowed her ſeparate Maintenance, and came from Beverly in Yorkſhire, where the Husband lived, to London: Where living in Adultery, ſome four Years after ſhe became big with Child; and in that Condition comes to lodge with the Plaintiff, who did not fully appear to have known any Thing of the Matter, and lodged and boarded with him for nigh a Twelve-month; he was likewiſe at the Charge of her Lying in. Now the Action was brought againſt the Husband for this Debt; and all this Matter appearing on Evidence, the Chief Juſtice ordered the Plaintiff to be called: For he ſaid, That though the Husband be bound to pay the Wife's Debts for her reaſonable Proviſion, yet if ſhe parts from him, eſpecially by reaſon of her Misbehaviour, as here it muſt be preſumed ſhe did, ſhe living in Adultery after the Separation, and he allows her a Maintenance, he ſhall never after be charged with her Debts, till a new Cohabitation.

Vide 1 Salk. 113, 116, 119; 1 Keb. 69. 337, 482. 1 Mod. 124; 2 Sid. 109. 1 Lev. 4. Feme Covert after parting by Conſent, and ſeparate Maintenance allowed commits Adultery and runs her Huſband into Debt.

Q. If the Husband ſhall be charged.

Ante 105. Poſt 162, &c.

Note; Here the Woman lived very decently and modeſtly all the while ſhe was in the Plaintiff's Houſe; and alſo it was proved, that her Maintenance was duly paid to her.

Vide 1 Salk. 116, 119. 1 Keb. 96. 337. 1 Sid. 127, 425, acc. Poſt 171.

Popley *verſus* Aſhly.

THE Defendant being a Captain of a Ship, took ſeveral Goods for the Uſe of the Ship from the Plaintiff, who ſent his Servant with a Bill to him for his Money. The Defendant orders the Servant to write him a Receipt for the Money, which he did, and thereupon he gives him a Note upon a third Perſon, payable in two Months. The Maſter ſent ſeveral Times to the third Perſon to preſent him the Note, but could not get Sight of him within the Time at which the Money was payable: The Party breaks, and now this Action was brought for the Money againſt the Captain. All this appearing on Evidence, and that the Captain went to Sea next Day after he gave the Note, the ſaid Chief Juſtice directed for the Plaintiff.

Captain of a Ship takes a Receipt, and gives a Note upon a third Perſon, who failed before the Note was due, and the Captain was gone to Sea.

And per ipſum, If a Man give a Note upon a third Perſon in Payment, and the other takes it abſolutely as Payment; yet if the Drawer knew the third Perſon breaking, or to be in a failing Condition, and the Receiver of the Note uſes all reaſonable Diligence to get Payment, but cannot, this is a Fraud, and therefore no Payment, and here was no Laches in the Plaintiff; for the Party failed before the Money was payable, and the Captain was gone to Sea, ſo he could not bring him back to him to give him Notice: But if a Man

The Receiver uſes Diligence to get ſuch Note paid, but cannot, &c. 'tis a Fraud in the Captain, &c. Poſt 301.

takes a Note, and after it is payable makes no Demand, and that he might be paid if he had been diligent enough, there if the Party, on whom the Note is, fails, it is at his Peril that took the Note.

S. C. 2 Salk. 696.

Graves *verſus* Blanchett.

Words ſpoken at ſeveral Times in Defamation of a young Woman: Verdict, and intire Damages, the firſt Words not being actionable, &c.

IN Caſe for Words, the Plaintiff declared for Words ſpoke at ſeveral Times: The firſt were, She is a Whore, and has had a Baſtard by her Father's Prentice; alledging a Colloquium: The other, Thou art a Whore, and hadſt a Baſtard by your Father's Prentice; quorum quidem aliorum verborum propalatione, &c. ſuch a one who courted her for a Wife, and was ready to marry her, fell off: Verdict, and intire Damages, and moved in Arreſt of Judgment, that the firſt Words were not actionable, the ſpecial Damages being tied up to the latter Words by the Word aliorum.

Carth. 498.

Vid. antea. Vid. 1 Vent. 4. 1 Sid. 396. Hob. 296.

1 Cro. 436.

And per Cur', If it were res nova, it were reaſonable to make the firſt Words actionable, for no greater Misfortune can befal a young Woman, whoſe Well-doing depends upon her having a good Husband, than to be reputed a Whore: But the Authorities are too many and great to run counter to them; and the Reaſon of them is, that Fornication is a Spiritual Offence, not puniſhable at Common Law; and an Action ſhall not lie for charging one with an Offence of which the Law takes no Notice, without ſpecial Damages; and if Anne Davis's Caſe had been purſued, as it has been contradicted, it would do: And there was a Time when Hereticks were put to Death, yet it never was actionable to call a Man a Heretick: And Judgment arreſted, viz. Quod Quer' nihil' cap', &c.

Harvey *verſus* broad.

S. C. 2 Salk. 626.

Vid. poſt 159, 196, 250, &c.

Writ of Inquiry returnable *tres Trin'*, which being a *Sunday*, and the right Eſſoin-day.

Vid. antea 41, 81.

JUdgment was by Default in the Common Pleas, and Writ of Error of it there; and upon the general Error aſſigned, it was ſhewed, that the Writ of Inquiry was returnable Tres Trin', which in Fact happen'd to be Sunday the 14th of June: The Writ was return'd executed the 14th of June ult' præterit', which muſt be a Year before.

Per Cur', A Writ of Inquiry may be executed on the Day on which it is returnable, and the ult' præterit' is but a Miſtake, the Return being made after the 14th Day; and the ult' præterit' was intended to go to the Day, and not to the Year, and therefore you may amend it in Common Pleas: But what is fatal, is, that Tres Trin. is the Sunday, and right Eſſoin-day of the Term; and though the Eſſoins be kept on Monday, yet a Writ returnable Tres Trin', when that falls on a Sunday, though the Return be kept on the next Day, cannot be executed on the next Day, and therefore Judgment was revers'd niſi. Vid. poſtea.

Note; *Tres Trin'* is always on a *Sunday*.

Vi. poſt 159, 196, 252.

Cole *verſus* Turner:

Coram Holt, *Ch. Juſt.* at Niſi prius.

UPON Evidence in Treſpaſs for Aſſault and Battery: Holt, Ch. Juſt. declared, 1. That the leaſt touching of another in Anger is a Battery. What Aſſault, &c. makes a Battery.

2. If two or more meet in a narrow Paſſage, and without any Violence or Deſign of Harm, the one touches the other gently, it will be no Battery. Vid. poſt 172. Carth. 480, 491.

3. If any of them uſe Violence againſt the other, to force his Way in a rude inordinate Manner, it will be a Battery; or any Struggle about the Paſſage, to that Degree as may do Hurt, will be a Battery. Vid. Bro. Treſp'. 236, 336. 7 E. 4. 26. 22 Aſſ. 60. 3 H. 4. 9. 2 Rol. R. 545. 1 Mod. 3. 2 Keb. 545.

Note; It was in Action of Battery by Huſband and Wife, for a Battery upon the Huſband and Wife, ad dampnum ipſorum; and though the Plaintiff had Verdict, yet the Chief Juſtice ſaid, he ſhould never have Judgment: And Judgment was after arreſted above upon that Exception. Vid. ant. 127.

Turner *verſus* Nurſe.

Note. AN Order of the Court of Chancery is not to be given in Evidence, without producing a Copy of the Bill on which it was made; yet a Commiſſion out of Chancery to abut and bound certain Land, return'd and acquieſced under, and an Enjoyment accordingly, is good Evidence of the Land ſo bounded being rightly bounded; but a bare Commiſſion return'd without more, is no Evidence at all. Vide 1 Salk. 278, 281, 283, 286, &c. 555, 566, 690, 2 Salk. 555. Fareſl. 129, 141. Where an Order, or bare Commiſſion of *Chancery* is no Evidence. Vid. poſt 225.

Per Cur', If a Man either by Grant or Preſcription has Right to Wreck thrown upon another's Land, of neceſſary conſequence he has a Right to a Way over the ſame Land to take it; and the very Poſſeſſion of the Wreck is in him that has ſuch Right before any Seiſure: Originally all Wrecks were in the Crown, and the King has a Right to Way over any Man's Ground for his Wreck; and the ſame Privilege goes to Grantee thereof. Privilege of the Grantee of a Wreck for a Way to it. Vide ante 3. Poſt 163. 1 Ro. Ab. 60. Noy 9.

Hale *verſus* Claro.

S. C. 1 Salk. 266. Vide Fareſl. 103.

IT was a Writ of Error of a Judgment in the Palace-Court, and a Variance between the Plaint and Declaration, viz. That the Plaint was enter'd at the Suit of C. F. generally, and the Declaration was C. F. Executor, &c. So that the Plaint was in his own Right, and the Declaration as Executor: This was aſſigned for Error. Poſt 181. Judgment reverſed upon Error in the Palace-Court for Variance between the Plaint and Declaration.

Per

Alit', If after a Verdict.

Per Cur', If this Variance had been in a Record certified from the C. B. between the Original and Declaration, where the Original is only by way of Recital, the Party might alledge Diminution, and have the right Original if any certified: But the Difference is between inferiour and ſuperiour Courts, for no Diminution can be alledged of a Record removed out of an inferiour Court; but the Court muſt take it as they find it at firſt, and this Variance is fatal; and Want of a Plaint in an inferiour Court, is like the Want of an Original in a ſuperiour Court, and therefore curable by Verdict: So, if there had been a Verdict in this Caſe, the Queſtion would be, Whether we wou'd not look upon a Plaint in another Action to amount to the Want of a Plaint, and ſo aid it by the Verdict? But it being not after Verdict, that Matter falls not under Conſideration. Et per totam Cur' Jud' revers'.

Vid. 1 Vent. 6. 2 Cr. 108, 109. *contra.* 1 Jo. 304. 1 Cro. 282. Vide Hob. 130, 135, 264, 282.

White *verſus* Bodinam.

S. C. 2 Salk. 629. Covenant for quiet Enjoying; Defendant pleads he entered to diſtrain, and traverſes the *Ouſter*. Plaintiff demurs, Judgment for Defendant, Carth. 205, 177, 183, 290, 519. Vide Vaugh. 175, 176. 2 Co. 1. 8 Co. 91. 3 Cro. 914. 2 Saund. 177. Yel. 30. 1 Vent. 272. Lat. 105. 1 Lut. 317, 323. 1 Inſt. 282. Hob. 53.

LEſſee for Years brings Covenant againſt the Leſſor, declaring upon a Demiſe and Covenant for quiet Enjoyment, and aſſigns for Breach, that the Leſſor did enter upon him, and ouſt him of the Premiſſes: The Defendant pleads, That he enter'd to diſtrain for Rent arrear, abſq; hoc, that he did ouſt him de Præmiſſis. To which the Plaintiff demurs, thinking the Traverſe ill; becauſe if he had ouſted him of any Parcel of the Premiſſes, he had a good Cauſe of Action; therefore he ſhould have traverſed, abſq; hoc that he ouſted him of the Premiſſes, or any Part thereof.

But per Cur', The Plea is well enough in this Caſe; for if the Plaintiff will join Iſſue upon the Matter of the Traverſe, and prove Ouſter of any Part, the Iſſue will be for him. And the Court took a Diverſity between pleading of the General Iſſue, (as in Debt you muſt plead, Non debet nec aliquam inde Parcellam) and a Special Iſſue as this is. 3 Cro. 83, 84. Robſert *v.* Andrews, Dyer 115. And Jud' pro Defend'.

Domina Regina *verſus* The Dutcheſs of *Bucklew*, Sir *John Bucknall*, my Lady *Anne Franklin & al'*, Tenants of Lands, now or heretofore Part of the Manor of *Delemore* in *Hertfordſhire*.

S. C. 1 Salk. 358. Fareſt. 91.

Vi. poſt 191, 255, 307. Information upon ſuffering a *Bridge* to be out of Repair.

AT a Trial at Bar upon an Information, for ſuffering a common Bridge to be ruinous, and out of Repair, theſe Points were reſolved by the whole Court:

1. If a Manor be holden by the Service or Tenure of Repairing a Bridge, Highway, &c. and Part of it be after ſevered from the Manor, yet the Charge or Service ſhall run with it; and every one of

of the Alienees, of ever ſo ſmall a Matter or Parcel of the Demeſns or Services, is anſwerable to the Publick for the Whole, and are contributary among themſelves. Bridges, &c. See Salk. 356. &c. to 359.

2. If a Manor be holden of the King by Knights Service, and the Lord ſince or before the Statute of Quia Emptor. terr', aliens Part of the Demeſns, Alienee ſhall hold by Knights Service.

3. If the Lord of a Manor grants a Rent-Charge thereout, and alien Part of the Demeſns, the Alienee ſhall hold it charged with the Rent. Rent-charge

4. Upon Alienations, or Severance of Parcel of the Manor, the Lord may agree to diſcharge the Land of the Repairs; but that only binds himſelf, and ſuch as claim under him, and not the Publick.

5. A Manor is an intire Thing, and not ſeverable.

6. Lands once ſevered from a Manor, can never after become Parcel of it in Reality, but it may in Reputation; as if Lands, Part of a manner, be alien'd away abſolutely, and repurchaſed, and an Unity of Poſſeſſion for a conſiderable Time after. 1 Salk 186, 187.

7. Here a Park was Parcel of a Manor, which none can have but by Grant or Preſcription.

Note; This whole Manor was ſeveral Times in the Crown as Part of the Dutchy of Lancaſter.

Clerk *verſus* Dealy:

At Niſi prius, Coram Holt, *Ch. Juſt.*

PLaintiff as Executor brought Indebitat' for Money of the Teſtator received after his Death to the Plaintiff's Uſe, and produced the Teſtator's Debtor, who paid it, as a Witneſs; but he was rejected. *Indebitat. aſſ.* by an Executor, for Money of Teſtator received to Plaintiff's Uſe.

Per Holt, Ch. Juſt. For the Plaintiff by bringing this Action determines the Election he had of ſuing the original Debtor, or the Receiver, and allows of the Payment; but if he be nonſuited, the Matter is at large again, and he may ſue the Debtor, and therefore the Debtor ſwears to diſcharge himſelf, and by conſequence is no Witneſs. Vide 1 Salk. 27, 28. Evidence. Vide 1 Salk. 283, 285, 286, 287.

It appeared alſo, that another Sum of Money mentioned in the Declaration, was found by the Defendant in the Teſtator's Room after his Death, which he took.

And per Holt, Ch. Juſt. As to that, the Plaintiff miſtook his Action; for he ſhould have brought Trover, and not an Indebit. for Money received to his Uſe: And the Plaintiff was nonſuited. Trover, Plaintiff nonſuited.

Domina

Domina Regina *verſus* Chapman, *late Mayor of* Bath.

Information for falſe Return of a *Mandamus* by a late Mayor Vide 2 Salk. 428, 429, 430, 431. 1 Salk 77, 78. Poſt 309. See Carth. 170, 171, 173, 293. Skinner 293, 310, 368. q. 2 Hawk. ch. 10. Sec. 47, &c.

AN Information was againſt him, for making a falſe Return to a Mandamus, commanding him to proceed to the Election of a Town-Clerk for the Corporation, in the Room of one Buſhell.

To which he return'd, That before the Arrival of the Writ, J. S. had been duly choſe, and ſworn into the ſaid Office: And it appear'd on Evidence, That the Right of Election was in Thirty Common-Council Men; that the Mayor at ſuch a Time before the Arrival of the Writ, had ſummoned them to meet in order to the Election; that Twenty-eight met, that three Candidates were ſet up, that Two of the Twenty-eight voted for one, that thirteen voted for another, and the Mayor and Twelve more voted for the Third; that the Mayor pretending to have a caſting Voice, declared his Man duly elected, and at another Court ſwore him in.

And the following Points were in this Caſe ruled by Holt, Ch. Juſt. at Niſi prius.

Evidence of this Falſe Return.

1. That there needs no more Evidence to prove this Return to be the Mayor's, but the Copy of the Writ and Return thereof in the Crown-Office.

Vide 1 Salk. 431, 701.

2. That tho' upon the Conſultation the Majority be againſt him, and make a Return in his Name, yet it ſhall be taken to be his if he does not come and diſavow it.

3. That it is not neceſſary to prove a Delivery of the Writ to the Mayor, no more than to a Sheriff in a falſe Return againſt him.

4. That notwithſtanding, the Writ is to be delivered to the Mayor as the moſt viſible Part of the Corporation.

5. That this Action for a falſe Return may be brought againſt the whole Corporation, or againſt any particular Member of it.

6. That the Mayor or other Head Officer, of Common Right, has not Caſting Voice; but ſuch a Thing may be by particular Conſtitution, as by Preſcription or Charter.

5 Mod. 404.

7. If there be an Equality of Votes, and therefore they cannot chooſe, upon Mandamus they muſt agree, or elſe they ſhall be all brought up as in Contempt, and laid by the Heels till they do agree; for after a Jury is ſworn, they ſhall be impounded till they all agree; but here it ſuffices that a Majority do agree.

And the Mayor was found guilty.

Dove *verſus* Smith.

IN Treſpaſs for breaking the Plaintiff's Cloſe, and treading his Graſs, it appeared on Evidence, That the Plaintiff had a Cloſe adjoining to the back Part of the Defendant's Houſe, which was a Publick Houſe: The Defendant ſometimes uſed to ſet a Table for his Gueſts in the ſaid Cloſe, and ſerve them there: That he often uſed to walk there for his Pleaſure, and with others, who ſhot with Bows and Arrows there.

In Treſpaſs for breaking his Cloſe, and treading down his Graſs. V. ant. 38, 105. 2 Mod. 253. 5 Mod. 178.

Per Holt, Ch. J. You muſt give Evidence of the Value of the Damages done, or you cannot recover, for the Law goes by Evidence. And if in this Caſe the Jury give under 40 s. Damages, tho' the Title of the Land doth not come in Queſtion, yet will I certify for Coſts, for this is a voluntary malicious Treſpaſs, and the Statute is only to be underſtood of ſmall accidental Treſpaſſes. And here it being upon a Not Guilty, they could not give any Matter of Right in Evidence, not even in Mitigation of Damages.

Lutw. 1301, 1304, &c. 22, 23 Car. 2. c. 9. laſt Sect.

Per Cur'. If an Attorney be well known, and may be found, it is not ſufficient to leave a Declaration for him in the Office, but it ought to be delivered to him, otherwiſe it ſuffices to leave it in the Office.

Leaving Narr's in the Office.

Anonymus.

AN Action in this Court upon a Judgment for Damages in the Common Pleas.

Motion before Plea to bring Money into Court, and denied. Vide Fareſt. 14, 140. 2 Salk. 583, 596, 597. Antea 11, 25, 60, 101.

And Salkeld, now before Plea, moved to bring ſo much into Court, and to have it ſtruck out of the Declaration.

Holt, Ch. J. No: You may plead Tender, and Uncore Priſt.

But then the Counſel diſcovered that the Plaintiff below was now become a Bankrupt, and no Commiſſion being out, they durſt not tender him the Money, but would bring it into Court, to remain in Truſt for him that ſhould have Right.

Holt, Ch. J. You are in the right to take Care how you pay it voluntarily, but we cannot be Truſtees for you.

And they would make no Rule.

Rich *verſus* Doughty.

Sheriff returns a Warrant, that one who had eſcaped out of K. B. was taken upon an Eſcape Warrant, &c. Vid. ante 22, 63, 95, 125. Poſt 183, 253. 5 Mod. 8.

HE was a Priſoner in the King's Bench, and having eſcaped, was taken up on a Judge's Warrant, purſuant to the late Act, by a Parcel of People, whereof none was an Officer as the Act directs.

And Mountague having diſcloſed the Matter by Motion, the Sheriff was ordered to return the Warrant, which he did thus: That he was brought to him in Cuſtody of one R. and others to him unknown, by Vertue of the Warrant; and that he detained him in Cuſtody juxta Exigentiam Warranti præd'.

And tho' Brotherick urged, that this Act, being in Aid of Execution of Juſtice, ought to be favourably extended; and therefore the Priſoner being brought to the Sheriff, and delivered to him together with the Warrant, tho' the original Taking were illegal, yet the Warrant being directed to all Sheriffs, Mayors, &c. the Sheriff at his Peril muſt now detain him.

Sheriff ought not to receive him from any but a Conſtable.

Vide Hob. 63. fi'le.

Yet, per Holt, Ch. J. He is brought to the Sheriff by a Warrant illegally executed, and therefore it is the ſame Thing as if there had been no Warrant at all. And ſuppoſe the Sheriff had a Warrant for him, and he is forcibly brought before him by a Perſon that has no Authority, the Sheriff cannot detain him by the Warrant, by grafting a legal Impriſonment upon an illegal one: And if he does, Falſe Impriſonment will lie againſt him; and he cannot juſtify receiving any that is brought to him in illegal Cuſtody, and he is not bound to receive him from any Body but from a Conſtable, or other Peace Officer. Indeed, if he asks him that brings the Priſoner what he is, and he affirms himſelf to be a Conſtable, &c. he muſt believe him, and make a Return accordingly; and here the Return not being filed, they gave him Time to amend, which he would not do.

Vide antea.

And at another Day, the Return being filed, the Court adjudged it inſufficient, and granted an Habeas Corpus to bring the Priſoner back to the King's Bench Priſon.

Foxton *verſus* Moſely.

Covenant brought by an Apprentice.

COvenant by an Apprentice for not teaching him four ſeveral Trades in an Indenture of Apprenticeſhip mentioned. The Defendant inſtead of craving Oyer of the Plaintiff's Indenture, ſets forth an Indenture of his own, and pleads a Performance of the Covenants therein contained.

And upon Demurrer, adjudged pro Quer. For the Defendant cannot shew any other Indenture, but crave Oyer of the Indenture declared on.

S. C. 2 Salk. 437, 438, 553.

Collins *versus* Jessot.

KIng moved for a Prohibition to the Spiritual Court for libelling there to dissolve a Marriage because of a Precontract, but the Libel did not set forth that it was in order to a Dissolution, and therefore the Suggestion was, That the Libel did not in Certainty shew the End of the Prosecution, as it was said they ought to do, that the Court here might see whether it was an End proper for them to prosecute for. F. N. B. 41. a.

Motion for a Prohibition for libelling in Spiritual Court, to dissolve a Marriage because of a Precontract.

Holt, Ch. J. If Contract be per Verba de præsenti, it amounts to an actual Marriage, which the very Parties themselves cannot dissolve by Release or other mutual Agreement; for it is as much a Marriage in the Sight of God, as if it had been in Facie Ecclesiæ; with this Difference, That if they cohabit before Marriage in Facie Ecclesiæ, they are for that punishable by Ecclesiastical Censures; and if after such Contract either of them lies with another, they will punish such Offender as an Adulterer.

How if a Contract be *per Verba de præsenti.* Swinb. de Sponsalib.

And if the Contract be per Verba de futuro, and after either of the Parties so contracting, without a previous Release or Discharge of the Contract, marry another, it will be a good Cause with them of a Dissolution of a second Marriage, and of Decreeing the first Contract's being perfected into a Marriage. Quæ omnia tota Cur. concess. except the last Point, whereof Powell doubted.

Or if *per Verba de futuro.*

Upon which Holt, Ch. J. added, That it was first resolved in my Lord Vaughan's Time, that an Action would well lie at Common Law for Breach of such an executory Contract per Verba de futuro, which Resolution Vaughan totis Viribus opposed, because the Party had this Remedy in the Spiritual Court, which was agreed by all.

Vide Cro. El. 79. Election of Remedy by the Party.

But notwithstanding, it was resolved the Party had his Election of either Remedy, and that by bringing Action at Common Law, and that appearing on Record, the Remedy in the Spiritual Court was actually released; for now, in Lieu of a Performance of the Contract, he shall recover Damages.

Damages may be recovered.

And he quoted a Case which he remembred had been tried at Guildhall, which was an Action for Breach of such a Promise, and upon Issue of Non assumpsit, Proof was made of the Promise. But the Defendant shewing that he had been sued for the same Matter in the Spiritual Court, and producing a Sentence against the Plaintiff, the Plaintiff notwithstanding this Proof was nonsuited, because that they were the proper Judges in the Spiritual Court whether it were a Precontract or not.

5 Co. 51. a.

Vide 2 Lev. 15, 16. acc.

Poſt 172. 3 Lev. 65. 5 Mod. 411.

And if a Man and Woman make mutual Promiſes of Intermarriage in futuro, and the Man gives the Woman 100l. in Satisfaction of the Promiſe, and ſhe accepts it ſo, it is a good Diſcharge of the Contract.

And being ſtirred again at another Day:

Juriſdiction of Spiritual Court allowed.

Per Cur. The Spiritual Court have Juriſdiction of all Matrimonial Cauſes whatſoever, and where it appears to us that the Cauſe is ſpiritual, of which in Conſequence they have Conuzance, unleſs it be by reaſon of ſome collateral temporal Matter in it, we ought not to prohibit them. And it is no Reaſon here to prohibit them, becauſe this may be a future Contract, for Breach of which an Action at Law will lie no more than when they libel for laying violent Hands upon a ſpiritual Man, for which an Action at Law lies for him for the Battery, and a Suit in the Spiritual Court for the Irreverence to his Character.

Vid. Hob. 79, 213. 2 Salk. 553.

And per Holt, Ch. J. There is a great Diverſity between the Spiritual Court and Court of Admiralty in Reference to Suggeſtions for Prohibitions, for the Admiralty has Juriſdiction in reſpect of Locality of Cauſe of Action, let the Nature of the Action be what it will; and therefore for a Prohibition, tho' they lay the Cauſe to ariſe ſuper altum Mare, yet the Party may ſuggeſt the contrary to oust them of Juriſdiction; but the Juriſdiction of Spiritual Court is in reſpect of the Nature of the Thing, viz. if it be Matrimonial or Teſtamentary, and therefore, if it appear by the Libel to be of that Nature, we will not prohibit them.

Poſt 172.

And Powel condemning the Diverſity in F. N. B. 107. a. between Promiſe to give 10l. with his Daughter in Marriage, and to pay him 10l. if he married his Daughter: Holt, C. J. ſaid, That by the firſt was underſtood 10l. to be laid down upon the Book at the Time of Marriage, and therefore it was matrimonial.

And Prohibition denied per tot. Cur.

Smith *verſus* Bartlett.

How the Act of Compoſition ought to be pleaded. Vid. ante 58.

DEBT upon a Bond, and the late Act of Compoſition of two Thirds in Number and Value of the Creditors pleaded in Bar, averring, that he was indebted to the Plaintiff in 49l. the 17th of November, 1697. and did then abſcond, a Replication and Rejoinder.

And

And Acherly excepted to the Declaration, that the Abſconding ought to be averred on the 1ſt of October, being the Time on which the Seſſion begun, and to which the Act as to this Part relates: And this appears plainly by the Word have in the Clauſe of Abſconding in the Statute.

Et Jud. pro Quer.

Famſhaw *verſus* Morriſon.

S. C. 1 Salk. 208. 2 Salk. 520. Poſt 197.

Hill. 3 Annæ, in B. R.

JUdgment was in C. B. upon Sci. fa. on a Recognizance by Bail, upon a Writ of Error, *Quod* the original Plaintiff ſhould have Execution upon the Recognizance, *Et quod recuperet damna ſua*, which he had ſuſtain'd *Occaſione Dilationis Executionis*. And the Exception taken was, that the Court had no Power to award Damages for Delay of Execution, but they ſhould give him them for Coſts of Suit. Judgment upon a Recognizance by Bail, &c. Poſt 159. See Carthew 415. & Skinner 100, 120.

Per Cur. Damages generally include Coſts, which Word [Coſts] properly ſignifies Coſts of Suit, and Delay of Execution is properly Damage, viz. the being ſo long out of his Money, which the Court uſed formerly to aſſeſs, by allowing the Party the lawful Intereſt: So Damages of Delay of Execution, and Coſts of Suit upon the Statute, are very different, and to be aſſeſs'd by different Meaſures, and the Statute gives only Coſts of Suit againſt the Bail, &c. Coſts & Damages. 3 Jac. 1. c. 1. *or* c. 8.

Ideo per Omnes, This is Error. Vide tamen 2 Cro. 420.

Rowſton *verſus* Combat.

INdebit. aſſumpſit for Goods ſold and delivered: Defendant pleads Quod ipſe ad Nar' præd' reſpondere non debet, quia there is another Action pending ex eadem Cauſa in C. B. Auter Action pending, ill pleaded.

Per Cur. This is not a Demurrer to your Declaration, or a Plea in Bar, but in Abatement of the Declaration; and reſpondeat ulterius was awarded. Vi. poſt 103.

For Pleas of other Action pending in Bar or Abatement, vide 6 Co. 7, 8, &c. Ferrar's Caſe. 5 Co. 7. b, 32, b. 4 Co. 39, 40. Cro. El. 668. Lat. 193. Mo. 458. 2 Vent. 168. 2 Mod. 2. 1 Lut. 41, 42, &c. Hob. 138, 139. See alſo Carthew 455, 456, & poſt 217, 218.

Gil-

Gilbert *verſus* Parker *& al'.*

S. C. Salk. 629, 630.

Replevin for Cattle. Juſtification Damage-feſant. Vide 9 Co. 66, 112. 8 Co. 89. 3 Lev. 104. Lutw. 1177, & 1316. 2 Salk. 580, 583.

REplevin for taking the Plaintiff's Cattle in ſuch a Place. Defendant makes Conuzance as Servant to G. P. who was ſeized of the Place where in Fee, and juſtifies the Taking Damage-feſant. The Plaintiff in Bar of the Conuzance alledges, that he himſelf was ſeiſed in Fee of a Third Part of a Moiety of a Fifth Part of the Place where, and juſtifies putting in his Cattle, abſque hoc that the Defendant's Maſter was ſole ſeiſed thereof. To which there is a Demurrer, of which Brotherick aſſigned for Reaſon:

1. That the ſole Seiſin here is not alledg'd, and therefore nottraverſable.

2. This Plea confeſſes and avoids our Title, and for that too it is not traverſable.

He agreed, That whatever is neceſſarily implied in the making a Title, may be traverſed; for if it be neceſſary, the Plea will be bad without it be intended; and if it be neceſſary, and for that intended, it may be traverſed as a neceſſary Part of the Title: And a Conuzance is in Nature of a Declaration, whereby one makes himſelf a Title to diſtrain. And here the Plaintiff ought to ſay that we have no Seiſin at all, or to ſhew that he has Right to put his Cattle there by ſome Title conſiſting with ours; but now he brings in his own Title by way of Inducement, ſo that we cannot traverſe. And he offered to ſhew a Diverſity between an Avowry upon a Title, and Conuzance or Avowry for Damage-feaſant; for if one avow for Rent, he muſt ſhew his Title and Tenure in particular, and there the Defendant may traverſe any Part of what he had ſet out; but to avow for Damage-feſant, it ſuffices upon the whole Matter that a Title appear for him to diſtrain, tho' not exactly agreeing with what he ſet out; for there the Plaintiff muſt ſhew the Taking unjuſt, by making himſelf Title, or by utterly deſtroying the others. Vide Hob. 72. Mo. 863.

Carth. 179. 5 Mod. 150. Vid. poſt 223. Vid. 1 Ed. 4, 9. Dyer 280. 2 Vent. 228. Hutt. 120.

How the Plaintiff might have derived his Title, and traverſed. Vid. Hob. 119, acc.

Holt, Ch. J. You ſet out a Seiſin in Fee, and nothing more need be traverſed. And here he might have ſaid that J. S. was ſeized, and derive Title under him, abſque hoc that you were ſeized; or that he was Tenant in Common with you, abſque hoc that you were ſeized Modo & Forma, and it had been well. Vide 3 Cro. 795. Defendant juſtified Diſtreſs, for that A. being ſeized of the Place where, ſurrender'd it to him and two more, who died, and conveys to him as Survivor, whereby he became ſole ſeized. Plaintiff replies, confeſſing the Surrender to three, the Death of two, but that one of them before his Death ſurrender'd his Share to him, abſque hoc that the Defendant was ſole ſeized, and adjudged good on Demurrer. Winch 7. 2 Mod. 6. In Treſpaſs the ſole Seiſin is traverſed, tho' but a Seiſin in Fee generally be alledged: And where one alledges Seiſin in himſelf generally, it will not be enough for another to alledge himſelf

ſelf to be a Tenant in common with him, without traverſing the ſole Seiſin, for it is not a Confeſſion and an Avoidance. And if here he had replied, that J. S. was ſeized in Fee, and make Title under him, abſque hoc that the Defendant was ſeized Modo & Forma, and upon Iſſue the Defendant were found ſeized of a Moiety only, it would be againſt him; for he avowed as one ſole ſeized, when it ſhould be as Tenant in Common. And where Dyer 280. is objected, 1. The Court were divided upon it. 2. There may be a Difference between Coparceners and Jointenants, and Tenants in Common; for the two firſt are ſeized per my & per tout, but the laſt have ſeveral Seiſins, and here to introduce his Traverſe, he muſt make himſelf ſome Title, to enable him to controvert with the Defendant. And there is no Difference between Avowry and Juſtification, as was urged; for in both, if the Party ſet forth a Falſity, he is bound to maintain it.

Difference between Coparceners and Jointenants, and Tenants in Common. Carth. 16, 96, 289, 364, 329, 505.

Et ſic per totam Cur' Judic' pro Quer' niſi.

Judic' pro Quer' niſi.

Note; As Authorities were quoted at the Bar, 1 Ed. 4. 9. 37 H. 6. 31. Br. Traverſe 142. 21 Ed. 4. 65. b. 32 H. 6. 2. b. Keilw. 27. 1 Lev. 78.

And though it was ſaid by Brotherick, that by 1 Ed. 4. 9. it was agreed, that laying a Seiſin generally in a Declaration did not import a ſole Seiſin, as it would in a Bar, Repl', &c. and that an Avowry was no more than a Declaration.

Ideo Holt, Ch. J. ſaid, An Avowry was a Declaration, and more.

Parkins *verſus* Chatherton.

DEBT upon a Recognizance by Bail in this Court, and the Declaration ſets forth, That the Plaintiff in Michaelmas Term obtained Judgment againſt their Principal, and that in Eaſter Term before the Defendants became Bail by Recognizance conditioned, &c. in Placito præd'. And to this it was objected, that it did not alledge that there was any Action pending in Eaſter Term.

Common Form of declaring upon Recognizance againſt the Bail. Vid. ant. 157. Poſt 197.

But per Cur'. It is well, and the common Form in Sci. fa. is ſo; ideo it will be as well in Debt upon the Recognizance.

Judic' pro Quer'.

Harvey *verſus* Broad.

S. C. 2 Salk. 626.

Vide ante 148, & poſt 196, 250, 251, &c.

WRIT of Enquiry was returnable Tres Trin', which happened to be on a Sunday, ſo that the Eſſoins were kept on the Monday; the Writ is returned to have been executed the 14th of June, which was the Day after the Return, viz. Monday. And tho', per tot' Cur', without Doubt a Writ may be executed on the Day of its Return, yet if that Day be ſuch a Day as it cannot be legally done on, they ſhall

If a Writ may not be executed on Day of Return legally, it ſhall not the next Day.

Vide antea 81, 41, 148. 1 Leon. 242. Poſt 252.

ſhall not do it the next Day? And the Kalendar is Law, of which we as Judges muſt take Notice, and ſuch a Fault may be aſſigned for Error Ore tenus at the Bar: And the Diſtinction in the Books that we ought to take Notice of immoveable, but not of moveable Feaſts, is vain, for we know neither one nor the other, but by the Almanacks; and we are to take Notice of the Courſe of the Moon.

But at the Importunity of Hall, Serjeant, they gave Time to ſpeak to it upon this Point, viz. Whether it not being aſſigned on Record, but only Ore tenus, the Court were bound to take Notice of it? Vide poſt 196, & ante 148.

Oates *verſus* Bromell.

S. C. 1 Salk. 75.

Vide ib. 69, ante 82. Poſt 176. Debt upon Bond to perform an Award, *Ita quod, &c. Nul Award* pleaded, and *Parol Award* ſet out, ready to be delivered, &c.

DEBT upon a Bond for Performance of an Award, ita quod it were made and ready to be delivered to the Parties, or ſuch of them as ſhould deſire it by ſuch a Day: Null Award pleaded, and a Parol Award ſet out, and avers, That it was ready to be delivered to the ſaid Parties: And a Demurrer; for the Words, ready to be delivered, per Brotherick, neceſſarily import, that the Award was to have been in Writing; and he quoted a Caſe in the Common Pleas, Trin. 1° Regin' int' Wood & Ardiſt, in the very Point: And inſiſted much upon Hungate's Caſe, 5 Co. 103. where the Condition of the Performance was, Ita quod Arbit' fiat & deliberetur utriq; partium, there being two Defendants; and held, that a Delivery to one of them was inſufficient, yet if it could be a Parol Award, a Publication of it to both would be ſufficient.

If a Parol Award may be delivered as well as a Writing.

Salkeld contra. Parol may be delivered as well as a Writing; as in common Parlance to deliver a Meſſuage, to deliver himſelf well; when a Man expreſſes his Thoughts gracefully: And Delivery is to be underſtood, ſecundum ſubjectam materiam; if it be of a Writing, it muſt be a manual; if of a Parol Matter, it muſt be an oral Delivery: And relied on Dyer 218. Pl. 5. Co. Ent. 126. full in the Point; and 3 Bulſt. 311. Capell *v.* Rogers; and that Benloe's 97. which ſeems to differ from Dyer, is very obſcure in his Report of the Caſe.

Vid. ant. 82. 2 Cro. 541.

Holt, Ch. J. There are two diſtinct Things to be done: 1. The Making: And, 2. To be ready to be delivered: If it had been, ſo as the ſaid Award be ready to be delivered, it might be well: If it were in Writing, it would ſuffice to ſay, That it was made; for what is made in Writing, then is ready to be delivered, becauſe then it is deliverable: But the Queſtion is, Whether a Parol Award be properly deliverable; or whether we ſhall not underſtand the Meaning of the Words, ready to be delivered, to be a Delivery in Writing? And he and the Court ſeemed clear it ſhould be ſo underſtood.

How the Words [*ready to be deliver'd*] are to be underſtood.

But another Day Holt, Ch. J. having ſeen the Caſe above in Dyer, and the Record of it in Co. Ent. ſaid, They were very ſtrong Authorities for the Plaintiff, and that the Award might have been made behind the Parties Backs, and delivered, viz. pronounced over again

again to their Faces; and if ſo, what may be delivered, may be ready to be delivered: And that the Caſe, as it is in Bendloe's, had neither Head nor Tail to it.

Powel. If the Words had been only, ſo as it be made and delivered, I would take Delivery to be only to give the Parties Notice of the Award; but ready to be delivered, I think muſt be a Delivery in Writing; and if Iſſue were taken upon the Readineſs of Delivery, how ſhould it be tried?

Holt, Ch. Juſt. If it were res nova, I ſhould be apt to think ſo too; but when I find ſo clear an Authority in the Caſe, and ſome Reaſon for it, I cannot depart from it: And ſo ſaid Gould; but they would be well informed of the Caſe quoted lately in the Common Pleas, and no Rule was given. Vid. poſtea.

Holmes *verſus* Hall:

Vide 1 Salk. 24, 27, 28.

At Guildhall, *at* Niſi prius, Coram Holt, *Ch. Juſt.* Poſt. 309.

INdebit' Aſſumpſit by Executor, for ſo much Money of Teſtator received by the Defendant to the Uſe of the Executor.

Indebit. Aſſ. by Executor, for Money of Teſtator, received to Uſe of Executor.

The Evidence was, That ſome Writings of the Teſtator came to the Defendant's Hands, which he would not deliver up to the Executor; who, to get the Writings, gave him ſo much Money, whereupon he promiſed to give up the Writings, but after refuſed.

And Serjeant Darnell objected, That the Plaintiff miſtook his Action; for he ſhould have brought Caſe upon the ſpecial Agreement for Nondelivery of the Writings.

Obj. That Plaintiff had miſtaken his Action.

Holt, Ch. Juſt. If A. give Money to B. to pay C. upon C.'s giving Writings, &c. and C. will not do it, Indebit' will lie for A. againſt B. for ſo much Money received to his Uſe; and many ſuch Actions have been maintained for Earneſts in Bargains when the Bargainor would not perform, and for Premiums for Inſurance when the Ship, &c. did not go the Voyage: but it has been held, it would not lie for Money paid upon an uſurious Contract, becauſe there it was not intended it ſhould be repaid, or any Thing done for it. Indeed, theſe Caſes have been carried too far, viz. Indebit. for Money received to Uſe, and no Body would more willingly check them than I would; therefore it ſhall be ſaved you if you will, but I will not nonſuit the Plaintiff: But it appeared on the Evidence, that the Defendant pretended to the Money as due from the Teſtator, and would not deliver the Writings without Payment, and that the Money was given in Satisfaction of the Debt: So it was clear againſt the Plaintiff, and he was nonſuited.

And Darnel quoted a Caſe, where he ſaid, One had undertaken to obtain a Pardon for another, and to that End got ſeveral Sums of Money from him, but had not got the Pardon; and an Indebit. for Money to the Plaintiff's Uſe brought, and yet the Plaintiff had been nonſuited before Holt: Which Holt, Ch. Juſt. utterly denied.

Langford *verſus* Adminiſtratrix of Tyler.

S. C. 1 Salk. 113.

Againſt Adminiſtratix, who in her Husband's Life-time dealt ſeparately in ſelling Tea, and a Bargain by her then made.

THE Defendant, now Adminiſtratrix to Tyler her late Husband, in his Life-time uſed to deal in Tea, and ſold four Butts of Tea to the Plaintiff at ſo much per Pound; who took one away, paying for it, and 50 s. over to go towards Payment of the reſt. When ſhe came for the reſt, Vendor would not ſtand to her Agreement; and Action brought, and two Counts, one upon the Agreement, and the other Indebit. for 50 s. received to the Plaintiff's Uſe.

See Skinner 349.
Ante 105, 147.
Poſt 230.

Theſe Points were ruled by Holt, Ch. Juſt. 1. If Husband and Wife cohabit, and Wife deals ſeparately, her Contracts ſhall charge the Husband, for Cohabitation is ſufficient Evidence of Notice.

2. If Bargain be made, and Earneſt given, without an expreſs Agreement that Payment is to be made at a certain Time, the Money muſt be paid before the Goods be removed.

3. A Demand of the Goods without a Tender of the Money, is void, becauſe it is not purſuant to the Intent of the Bargain, and the Earneſt is only to bind the Bargain.

4. After Earneſt given, the Vendor cannot ſell to another; but if Vendee does not come to pay, and take the Goods, Vendor ought to come and requeſt him to come and pay; and if he does not come in convenient Time, the Agreement is diſſolved, and when he may ſell.

More *verſus* Rowbothom.

Caution given in the Admiralty to ſome Part-Owners of a Ship, and there afterwards libelled upon the Ship being loſt.
Ante 12, 26, 79.
Prohibition
See Carthew 26, 166, 518,

SEveral Part-Owners of a Ship, ſome whereof were againſt Fraighting her; but by a Courſe in the Admiralty in ſuch Caſe, for Advancing of Navigation, they decree, That the Major part ſhall prevail and freight, they giving the diſſenting Party Caution for their Parts of the Ship againſt all Riſques; which was done here, and the Ship being loſt, the Caution were libelled againſt, and Sentence given in the Admiralty: And now Prohibition was moved for, ſuggeſting, that the Caution was given upon Land, and that all Matter of Property is to be ordered by the Common Law only: And the Court ſeemed ſtrong, that they had ſuch Power; and if ſo, by conſequence they have no Juriſdiction over the Caution as incident thereunto: Yet it being Matter of Conſequence, and never yet determined, they granted a Prohibition, and directed them to declare according to their Vid. Hob. 79. Suggeſtion forthwith: And though it be after Sentence, yet if they had no Juriſdiction, Prohibition ought to go: And ſo it was ruled.

Domina Regina *verſus* Inhabit' de Cluworth.

S. C. 1 Salk. 358.

THEY were indicted for not repairing a common Foot-way, and ſubmitted by pleading guilty; and the Court, before they would ſet a Fine, would be certified by ſome of the Juſtices of the Peace of the Neighbourhood that the Way was ſufficiently repaired, which they did. Of Repairing Highways, ſee Carth. 212, 451.

Submiſſion to an Indictment for not repairing a common Highway.

Per Cur', If one be found Not guilty upon ſuch an Indictment, he is quit for being fined; but a Diſtringas in infinitum ſhall go to the Sheriff againſt him 'till he certify that the Way is repaired.

And per Holt, Ch. Juſt. If one has Land adjoining on a Navigable River, every one that uſes that River has, if Occaſion be, Right to a Way by Brink of Water over that Land, or farther in if neceſſary: If a Man by Preſcription be bound to repair a Way, he is not bound to put it into better Repair than it has been in Time out of Mind before.

Vide ante 3, 149.

Sexton's *Caſe*.

ADminiſtratrix owing Money to A. as ſuch, but nothing in her own Right, was arreſted by him by a Writ, without naming her Adminiſtratrix; and ſhe being thus under Arreſt, gives a Warrant of Attorney to confeſs Judgment: Whereupon Judgment being entered, and her Goods taken in Execution, and all this appearing by the Maſter's Report, though there had been an Attorney by at the executing the Warrant of Attorney, the Judgment for Irregularity was ſet aſide, and Reſtitution awarded; for ſhe was in Cuſtody without any Foundation, and under that Terror gave the Warrant. Per Cur'.

Adminiſtratrix, tho' not ſo named, gives a Warrant to confeſs a Judgment, under Terror of Arreſt. Vid. ante 85. 1 Salk. 399, 400. Fareſl. 115, 139.

Queen *verſus* Inhabit' de Newnham Murrey.

AN Order of Juſtices was, Whereas Complaint hath been made to us by the Church-wardens, *&c.* of *A.* that *B.* came to ſettle in ſuch a Pariſh contrary to Law, therefore they ordered him to another Place; and quaſhed for want of Adjudication, that he was likely to become chargeable. Vide 2 Salk. 478, 479, 491. Carthew 28, 222, 365, 396, 516, &c.

Order of Settlement quaſhed; ante 87, 88, poſt 213, 287.

Domina Regina *verſus* Gold.

S. C. 1 Salk. 381.

HE was indicted, for that one A. a poor Boy being ſet out to him as an Apprentice, purſuant to the Act of Parliament, he Vi & Armis refuſed to provide for him, and moved to quaſh it:

Indictment for refuſing to provide for a poor Apprentice. 5 Eliz. c. 4. Vide 1 Salk. 66, 68. Poſt 164.

1. Becauſe it was not a Matter indictable.

2. In caſe it be indictable, there ſhould have been firſt an Application to a Juſtice of Peace, and after an Appeal to the Seſſions, and then peahaps foꝛ Diſobedience to ſuch Oꝛders an Indictment would lie.

3. It is laid to have been Vi & Armis, which is abſurd, it being foꝛ a Nonfeaꝛance.

Per Cur', If this had been the Caſe of a common Appꝛentice, an Indictment would not lie: Indeed foꝛmerly it has been held generally, and by all the Judges in Pyne's Caſe, That the Juſtices could not compel a Man to take an Appꝛentice upon the Statute; but ſince the contrary Opinion has pꝛevailed: And then when we allow them ſuch Power, of neceſſary Conſequence we muſt allow an Indictment foꝛ Diſobedience to their Oꝛders, either in not receiving, oꝛ receiving, and after turning off, oꝛ not pꝛoviding foꝛ ſuch Appꝛentice. And tho' an Act of Parliament pꝛeſcribes an eaſier Way of pꝛoceeding by Complaint, as is urged, yet that does not hinder an Indictment; and tho' the Vi & Armis in this Caſe be abſurd, yet it is only Surpluſage, which will not vitiate, and refuſed to quaſh it.

Pyne's Caſe. 3 Keb. 628, 686, 854, 516. Vide 2 Salk. 491. 1 Sid. 99. 1 Salk. 67. 1 Lev. 84. Ray. 65. Show. 76. 3 Mod. 270.

Vi & Armis here, Surpluſage, &c.

Note; There is a late Act of King William's Time touching this Power of Juſtices. Vid. Stat. 8 & 9 W. 3. cap. 30. And ſee the Caſes touching Apprentices in Carthew 56, 94, 162, 198, 231, 366, &c. And Skinner 98, 108, 114, 579.

Caly *verſus* Hardy, Golſon *& al' Juſt' Pacis* of the Town of *Ipſwich.*

Vide 1 Salk. 327.

Clerk of a Market turned out of Poſſeſſion by Force.

THE Magiſtrates of the Town had a Mind to turn the Clerk of the Market out of his Place, and pꝛocured a foꝛcible Entry to be made upon the Market-houſe to get the Poſſeſſion thereof from him; and the Juſtices of the Town being, as was ſuggeſted, in the Faction, would not inquire of the Foꝛce.

And here, per Holt, Ch. Juſt. If all the Juſtices of a Coꝛpoꝛation are concerned in a Foꝛce, and will not inquire of it, the next Juſtices of the County ſhall do it; foꝛ the denying to do it, is a Foꝛfeiture of their Exemption from the County: And here a Mandamus was granted jointly and ſeverally to all the Juſtices of the Town, to inquire of the Foꝛce, foꝛ the Court would ſuppoſe them all guilty.

Domina Regina *verſus* Tutchin.

Vide poſt 268. 1 Salk. 48, 49, &c. 2 Salk. 699.

Defendant, Author of the *Obſervator*, appearing in Court upon his Recognizance.

HE was the Authoꝛ of a ſeditious Paper, called The Obſervator, and an Oꝛder of the Houſe of Commons againſt him foꝛ appꝛehending him; and likewiſe a Pꝛoclamation, with a Reward foꝛ taking him up; but he abſconded a long Time, but did not deſiſt from wꝛiting on very ſcandalouſly on the Government: And now at laſt he ſurren-

ſurrender'd himſelf to the Secretary of State, who bound him to appear here the laſt Day of this Term, and to his Good Behaviour in the mean Time, and now an Information being filed againſt him, he by his Counſel prayed Time to plead till next Term.

Per Cur', If he had been ſummoned, and not appeared, but were brought in upon the Capias, he muſt have pleaded inſtanter; but appearing upon his Recognizance, he ought to have convenient Time: And now he muſt renew his Recognizance here, that is, give new Bail, or the ſame, if good, may enter into a new Recognizance; and though we do record his Appearance now, and give him Leave to go look for Bail, yet if he don't come ſitting the Court, we may call him, and record his Default: And we cannot well bind him to his Good Behaviour; for it is not uſual, when we proceed in order to convict a Man, to bind him to his Good Behaviour in the Interim. Vide poſt 268. Reſiduum.

Had convenient Time to plead, and find new Bail, &c.

And was not bound to his Good Behaviour.

Gawdy *verſus* Pickerſdale.

ERror of a Judgment againſt an Executor in Rippon Court; Verdict gave the Plaintiff 3 l. Damages, 1 s. Coſts, and 5 l. 10 s. de incremento: And Judgment, Quod Quer' præd' ſummas attingent' to 7 l. &c. de Bonis Teſtatoris, ac ſi de Bonis propriis of the Defendant.

What Errors of Judgment in an inferiour Court will be allowed to be amended.

Per Cur', We will not ſuffer them to amend any Error in Knowledge or Skill by their Books of Minutes; yet we will allow Amendments of Errors in Fact in the Record by the Minute-Book, if it appear upon Examination to have been originally right in the Book, and not made for that Purpoſe.

Vide 1 Salk. 47, 50, 51, 53.

And Holt, Ch. Juſt. remembred the Caſe of Sanderſon *v.* Laniere; where in Error of a Judgment in the Court of Northampton they would not ſuffer them to amend Præceptum fuit into Præceptum eſt; yet in the ſame Caſe there were but eleven Jurymen named in the Record, there being twelve in the Book, they ſuffered them to amend that.

Vi. Hob. 127.

The Warden and Company of Sadlers of London *verſus* Jones:

At Niſi prius, Coram Holt, *Ch. Juſt.*

THEY brought Debt upon the Statute of 1 Jac. 1. c. 22. & Sect. 44. againſt the Defendant; For that being a Sadler, he did make 500 Saddles unſufficiently and unſubſtantially, contra formam Stat', and ſo became indebted to them in the Forfeiture. Upon Evidence, the Caſe was thus:

Debt brought for making 500 Saddles unſufficient, &c. for the Uſe of the *Portugal* Envoy.

The

The King of Portugal's Envoy reſiding here, directed the Defendant to make him 500 Saddles for War, for the Uſe of the King his Maſter, after the Pattern of a Saddle brought for that Purpoſe from Portugal; the Seat whereof was covered with Goat-Skin, and ſtuff'd on the Outſide with Straw: The Defendant makes ſome twenty Saddles in Imitation of the Pattern, but covered the Seat with white Allom'd Sheep Skins; and inſtead of Straw, ſtuff'd them with Hay on the Outſide. The Company finding this Matter, applied to the Envoy, informing him of the Cheat put upon him: Who thereupon countermanded the Defendant for ſome Time, 'till he had examined and compared his Work with the Pattern, and after ordered him to go on, which he did: The Saddles were all made, as aforeſaid, paid for, and ſent to Portugal; and this Action now brought for the Penalty, and Three of the Company were diſfranchiſed to be legal Evidence, they declaring upon a Voire dire, that they had no Aſſurance of being received again: And the Queſtion was,

The Company complains to the Envoy of a Cheat, who ordered the Defendant to go on after examining Part of the Saddles.

Q. Whether allom'd Sheep-Skins be Leather within the Act 1 *Jac.* 1. *c.* 22. and it ſeems they are.

1. Whether allom'd Sheep-Skins were Leather within the Act? And it appears by Sect. 49. that it is if tann'd or tawed: And it appearing by Evidence, that there are two Sorts of tawing, one Dry, which leaves the Fur on; the other wet, which is done with Salt and Allom; it was clear, Sheep-Skins allom'd were Leather within the Act.

If it were improper for that Uſe, &c.

Next Queſtion, If it were proper for the Uſe that it was put to by the Defendant? And if not, Whether imploying it improperly, would bring the Defendant within the Words, Not ſubſtantially and ſufficiently made up? Sect. 44.

And as to this, Holt, Ch. Juſt. ſaid, That if the Jury would think it improper for that Uſe, he would have the reſt found ſpecially; for if theſe Words (as it was urged) were only applicable to the Making up and Workmanſhip, without Regard to the Materials, that being provided for by other Clauſes in the Statute; he ſaid, if a Sadler, &c. has bought good Leather according to the Statute; and ſuffer'd it to rot, and after work'd it up into Saddles, &c. he would be diſpuniſhed by that Conſtruction.

Meaning of the Statute is not to prevent one to buy and contract for what he pleaſes.

2. He ſaid, the Meaning of the Statute was to prevent People's being cheated by having ill Goods put upon them; and if this Kind of Sheep-Skins were not according to the Statute, yet if the Buyer knew it, and were ſatisfied therewith, it would be no Crime; for the Statute did not deſign to take away any Man's Liberty of uſing what he pleaſed, that is, buying and contracting for what he pleaſed: But the Jury found for the Defendant generally.

Neal *verſus* Goulſton.

DEBT upon a Bond conditioned for Payment of Money, and therefore to be ſpecified in Taxation according to the late Act of Parliament.

Debt upon a Bond not ſpecified in Taxation according to a late Act.

Per Holt, Ch. Juſt. upon Evidence, If the Certificate produced bear Date in due Time, I will not doubt but that it was then delivered, or now, that it bears but a very late Date; yet if you prove, that it was tared in due Time, it will ſuffice: Or laſtly, if it has not been tared in due Time, yet if you have a Talley to produce that you have paid the double Tax for Penalty, it will do: And the Plaintiff failing in all, was nonſuited.

Vide poſt. 184. infra.

Plaintiff failing in Evidence, was nonſuited.

And here Holt, Ch. Juſt. put the Caſe, If Obligee had been beyond Sea all the while; but reſolved nothing as to that.

Osbourne *verſus* Hoſier.

DEBT was upon a ſingle Bill for Payment of 230l. on Demand; upon non eſt Factum, one of the ſubſcribing Witneſſes was produced, and gave full Evidence of the Enſealing and Delivery of the Bond. On the other Side was produced a Perſon of the ſame Name and Surname with the other ſubſcribing Witneſs; who acknowledged that the Hand was very like his, but it was not his; that he never knew either of the Parties, nor the other Witneſs, nor could the other Witneſs ſay he was the Man; and both their Reputations being made good in Proof, Holt, Ch. Juſt. order'd them both to write their Names, and thereupon left it to the Jury, who found for the Plaintiff.

In Debt upon a ſingle Bill, two Perſons produced as Witneſſes ordered to write their Names, and Verdict for Plaintiff.

And here Holt, Ch. Juſt. ruled, That this being a ſingle Bill, it needed no Specification according to the late Statute, becauſe it did not carry Intereſt, yet directed the Jury to give Damages, viz. Intereſt: And where it was objected it was payable on Demand, and no Damages or Intereſt incurr'd till Demand, and none was proved; Holt, Ch. Juſt. ſaid, That could not have been taken Advantage of upon non eſt Factum, or any other collateral Iſſue, but ſhould have been pleaded.

Vid. ſupra & poſt 184.

Domina Regina *verſus* Carter.

Vide 5 Mod. 343, 349, &c.

HE was indicted for a wilful and corrupt Perjury; and the Indictment reciting the Record of the Trial, at which it was ſuppoſed the Perjury was committed, being a feign'd Iſſue out of Chancery, did ſet forth, That there happen'd a Diſcourſe between my Lord Wharton and

Indict. for a wilful Perjury, reciting the Record of Trial to be upon a feigned Iſſue out of *Chancery*.

Perjury. Vide 1 Salk. 374. 2 Salk. 514. 1 Sid. 106, 237, 377, 454. 1 Ven. 182. 370.

and Sir W. R. R. S. R. R. and J. S. concerning the Boundary of certain Lands; and my Lord W. affirm'd A. to be a Boundary: The ſaid Sir W. R. R. S. and J. S. affirm'd, that A. was not the Boundary. Whereupon a Wager was laid, and mutual Promiſes were made between the Lord W. and them the ſaid Sir W. R. R. S. R. R. and J. S.

Variance aſſign'd between the Record recited and the Indictment. Vid. tamen, Hob. 55. & quære Hob 59. Fareſt. 101. 1 Sid. 148, 153, 217. Raym. 74. 1 Keb. 531. 2 Salk 660.

And now at the Trial of the Indictment, this Variance was aſſign'd between the Record they took upon them to recite and the Indictment, That the Affirmation that A. was not a Boundary, was in the Record laid to have been by Sir W. R. R. S. R. R. and I. S. whereas the Indictment laid it to have been by Sir W. R. R. S. and J. S. omitting R. R. ſo this Record now produced in the Court was not the Record deſcribed in the Indictment, and ſeem'd a good Exception: For per Holt, Ch. Juſt. If you bring an Aſſumpſit againſt two, and give Evidence only of an Aſſumpſit by one, you are gone.

Another Variance was, That in one of the Denominations of Lands in the Record, it was Barnap, and in the Indictment Barnep: Another Word in the Record was Orientati, and in the Indictment Orientali; and all theſe being in the Deſcription of the Record, ſeem'd fatal.

Record of the Trial not entered up, a groſs Fault.

But another Fault yet groſſer was, That the Record of the Trial at which the Perjury was alledged, was not enter'd up; ſo it did not appear that ever there was a Trial.

And Holt, Ch. Juſt. denied the Minutes of it for Evidence, and quoted a Caſe where a rank Perjury had gone unpuniſhed for ever for that Omiſſion; for that he ſaid was final, ſo as the Party could never be tried thereon again: But in this Caſe he ſaid, That by reaſon of the other Exceptions, the Indictment being Inſufficient, they might indict him anew; for an Acquittal upon a bad Indictment, would not be a Plea to a good one; whereas if the Indictment had been good, an Acquittal upon the laſt Fault had been peremptory: And here the Indictment being brought to Trial by the Defendant, if he have made it up variant from what it is upon the Plea-Rool, an Acquittal upon it will be void; and beſides, the Defendant has forfeited his Recognizance, whereby he was obliged to bring down the Indictment to Trial.

1 Sid. 153, 154.

Two Indictments, and one withdrawn, and Defendant ordered to put it in again.

And whereas here were two Indictments againſt the Defendant, and he had brought them down both, and put them into Court, he now, to bring which he pleaſed on firſt, withdrew one of them.

Holt, Ch. Juſt. ordered him to put it in again; and it was inſiſted on, that the Queen had her Election to bring on which of her Cauſes ſhe pleaſed, and therefore they would bring that on firſt which the Defendant would have come on laſt.

But per Holt, Ch. Juſt. It is true, the Queen has that Election where ſhe brings on her Cauſes her ſelf, but here the Defendant brings it on, and he is to do the firſt Act, and therefore has his Election; but if you will enter a Non pros. upon that which they deſire to bring on, you thereby inforce them to bring on the other; but to ouſt all Contro-

Controverſy, the Defendant having put in that which he would prefer firſt, it was firſt called.

Note; Another Exception was, that the Record of the original Trial began, Memorand. quod apud W. coram Domina Regina & Johanne Holt Milite, Capitali Juſtic', &c. & Sociis ſuis, &c. Whereas there is no Court ſo ſtyled, but it ought to be coram Domina Regina only.

Muriel *verſus* Tracy, Jenkins, Chamberlain, and Cornwaill.

Vid. ante 30. 90, 114 137. Poſt 178, 185. Indictment for a Conſpiracy. Caſe for conſpiring to vex and oppreſs the Plaintiff &c. Vide 1 Salk. 14, 15. 5 Mod. 349, 405. 1 Saund. 128, 230. 4 Co. 14, 15. 5 Co. 56, 57. 2 Mod. 306. Carth. 417. Skinner 44. Ante 100, 137. poſt. 187.

IT was an Action upon the Caſe in Nature of a Conſpiracy, wherein the Plaintiff declared, that the Defendants, per Conſpirationem inter eos habitam to vex and oppreſs him, did (pretextu cujuſdam Warranti from Sir S. Lovell, Recorder of London, wherein the Plaintiff was charged by Oath of one Aſhby to have aſſaulted the ſaid Aſhby on the Highway, with Intent to rob and murder him) arreſt him the Plaintiff, and carry him before Chamberlain, a Juſtice of Peace, who, ex Perſuaſione of Tracy, refuſed to bail him, tho' good Bail were tendered; and ſo Chamberlain committed him to the Priſon of the Gatehouſe, where ſuch and ſuch Sums of Money were extorted from him, and not ſaid in the whole Declaration that it was without probable Cauſe.

Upon Evidence before Holt, Ch. J. it appeared, That eight Years ago Muriell being a Gentleman's Servant, and riding one Day abroad, had fallen out with Aſhby on the Road, and being in Drink, was ſoundly beat by him; notwithſtanding which, Aſhby took out immediately a Juſtice's Warrant againſt Muriell for an Aſſault and Battery, but nothing more was done upon it. Six Years after, ſome Difference ariſing between Muriell, Tracy and Jenkins, here in London, Jenkins goes down to Suffolk, and at the Perſwaſion of Cornwaill, prevails with Aſhby to come up to London, to make the Oath abovementioned againſt Muriell, which he did before the Recorder, (whereupon the Warrant was granted) and had a Guinea from Jenkins for his Pains. Now a Twelvemonth after Tracy being himſelf a Juſtice of Peace, employs the Under-keeper of the Gatehouſe, and others, to take up Muriell, and to carry him before Juſtice Chamberlain, and ſend him Word as ſoon as they took him, which accordingly was done. And Tracy informed Chamberlain that he had adviſed with the Recorder and other Lawyers about the Offence charged upon Muriell, and that they were of Opinion it was not bailable; whereas in Truth he never did aſk the Queſtion: Whereupon Chamberlain refuſed Bail, and committed him. Tracy follows him to Gaol, and directs the Gaoler to uſe him ſeverely, and to iron him.

Holt, Ch. J. As to Chamberlain, he was to blame for his Ignorance, but no Reaſon to find him guilty upon this Evidence; but for the reſt, the Circumſtances of the Evidence ſhew it to be all one Chain of Malice; and if the Declaration were good, the Evidence would maintain it.

But Exceptions taken to the Declaration were: 1. That it recited a Warrant variant from that on which Plaintiff was arreſted, for the Recital was abſolute and poſitive that the Oath was, that the Plaintiff had aſſaulted Aſhby with Intent to rob and kill him; but the Warrant was with Intent, &c. as he believes. But no great Heed was had to that Objection; but Holt, Ch. J. ſaid, it ſhould be ſaved to them.

2. Exception was, That the Declaration ſuppoſed the Arreſt to be without a legal Warrant; for it was, that Pretextu cujuſdam Warranti, and Pretextu was the ſame as Colore, and that muſt be taken as if no Warrant had been: But that was over-ruled, for there being an ill Uſe made of this Warrant, tho' it were legal, ſure that were Pretextu of a Warrant.

3. If it be taken to be a legal Warrant, there can be no Conſpiracy in taking up one by a legal Warrant, eſpecially it not being laid that the Warrant was taken out without probable Cauſe.

And upon this Exception, Holt, Ch. J. willed them to withdraw a Juror, for he held the Declaration ill for not alledging to have been without probable Cauſe: And to this the Parties conſented.

Vid. 1 Vent. 86.

Note here per Holt, Ch. J. This being Caſe in Nature of a Conſpiracy, all might be acquitted to one, and he found guilty. Vide N. B. 277. A. 278. K. 2 Saund. 230. 1 Vent. 12, 18, 23. & Lib. Ante 16. 1 Cro. 239.

Oliviere *verſus* Vernon

Trover for 14 Lemon-Trees licenſed to ſtand in a Lord's Garden, &c.

TRover for 14 Lemon-Trees, and the Statute of Limitations pleaded. On Evidence at Niſi Prius, coram Holt, Ch. J. it appeared, the Plaintiff obtained Leave from my Lord Brudenell above 6 Years before to have the Trees ſtand in his Garden at Twittenham, and that his Lordſhip's Gardener might take Care of them. After my Lord ſold his Garden, with all his Trees therein, to my Lord Portland, who after ſold the Garden, and whatever he had from my Lord Brudenell, to the Defendant, and a Demand and Refuſal within ſix Years proved upon the Defendant.

Here it was objected 1. That the Gardener who received the Trees firſt from the Plaintiff, and continued Gardener all along, and looked after and reared the Trees, could not be a Witneſs; for that he, in caſe he proved a Title in the Plaintiff, would thereby intitle himſelf to an Action for his Labour and Skill employed in rearing up the Trees; whereas if it went for the Defendant, he was to have nothing.

But this was over-ruled by Holt, Ch. J. 1. Becauſe if the Gardener took Care of them as my Lord Brudenell's Servant, he was to have nothing for his Pains from the Defendant.

2. If my Lord only gave the Gardener Leave to do it for the Plaintiff, the Gardener then was ſo far the Plaintiff's Servant, and it

never was doubted but a Servant was a good Witneſs for his Maſter.

He alſo held, that theſe Trees being in Bores, and ſeparate from the Freehold, could not paſs by the Grant of the Garden, nor by the Words [all his Trees therein,] for they were not his Trees, that is, my Lord Brudenell's. Nay, it would be hard to comprehend them by Conſtruction within the Grant, if the Words had been [all the Trees in the Garden,] without there were a Schedule of the Trees intended to paſs, and the Plaintiff's Trees mentioned therein. But he agreed, if they had been conveyed by my Lord Brudenell's Grant, that had been a Converſion, and being above ſix Years, the Iſſue would be againſt the Plaintiff. That theſe Trees could not paſs by the Grant.

And beſides that, the Grant of the Garden was a Determination of the Licence given to the Plaintiff, and that the Grantee might diſtrain the Trees Damage feaſant; but he having not done ſo, but ſuffered them to continue, was ſo far from a Converſion, that it was Evidence of a Licence by him. And he ſaid, That by Grant of all a Man's Trees, Apple-Trees would not paſs. Q. Note.

And Plaintiff had Verdict.

Robiſon *verſus* Goſnold.

S. C. 1 Salk. 119. Vide ib. 116, 118. 1 Lev. 4, 43. 1 Vent. 42. 2 Vent. 153. 1 Mod. 124. 1 Keb. 69, 80, 87, 206, 337, 361, &c. 1 Sid. 109, 425.

A Husband diſcovering his Wife to be a very lewd Woman, goes away from her, and ſhe, after having lived ſeveral Years with an Adulterer, was received into the Plaintiff's Houſe, who entertained her as the Husband's Wife. And this Action being an Indebitatus Aſſumpſit againſt the Husband for lodging and dieting the Wife, Holt, Ch. J. at Niſi prius, held, That let the Woman be ever ſo vitious, yet, while ſhe will cohabit with the Husband, he is bound to provide Neceſſaries for her, and is liable to Action of ſuch as furniſh her with them, for his Bargain was to take her for better for worſe. In like manner it is if the Husband turns his Wife away for her Wickedneſs, he remains ſtill chargeable for her Neceſſaries. But if the Wife leaves her Husband, they that truſt her after it is notorious that ſhe has left him, do it at their Peril, and ſhall not thereupon charge the Husband. Ante 147. Husband leaves his Wife. Plaintiff entertains her, and brings an Action againſt Huſband for Lodging and Diet. Vide ante 147.

And he ſeemed to be of Opinion, That if a Wife had run away from her Husband, and contracted Debts, and after the Husband received her, or came after her, and laid with her but for a Night, that would make him liable to the Debts. Like the Caſe where a Wife elopes with an Adulterer, tho' ſhe thereby forfeits her Dower, yet if the Husband will of his own accord receive her again, ſhe ſhall have her Dower again.

S. C. poſt 180.

Domina Regina *verſus* Coteſworth.

Spitting in the Face, a Battery.

INdictment was for Battery upon Doctor R. and the Evidence was, That the Defendant did ſpit in his Face.

Vide ante 149. 2 Keb. 545. 1 Mod. 3. Q. 2 Rol. 545. Tremain's Entries 270. Carth. 280, 491.

Per Holt, Ch. J. It is a Battery.

And per ipſum. Tho' one cannot juſtify a Battery by ſon Aſſault demeſne, by pleading it to an Indictment, yet he may give it in Evidence upon a Not guilty, and he may be thereupon acquitted.

Hutton *verſus* Manſell.

Caſe upon mutual Promiſes of Marriage, and no Evidence of her expreſs Promiſe. Vide 1 Salk. 24. 2 Salk. 437, 438, 553. Ante 156. 3 Lev. 65. 5 Mod. 411.

CAſe was brought, laying mutual Promiſes of Marriage between Plaintiff and Defendant, and Breach in the Man, the Defendant. Upon Evidence, expreſs Promiſe was proved upon the Man, but none on the Woman's Side.

Per Holt, Ch. J. If there be an expreſs Promiſe by the Man, and that it appear the Woman countenanced it, and by her Actions at that Time behaved her ſelf ſo as if ſhe agreed to the Matter, tho' there be no actual Promiſe, yet that ſhall be ſufficient Evidence of a Promiſe of her Side. And he remembered a Caſe in which he had been a Counſel in my Lord Chief Baron Montagu's Time, where it had been ſo ruled upon Evidence againſt his Client, and being diſſatisfy'd then therewith, he put the Caſe to eminent Men of thoſe Times, who all concurred in Opinion with the Chief Baron. See and Note the Caſe of Harriſon and Cage in Carthew's Reports, 467.

DE

DE

Termino S. Trin.

Anno 3 Annæ, in B. R.

Coram Holt, *Chief Juſtice*,

Powell,
Powys,
&
Gould,
} *Juſtices.*

Genner *verſus* Sparks.

GEnner was a Bailiff, and having a Warrant for Sparks, came to his Houſe, and finding him in the Yard, told him he had a Warrant for him, and pronounced the Word of Arreſt, but did not lay his Hands on him: Whereupon Sparks ſnatched up a Pitch-fork, and kept off the Bailiff, threatning to kill him if he came nigher; and thus retreated into his Houſe, and ſhut the Door againſt the Bailiff. Upon all this appearing on Affidavit, Conyers moved for an Attachment upon the Matter againſt Sparks, ſuppoſing this to be a Reſcous, or at leaſt a great Contempt of the Queen's Writ.

S. C. 1 Salk. 79. Vid. Fareſl. 8. Bailiff pronounced an Arreſt to, but laid not Hands on the Party; ante 90, 96. 1 Salk. 78, 79. 1 Mod. 56. con.

And per totam Cur', Here was no Arreſt, the Bailiff having not laid Hands on the Defendant; for his ſhewing the Warrant, and pronouncing the Word Arreſt, without touching him, was no more an Arreſt than it would be one if a Bailiff ſees a Man look out at a Window a Pair of Stairs or two high, and tells him he has a Writ for him, and ſays, that he does arreſt him; and therefore in ſuch Caſes the Bailiff cannot break the Houſe to come at the Perſon, as he could lawfully do if he had been his Priſoner, and had eſcaped into a Houſe from him. But it was agreed, If here he had but touched the Defendant even with the End of his Finger, it had been an Arreſt, and he might have broke the Houſe after to ſeize upon him, and an Attachment might go for the Reſcous: As if a Bailiff have a Warrant againſt a Perſon who is in a Houſe, and lays Hand upon him

Per Cur. It was no Arreſt nor Reſcous; ante 141, poſt 210, 211.

Fareſl. 8.

him through the Window, he may after break the House to come to him. It was likewise agreed, That the Bailiff had the Protection of the Law; and therefore if he had ventur'd on here, and had been killed by the Defendant, it had been Murder in him; or if the Defendant had beat or hurt him, he might have his Action: Or in this Case, if the Defendant were within Reach of the Bailiff when he pointed the Pitch-fork at him, he might have his Action of Assault against him; so if he had presented a Gun at him at such a Distance as the Shot would reach him.

Attachment denied.

And per Cur', the Motion was denied.

S. C. 1 Salk. 266.

Burnaby *versus* Sanderson.

Error assign'd for Want of an Original. 1 Salk. 264, 266. Vi. post 206, 207, 235. ante 113.

ERror of a Judgment in the Common Pleas, and Want of an Original assigned for Error, the Defendant comes in ad audiend' Errores gratis, alledges Diminution, and has a Certiorari: Whereupon a variant Original is certified; at the Day given he comes again, and suggests a right Original of such a Term, and prays a new Certiorari to certify that, and pleads In nullo est Erratum.

Of Certioraries, &c. See Skinner 419 to 422. 1 Salk. 144 to 151.

And all this Fact appearing on the Report of the Master, per Holt, Ch. Just. The Defendant is right in Point of Law; for suppose the Record below be of Easter Term, and after Judgment, Writ of Error is brought here, and Want of Original, or Variance in the Original be assign'd for Error, and the Defendant alledges Diminution, the Certiorari there is only to the Custos Brevium to certify an Original of Easter Term, viz. the Term of which the Placita are; and if he either certify that there is none, or certifies a wrong Original, the Defendant in Error, before In nullo est Errat' pleaded, may suggest that there is an Original of another Term, viz. of Hill. Mich. or other Term; and there shall go two Certiorari's, one to the Custos Brevium to certify that Original, and another to the Chief Justice to certify an Entry of the Continuances: And this has been carried further; for if the Custos Brevium return a wrong Original, or a variant one on the first Certiorari, of the Term of which the Placita are, he may suggest that there is a right Original even of that very Term, and have a new Certiorari: And when both Originals are before the Court, they will intend that to be the right Original which agrees with the Declaration; to which all the rest agreed: But because in Point of Practice there ought to have been Notice to the Plaintiff of this Suggestion, and the new Certiorari ought to be filed in the Office which was not done here, so that the Judgment by that Irregularity was affirmed, sooner than otherwise it could have been, the Court did discharge the Rule for Affirmance of the Judgment, and directed the Defendant to proceed regularly: So he was forced to move to have it read as a Record again, and have it made a Consilium for to come regularly on.

Judgment affirmed.

And the Judgment after was affirmed per tot' Cur'.

Domina Regina *verſus* Criſp.

Indictment for tearing an Account after it was ſettled. See 2 Salk. Tit. *Indictments.*

HE was indicted, For that there being an Account ſtated between him and A. whereby he was indebted in ſuch a Sum to A. which Account he ſign'd, and that he got it into his Hands per falſas & ſiniſtras Inſinuationes, and Vi & Armis tore it contra Pacem, &c.

And Eyres moved to quaſh it: 1. Becauſe it was a private Offence not indictable.

2. Becauſe it did not ſhew whoſe the Property of the Paper was; but the Court denied the Motion, for it was a Treſpaſs now ab initio. A Treſpaſs *ab initio*, &c.

3. The Property is his, who was intitled to the Debt on the Account; and they bid him try it, or demur at his Peril. Where Account will not lye but Treſpaſs, ſee Carthew 89. 1 Salk 9.

When a Bill may be filed againſt an Attorney. Ante 106. 2 Salk. 544.

Per Cur', One may file a Bill againſt an Attorney any Day within the Term; and if there be four Days of the Term to come, one may ſerve Rules upon it that Term: But if the Declaration be in Eaſter Vacation, which is indeed a Declaration of Eaſter Term, the Defendant ſhall have four Days in Trinity Term to plead, and one is not confined to four Days to plead in Abatement, but he has the whole Term of which the Declaration is delivered; but if he has four Days in the Term of which the Declaration is, he ſhall not plead in Abatement the next Term. Vide 2 Salk. 515, 517, 519. 1 Salk. 1. Lut. 24. Time to plead in Abatement.

------*verſus* Croket.

S. C. 2 Salk. 669.

AN Aſſumpſit laid in Staffordſhire, and the Declaration of Eaſter Term: And Chetham moved to change the Venue into London upon the common Affidavit; but had no Affidavit, as the uſual Courſe is, of the Time of which the Declaration was delivered. Motion to change *Venue*, but no *Affidavit* of Delivery of the Declaration, &c.

And per Holt, Ch. Juſt. the Reaſon of that Courſe is, for that if the Action were laid in London or Middleſex, perhaps by the Rules of the Court the Plaintiff ſhould have a Plea to enter; and therefore it is neceſſary to ſatisfy the Court that the Declaration was not deliver'd ſo long ago as that the Plaintiff could be intitled to a Plea to enter, to obtain the Change of the Venue: But this being a Country Cauſe, and the Declaration of Eaſter Term, in which Caſe, tho' it were delivered the firſt Day of the Term, he could not have a Plea to enter, he thought this out of the Reaſon of the Rule, and therefore an Affidavit unneceſſary; but here, becauſe if the Action were laid in London, there muſt be fifteen Days between Teſte and Return of Proceſs: So the Plaintiff could have no Trial 'til Michaelmas Term, the Court held him up to the Rule. Party held up to the Rules.

Oates

Oates *verſus* Bromhill. Paſch. 3 Annæ.

S. C. 1 Salk. 75. Vide antea 160. So as the ſaid Award, &c.

THE Caſe coming on in the Paper this Term, Brotherick inſiſted very much, that the Condition in the Submiſſion, So as the ſaid Award be made, and ready to be delivered, and given up to the ſaid Parties, or ſuch of them as ſhould deſire it, were of ſome Uſe, and put in for ſome Purpoſe, and muſt be intended of another Delivery than the bare pronouncing of the Award: And yet if, according to Dyer, ready to be delivered, be only to be pronounced or declared by an Oral Delivery, the adding thoſe Words in the Condition would ſignify nothing; for then, as ſoon as it is made by the Arbitrators, it is ready to be declared or pronounced by them; and he inſiſted on the Caſe of Wood and Ardiſt in the Common Pleas, Trin' 1° Annæ, where the Condition of the Submiſſion was in the very ſame Words as here, and a Parol Award ſet out as here, and adjudged on Demurrer to be ill per tot. Cur', notwithſtanding the Caſe in Dyer had been urged; the Report of which Caſe he had from Tracy one of the Judges of the Court, and the Roll whereof he had peruſed.

Obj. That the Words intended more than a bare pronouncing and the Parol Award, as here, ill on Demurrer.

Another Matter he inſiſted on was, That the Averment was, that the Award was ready to be delivered to them both, without ſaying [and either of them;] for it may be, the Arbitrators were ready to declare it to both of them if they had come together, but not to one of them: He alſo objected, That in the Award ſet out it was ordered, that præfat. A. (for the Purpoſe) one of the Parties, ſolveret præfat. B. the other Party, præd. Summam of 10l. and there was no Sum of 10l. mentioned before.

Obj. 2 To the Averment of, *ready to be delivered to both*, &c.

Per Cur', A Parol Award is capable of Delivery, and how.

But per tot. Cur', Upon great Conſideration, notwithſtanding the ſaid late Caſe in the Common Pleas, a Parol Award is capable of a Delivery, viz. a Declaration of it to the Parties, or either of them, if they deſire it; and that being ſo, as ſoon as the Arbitrators have agreed on the Award, it is ready to be delivered, and the Readineſs of Delivery needed not to have been averred, becauſe the Alledging an Award made imports it; nor is the Condition in the Submiſſion therefore vain, for if after the Award made, the Parties, or either of them, had come and asked the Arbitrators what Award they had made, and they had refuſed to tell, then he might plead that it was not ready to be delivered, ſhewing that Matter: So perhaps, if the Arbitrators had died in ſo ſhort a Time after the Award made, as the Party could not have convenient Time to ask them; for the Intent of the Condition was, That the Parties ſhould have Notice of the Award; and it is not eſſential to a Parol Award, that it ſhould be notified to both Parties. And as to the præd. Summam, though it was agreed præd' could not without a Tautology be applied to B. the Party, becauſe of the Word præfat. before given him; yet becauſe in Senſe it could not be applied to Summam, there being no Sum mentioned before, they all agreed, that they would make a Comma after præd' and ſo join it to the Party,

Parol Award need not to be notified to both Parties.

rather than ſuffer it to go to Summam to vitiate the Award; and where a præd' may refer in good Senſe to either of two Antecedents, there it may vitiate, becauſe of Incertainty; but where it has but one thing to refer to, and joining it to that would make it Nonſenſe, it ſhall be rejected as idle. Vid. 2 Vent. 242. 3 Bulſt. 311.

Et per tot. Cur', Jud. pro Quer'.

Judgment *pro Quer'.*

Fazakerly *verſus* Baldoe.

S. C. 1 Salk. 341, 352. *Quære* 5 Mod 156. Vide ante 123.

Upon an *Hab' Corpus* a By-Law of *London* is return'd for Freeman to weigh Goods at the City-Beam, &c.

UPON a Return of an Habeas Corpus from London, a By-Law was ſet forth, laying a certain Penalty upon any Freeman that ſhould ſell Goods uſually ſold by Weight not having weighed them by the City-Beam, grounded upon ſuch a Cuſtom in London.

And now Parker and Eyre moved to have the Return filed, for that without it were filed the Defendant could not bring an Action of Falſe Return, and then there would be no Way to controvert the Being of ſuch a Cuſtom; ſo they might return what Cuſtom they pleaſed, falſo & impune: And as to the objecting, That after the Return filed there could not be a Procedendo; they anſwered,

1. That true it is, a Record once filed in that Court ſhall never be ſent back; but that is to be underſtood in another Term, but in the ſame Term it comes in it may. 1 Lev. 93. 1 Roll. Rep. 85.

1. Though it were true, that a Record once filed here could not be ſent back the ſame Term; yet this being a Return of an Habeas Corpus, which removes not the Record, nor any of the Proceedings below, but only certifies a Hiſtory or Tenor of the Record, the filing thereof cannot hinder the Court from awarding a Procedendo to enable them to proceed below. 1 Keb. 170. And if the Plaintiff would proceed here above, he muſt begin de novo with a new Bill againſt him in cuſtodia Mareſchalli.

Holt, Ch. Juſt. The Practice has always been in this Court to award a Procedendo without filing the Return; but the Queſtion is, Whether the filing the Return will be a Hindrance to our granting a Procedendo? It is true, by Habeas Corpus all Proceedings below are ſuſpended till the Court has determined of the Right of the Cauſe of Detainer upon the Return; and if they had proceeded below in the mean time it would be all void, and coram non Judice; ſo that it will be neceſſary to award a Procedendo to unty their Hands below: But why we may not grant a Procedendo after the Return filed, I cannot ſee, for there is a Difference in this Reſpect between Habeas Corpus and Certiorari; upon Habeas Corpus we have not the Record it ſelf here as we have upon a Certiorari: And where a Record is removed hither, and filed here, it ſhall never be ſent back, not even in the ſame Term in any Caſe whatever, except in Caſe of Felony; And that by the Statute of 6 H. 8. c. 6. whereby if one remove

his Indictment for Felony up hither, we may remand him back after it is filed, to the County where it is to be tried by the Judges of Jayl-Delivery there: If we grant an Habeas Corpus to bring up a Prisoner charged criminally from Newgate, and the Return is filed; yet if we adjudge the Return good, we remand the Prisoner, and the Jurisdiction of the Judges of Jayl-Delivery, which is suspended by the Habeas Corpus, is revived by the remanding him back: But upon Writ of Error of a Fine, the very Fine is never certified hither, but only a Transcript of it; and if the Court adjudge it erroneous, they send a Certiorari to the Chirographer to certify the Fine it self, and it is actually cancelled here: And after they had taken Time to consider, per Cur. it was filed, and a Procedendo awarded.

Domina Regina *versus* Foxby.

S. C. ante 11. 1 Salk. 266. Post 213, 239. Vid. Black' Cases 287. The ways to bring Writs of Error of Judgment upon Indictments against common Scolds, *& al'.*

SHE was convicted by the Justices of Peace at their Quarter-Sessions at Maidston, upon an Indictment for being a common Scold, and Judgment that she should be ducked: Whereupon she brought a Writ of Error, having obtained a Warrant for that Purpose from the Attorney General; and hereupon the Sheriff let her go at large, there being no Fine or Imprisonment in the Judgment.

Ante 11. Post 213, 239, 311, *&c.* 1 Salk. 149.

Per Cur', She must assign Error in Person; and the most usual Way of bringing Writs of Error of Judgment upon Indictments, is to remove the Record into the Crown-Office by Certiorari, and then bring a Writ of Error coram nobis; but one may directly remove it by Writ of Error, and either Way was good, but after Writ of Error the Course is to serve a Rule in the Office to assign Error; and if they fail, to have a peremptory Rule, which must be upon Motion, and upon Default in that, to nonsuit them upon the Writ of Error, and award Execution.

1 Vent. 53. So in case of Error from *Ireland.*

Domina Regina *versus* Tracy.

Vide ante 30, 114, 169. For causing *M.* to be arrested and committed to Gaol, laid in Irons, and then extorting Money from him. Vid. ante 90.

HE was again indicted, for that he, together with Taylor and Jeoffreys, with Intent to oppress Muriell, falso, nequiter, &c. did at the Parish of St. Gile's in Com. Middlesex, get Muriell arrested, by Pretext of a certain Warrant from the Recorder of London, reciting the Substance thereof, as before; and that after he was arrested, they brought him before Justice Chamberlaine, in the Parish of St. Magaret's in the said County; and that Tracy did there, with farther Intent to oppress him, falsly, maliciously, &c. perswade the said Just. Chamberlaine to refuse Bail for him, though sufficient Bail were then tendered to him, and procured him to refuse the said Bail, and to commit him to Jayl, and avers the Refusal of Bail and Commitment; and likewise that Tracy did perswade and procure Taylor and Jeoffryes to lay him in Irons, and use him severely; and that they did threaten to Iron him, and by that Means extorted 5 l. from him: He having

having enter'd into a Recognizance to try this Indictment, the Venire was made from the Parish of St. Giles's only, and after Verdict and Conviction, it was held a Mis-trial; for here being several Facts arising in several Parishes, the Venue ought to come from both, and so Judgment could not be given upon the Indictment. But the Court held that he had forfeited his Recognizance, for he had not tried the Indictment, for it must be a Trial with Effect on which the Court may proceed to Judgment; for if we do not estreat the Recognizance, every Defendant will wilfully make Faults, so that they shall always go unpunished, and we may award a Scire fac' upon the Recognizance here in this Court, and determine it our selves, or have it estreated into the Exchequer. And a new Ven' fac' was directed, and the Defendant forced to give a new Recognizance, or he must have gone to Jayl.

A Mis-trial. Vid. ant. 242. 2 Salk. 649.

A new *Ven' fac'*, and a new Recognizance.

Note; Here it was said, That it being a Fact in Middlesex, the Ven' might be made returnable de die in diem, and it being quash'd, they might date the new Ven' on the Day of Return of 1st; and being again convicted upon a new Ven', it was now moved in Arrest of Judgment by Eyre, that here was no Offence in the Indictment: 1. The taking a Man up by Virtue of a lawful Warrant is lawful, and cannot be maliciously, or with ill Intent, and quoted 1 Cro. 608. And the other Part, viz. perswading Chamberlaine to refuse Bail, was only his Opinion, which though false, yet not punishable: And as to the Extortion in Jayl, it did not appear to have been by his Direction.

Obj. That there was no Offence in the Indictment.

But per Cur', If a Man gets another wrongfully put in Jayl, and there the Keeper extorts Money from him, he that wrongfully put him in, is guilty of the Oppression of taking the Money. If a Man falsly imprisons J. S. and the Jaylor detains him 'till he pays so much Money, he shall have his Action of False Imprisonment, and taking so much Money from him against such Person: So here, though the Warrant be legal, yet if one, with Intent to oppress a Man, gets him taken up by this Warrant, and follows him to a Justice of Peace to hinder his being bailed, it is illegal; and it is illegal to use a lawful Means for Oppression; and it is an Offence in a Justice of Peace to refuse Bail in case of a common Misdemeanor; and it suffices to say in the Indictment, That sufficient Bail was tender'd; without saying, That the Party knew them to be sufficient: And here it was said, that Tracy did perswade Chamberlaine to commit him, and that he did commit, without saying, that it was super inde; yet held well.

And per Holt, Ch. Just. If one be taken by a Process from Sessions to the Sheriff, he must give Bail-Bond according to the Statute of H. 6. and where-ever one may be taken up by Warrant of one Justice, any one Justice may bail; formerly indeed none could be taken up for a Misdemeanor 'till Indictment found, but now the Practice over all England is otherwise.

Modern Practice of taking up the Party before Indictment found.

And per Hale, That Practice is become a Law, and Justices of Peace eo ipso may bind to Peace, and over to Sessions, for any Breach of Peace before an Indictment found.

5 Mod. 80.

Vide 2 Salk. 477, 488.

Domina Regina *verſus* Weſt.

Order of two Juſtices recites Oath before one of them, by the Mother [of a Baſtard] who was examined by one of them, and ill. 2 Salk. 488, 489.

AN Order of two Juſtices did recite, That whereas Oath was made before one of them by the Mother of a Baſtard, that B. was the Father of it; and that by Examination of her by one of them, it did appear that B. was the Father, therefore they adjudge him to be ſo, and order him to pay ſo much.

Per Cur', The Examination is a Judicial Act, and ought to be by both; and not enough that one of them ſhould examine, and make a Report to the other: But if they be both preſent, and one alone examines, that will be well; for there the Examination of one is the Examination of the other.

This Order quaſh'd, and Party bound over.

And per Holt, Ch. Juſt. Where two Juſtices of the Peace are ready to bail one, they ought to be both preſent to do it; and not enough that one of them ſhould firſt ſign the Recognizance, and then ſend it to another, tho' the contrary be ſometimes irregularly practiſed: And here the Order was quaſh'd, and the Party bound over to appear at the next Quarter-Seſſions.

2 Salk. 475.

Note; The Party muſt be preſent in Court in this Caſe, when the Motion is made for quaſhing the Order.

Vide Gazett, *May* 24, 1718.

Per Holt, Ch. Juſt. The Martial Law is not a fix'd, but a tranſitory Law, variable by the General, as Occaſion and Circumſtances require, according to the Articles of War.

S. C. ante 172.

Domina Regina *verſus* Coteſworth.

Exception to the Caption of an Indictment.

EXception was taken by Montague to the Caption of an Indictment, that it was preſented per Jurator' Elect' triat' Jurat' & Onerat' ad inquirend' pro Domina Regina (&) Corpore Com', inſtead of (pro) Corpore Com': Which was agreed per Cur' to be the right Way, but they held it well notwithſtanding; for it is good Senſe that they were charged to inquire for the Queen, and in Behalf of the County.

Return of *Hab' Corp'* to remain in Court.

Per Holt, Ch. Juſt. Let it be a Rule for the future, That when one is brought up by Habeas Corpus, the Return remain in Court, and a Copy of it only given to the Marſhal; and ſo of a Committitur.

Excommunication and Outlawry to be produced under Seal.

Per Cur', If an Excommengment in the Plaintiff be tender'd for Plea in Abatement, tho' it be ſigned by Counſel, by the Courſe of Court is not to be received unleſs it be produced under Seal, tho' the Plea need not mention that it is ſo produced: And ſo of an Outlawry.

Jenkins & *Uxor verſus* Plombe. Paſch. 3 Annæ.

S.C. ante 91.

THE Court having taken Time 'till this Term to conſider of the Caſe, declared unanimouſly, That in this Caſe the Defendant ought to have Coſts; upon this Ground aſſign'd by Holt, Ch. J. That if the Plaintiff, having married the Executrix, had ordered, as he might have done, J. S. to receive this Debt which was due to the Teſtator, and he had accordingly received it, that had been a good Payment and Diſcharge of the firſt Debt; and J. S. would now become indebted to the Plaintiff by a Contract in the Plaintiff's Time, viz. the Appointment and Receipt; and he in that Caſe might bring an Indebitatus Aſſumpſit againſt J. S. for ſo much Money received to his Uſe as Executor: And here, tho' the Defendant received the Money without any previous Appointment of the Plaintiff, yet the Plaintiff by bringing this Action, having aſſented to the Receipt, it amounts to an Appointment, and a Diſcharge of the firſt Debtor, and makes a Contract between the Defendant and him: And here the Plaintiff needed not have named himſelf Executor, it being upon a Contract with himſelf; his ſaying that it was to his Uſe as Executor, is true, and therefore no Harm, but rather better, for it ſhews how the Right came; for if here he had been an Adminiſtrator inſtead of Executor, and declared as ſuch and recovered, and then Adminiſtration had been revoked, the Defendant would be relievable by Audita querela.

Vide 1 Salk. 207. Ante 94. Carth. 297, 254, 386. That Defendant ought to have Coſts upon Plaintiff's being nonſuited, tho' he declared as Executor, &c.

That the Plaintiff's aſſenting to the Receipt, amounts to an Appointment, and Diſcharge of the firſt Debtor, &c.

And it is a true Rule, That where the Executor need not name himſelf Executor, he ſhall pay Coſts upon a Nonſuit, and the naming himſelf Executor ſhall not exempt him from it: And where Executor recovers in a Caſe in which he need not name himſelf Executor, and dies inteſtate, or makes his Executor, who will not prove the Will. As to the firſt Teſtator's Goods, his Executor or Adminiſtrator, and not the Adminiſtrator de Bonis non of the firſt Teſtator, ſhall ſue Execution, and would be liable to the Coſts of a Nonſuit of him, and not the Adminiſtrator de Bonis non: And though here the Executor ſhould bring the Action in his own Name, yet the Debt recovered are Aſſets in his Hands. If Executor lives at London, and Goods which Teſtator died poſſeſſed of are at Briſtol; yet the Executor has ſuch immediate Poſſeſſion of them, that he may maintain Trover for them in his own Name againſt any Converter of them, and the Damages recovered ſhall be Aſſets in his Hands; but if he does not recover ſo much in Damages as really the Goods were worth, and that happens not tho' any Fault of his, he ſhall anſwer for no more than he recovers; as if the Goods be periſhable Goods, and before any Default in him to preſerve them, or ſell them at due Value, they are impaired, he ſhall not anſwer for the firſt Value, but ſhall give that Matter in Evidence to diſcharge himſelf: But if one takes Goods out of his Poſſeſſion, he muſt ſue him that took them, to have an Opportunity of diſcharging himſelf of anſwering more in Aſſets than he recovers: So if Executor will omit to ſell the Goods at a good Price, and after they are taken

That where an Executor need not name himſelf Executor, he ſhall pay Coſts upon a Nonſuit, &c.

Vid. Hob. 218.

Where an Executor ſhall anſwer for no more than he recovers, and where the Value of the Goods ſhall be Aſſets.

taken from him, there the Value of the Goods shall be Assets in his Hands, and not what he recovers, for there was a Default in him. And in this Case, if the Receipt was by the Defendant after the Plaintiff's Marriage with the Executrix, the Husband alone should have brought the Action; but if the Receipt were in the Wife's Time, before the Marriage, the Husband and Wife ought to join in the Action: So per tot. Cur. Defendant must have Costs.

Vide 1 Salk. 116, 117.

Action arising Part in one County and Part in another.

Per Cur. If Cause of Action arise Part in one County and Part in another, Plaintiff has Election in which of the Counties to lay it, and in that Case the Defendant shall not upon the Common Affidavit change it; but where the Cause of Action is transitory, and the Plaintiff does lay it in another County than in that in which it did in Truth arise, and the Defendant by the common Affidavit would change it into a different County, the Plaintiff shall not come and say that it did arise in another County, and be bound to give Evidence there.

Vid. 1 Vent. 17.

S. C. ant. 99. 1 Salk. 380. Vid. post 289.

Domina Regina *versus* Daniel.

Indictment for inticing an Apprentice to depart is naught. Vid. Pop. 135. 2 Rol. Ab. 75. Skinner 11.

PER totam Curiam, this Term, the Indictment is naught.

1. The inticing an Apprentice or Servant to depart from his Master, is not an Offence of a publick Nature, but the Party's Remedy is by an Action upon his Case, which he may well maintain. Vide Noy 105.

2. A common Action of Trespass will not lie for inticing an Apprentice or Servant from his Master. But if one will take away my Servant or Apprentice by Force, Trespass will lie for the Master, declaring upon the Force, per quod Servitium amisit.

3. Here it does not appear whether he were a Servant or an Apprentice, and a manifest Difference is taken in 21 H. 6. 23. between a Servant and an Apprentice. An Apprentice must be by Deed, a Servant may be by Parol Contract. An Apprentice cannot be discharged but by Deed, but Servant may by Parol.

4. The inticing to embezil his Master's Goods has no Venue to it, and therefore that is bad.

5. Procuring to depart and absent himself from his Master's Service is bad, without positively averring that he did depart. Per Powell.

6. Per Powys. It ought also to appear how long the Absence or Departure continued, for here, for ought appeared, it might be but for half an Hour.

And per Omnes. The Precedent in Rastall is perfect Nonsence, for it was, That the Defendant procured his Servant to leave him, and that he was a common Procurer of Servants.

Fares. 52. 1 Mod. 71. 2 Keb. 24, 687. 1 Sid. 282.

Vide post 311. That Communis Deceptor, Oppressor, Perturbator, &c. are too general. So is Communis Lena. 1 Salk. 382. Communis Poculator, Jurator, &c. *Fares.* 52.

Grant *verſus* Southers *Mar'*.

Vid. ante 113.

GRant had been in Cuſtody of the former Marſhal, and voluntarily ſuffered to eſcape by him, and he after came voluntarily and returned, and being found in Cuſtody by the ſucceeding Marſhal, was detained by him. Whereupon he having brought an Action of Falſe Impriſonment, the Court granted an Imparlance till the next Term, affirming at the ſame Time that it was lawful to detain him, and that to ſuffer him to go at large would be an Eſcape in the Second Marſhal; and that Hale had been of the ſame Opinion. And they declared they knew no ſuch Thing as a perpetual Imparlance, tho' they had known perpetual Injunctions.

One voluntarily ſuffered to eſcape, voluntarily returned, and being detain'd, brought an Action.

Vid. Hob. 202. cont'.

Domina Regina *verſus* Steer *& al'*.

Vide 2 Keb. 178, 594.

THey were indicted, for that at ſuch a Place in Com. Suſſ. Vi & Armis, in the Defendant's Pond illicitè & injuſtè piſcerunt cum Retibus, and ſo many Carps, de Bonis & Catallis of the Proſecutor, did take and carry away.

Indictment for Fiſhing in his Pond.

And moved by Broderick to have it quaſh'd:

1. For the Inſenſibility of the Word Piſcerunt.
2. For that theſe being Fiſh in a Pond, they could not be Bona & Catalla of any Perſon.

Per Cur. The Inſenſibility of the Word Piſcerunt would not have vitiated, had the Taking and Carrying away of the Fiſh been well laid. 2 Keb. 594.

2. If a Man has a cloſe Pond in which there are Fiſh, he may call them Piſces ſuos in an Indictment, or he may not do it, at his Pleaſure, and either Way is good; becauſe being in a cloſe Pond, the Property (Ratione Loci) in them cannot be loſt, becauſe they cannot ſwim away; but notwithſtanding he cannot call them as Bona & Catalla, if they be not in Trunks, and for that the Indictment is bad, but however not fit to be quaſhed on Motion, the Offence of Fiſhing in other Mens Ponds, and taking away their Fiſh, being too great to receive ſo much Countenance. Vid. 2 Salk. 637. 2 Keb. 178. 3 Mod. 97.

Note; per Cur. There needs no Privilege to make a Fiſh-Pond as there needs in Caſe of a Warren.

Per Cur. One cannot declare againſt a Corporation aggregate, as in Cuſtod. Marr'. Corporation.

Per Cur. One is indictable for ſetting up a Market or Fair, or Leet. For Declarations by or againſt Corporations, ſee Skinner 2, 154. To ſet up a Fair, Market or Leet, indictable.

1. It is an Usurpation upon the Queen, for which she may bring a Quo Warranto, where there may be two Judgments, the one for Seizure of the Franchise into the Queen's Hands, the other for a Fine for the Usurpation; and to keep a Leet to summon the Subject to make Presentments, and to amerce, is a Grievance to the People besides. So of Fair or Market, if they take Toll of People.

Per Holt, Ch. J. at Nisi prius. If Bond be for 400 l. with Condition to pay 200 l. at a Day, without Mention of any Interest to be paid for the 200 l. So that if the Two hundred Pounds be paid at the Day, the Bond is saved; and tho' the Money be not then paid, so that now the Obligor cannot be relieved against the Penalty without paying Interest, yet such Bond needs no Specification by the late Act of Parliament.

Ante 167, *bis.*

Herring *versus* Crocker.

A *Fieri Facias* to the Sheriff before Judgment enter'd, and the Value levied. Farst. 37, 118.

JUdgment by Confession three Terms before, and before any Entry on the Roll of the Judgment a Fi. fa. is taken out, and the Sheriff taking Security for his Indempnification from the Plaintiff in that Judgment, levies Goods to Value. And now another Fi. fa. upon another Judgment, being brought to him, he returns nulla Bona, the Goods are sold upon the first Writ, and money paid by the Sheriff, and Satisfaction entered upon the Judgment, but the Roll not filed. The Plaintiff in the second Fi. fa. brings False Return against Sheriff. And now it was moved for the Plaintiff in the first Fi. fa. to have Leave to file his Roll.

Per Cur. How can an Action of False Return be maintained against the Sheriff if there be no Fraud in him? And if there be, you have your Remedy notwithstanding the filing this Roll, as well as if it be not filed. The Sheriff would not be liable to the Defendant in the first Judgment in Trespass, for the Writ is enough to justify him, and he is not bound to examine any farther.

1 Saund. 39.

By the ancient Rules of the Court, the Judgments of one Term ought to be entered upon the Roll before the Essoin-Day of the next Term, and the late Act of Parliament for docketting of Judgments, was only in Imitation of the ancient Course, and in Aid of it.

Post 191.

And per Holt, Ch. J. The Common Law is, and that is indulgent enough, That all Things done in the Vacation shall refer to the precedent Term; and tho' no Inconvenience appear to us if this Judgment be now filed as of the due Term, yet we cannot foresee how far such Retrospect may affect others. And if this first Debt be a just Debt, and the Party without any Compulsion had paid it before your Writ came to the Sheriff, it had been good against you: So here, if the Debt were just, and a Writ had come to the Sheriff, and he had levied the Money, and paid it before the second Writ had come

to him, it had been good against the second Plaintiff, tho' the first had no Judgment.

Therefore he advised Serjeant Darnell to consider of it again before he proceeded with the Action against the Sheriff.

And they would not grant the Motion.

Domina Regina *versus* Best & al'.

S. C. 1 Salk. 174. Ante 137. Vi. ante 100, & 169. Action S. C. for *Conspiracy*. Indictment for confederating to charge a Man falsly to be the Father of a Bastard Child. 1 Keb. 233. 254. 2 Keb. 59. Vid. Hob. 219.

They were indicted, for that they being idle, scandalous, and wicked Persons, in order to oppress and defame one P. P. and to get unto themselves unlawful Gains of Money from the said P. P. they did falso, nequiter, malitiose, &c. conspire, contrive and agree among themselves, falso to charge the said P. P. with being the Father of a Bastard Child, with whom they pretended one El. C. to be then big, and that in Pursuance thereof they did falso affirm him to be the Father of it. Upon Demurrer, now Broderick took Exception,

1. That it was not averred, ubi revera he was not the Father of it, or ubi revera the said El. C. was not then with Child; and that it was essentially necessary to the maintaining such Indictment to aver that the Party was innocent. Vide 9 Co. 53. a.

2. It does not appear that any Thing was done in Pursuance of the Conspiracy, and that also ought to appear according to the Polter's Case, ubi supra, and it is so far from being false that he was the Father of the Child, that he is adjudged to be so by the Justices of Peace, and ordered to maintain it.

And if this were an Indictment for Perjury, for falso swearing that a Deed was executed by such a Party, without saying ubi revera no such Deed was executed, the Word falso would not even by Intendment import that the Deed was not executed, but only that the Party that swore it was a false Person generally; and if Issue were taken that he did not falsly affirm it, the Affirmation, and not the Falsity, would not be triable.

Dee contra. The Indictment is grounded meerly upon the Conspiracy to charge falsly, and this Conspiracy, with the subsequent false Affirmation is sufficient to maintain the Indictment within the express Resolution of the Polter's Case. And that a false Conspiracy, without any further Act of Pursuance, is indictable, he quoted 1 Sid. 68. 1 Lev. 62.

If the Party ought not to shew himself to be innocent, &c.

Holt, Ch. Just. Tho' a Conspiracy to charge falsly be indictable, yet the Party ought to shew himself to be innocent, for People may lawfully meet, and contrive and agree to charge a guilty Person, and to say that they met and agreed to charge falsly, perhaps will not be enough, without shewing the Foundation of the Falsity, viz. the Party's Innocency. And here, if the Defendants had pleaded Not guilty, they must have been acquitted; for the Order of two Justices stand-

ing in Force, would have concluded P. P. from giving Evidence of his Innocency.

And the Case being spoke to again this Term, Montague for the Defendants urged, that it ought not only to appear that the Accusation was false, but that it was before a lawfull Magistrate; otherwise it could not be a legal Accusation.

And if this were a Writ of Conspiracy, it would not have lain before an Acquittal, and then there would be no need of an Averment of the Party's Innocence, because the Acquittal would tantamount.

And he insisted, That if this had been for Perjury, there must be an Avernment that the Matter sworn was not true, and that the falso would not serve; and for that he quoted the Case of the King *versus* Griebe.

And he took a Diversity between a Conspiracy and a Confederacy; the one must be in judicial Proceedings, the other may be in Pais. Vide the Statute of 28 Ed. 1. c. 10. but this Indictment is for a Conspiracy.

2 Inst. 561. 562. 3 Mod. 220.

But of the other Side was quoted a Precedent out of West. 2. p. 102. §. 97. agreeing with this: It was for conspiring falsly to charge one with Felony, without any Averment that he was innocent. Vide 42 Ed. 3. 15. In Conspiracy laid in one Place to charge with a Fact in another County, and the Venue came from the County where the Conspiracy was laid.

The Case of Perjury not like this.

Per Holt, Ch. J. Your Case of Perjury is not like this, for there the Crime meerly consists in the Fact sworn, and the Matter is indifferent till the Averment of ubi revera comes: But here is a Confederacy to charge a Man falso, nequiter, malitiose, &c. and tho' the Word confederaverunt be not in, yet there are the Words machinaverunt & aggregaverunt, which are as full. This indeed is not an Indictment for a formed Conspiracy, strictly speaking, which requires an infamous Judgment, and Loss of liberam legem, as upon Conviction on an Attaint, and for which an Indictment will not lie till Acquittal, or an Ignoramus found. But this seems to be a Conspiracy late loquendo, or a Confederacy to charge one falsly, which, sure, without more, is a Crime; and it is a Crime for several People to join and agree together to prosecute a Man right or wrong.

2 Cro. 131. acc.

Vid. 2 Cro. 8.

If in an Indictment for such Confederacy you proceed further, and shew a legal Prosecution of the Confederacy, there you must shew the Event thereof, as Ignoramus returned on the Indictment, or an Acquittal, or else the Indictment fails; but where you rest upon the Confederacy, it will be well without more.

2 Cro. 131, contra.

And it seemed to the whole Court, that the very Agreeing together to charge a Man with a Crime falsly, is a consummate Offence, and indictable: And as to the Want of averring his Innocence, every

Vide ante 100, 137, 169.

ry Man is presumed innocent till the Contrary appears, and the Falso strongly implies his Innocence.

Indeed if the Truth had been, that there was a Woman with Child, and the Parish likely to become chargeable, and the Defendants being Parish-Officers had met to inquire and find out the Father to save the Parish harmless, and upon such an Occasion should, upon their Information, charge this P. P. to be the Father, and the Indictment had been for that, they must have been acquitted.

And tho' all the Court were clear for the Queen, yet at the Importunity of Broderick, they let it pass over till the next Term.

And in Trinity Term after, Jud. pro Regina. For it is a Conspiracy to charge one falsly with Fornication, which, tho' it be no Crime at Common Law, yet is punishable in the Spiritual Court; and a Confederacy falsly to charge with a Thing that is a Crime by any Law is indictable, and the Confederacy is the Gist of the Indictment. Per totam Cur'.

Conspiracy Vid. ant. 137, 138, 169. 2 Haw. ch. 43. Sec. 25. ch. 46. Sec. 19.

Per Holt, Ch. J. If an Attorney will take a Man's Money to do Business, and does not do it, we may enter into a summary Examination of it, and if we find him refractory, we may strike him out of the Roll. Qr. 2 Lev. 66.

Vide ante 16, 42, 86. Attorney taking Money, and not doing his Business.

Domina Regina *versus* Wheeler.

Inquisition that the Wheel of a Forge moved to the Death of Deceas'd. Vid. 1 Salk. 220. 1 Hawk. ch. 26. Sect. 5, 6, 8, &c.

INquisition before the Coroner, super Visum Corporis, That the Wheel of a Forge moved to the Death of the Deceased. And now it was moved to stay Process for seizing it as a Deodand, because Parcel of a Freehold, as the Wheels of a Mill or Mill-stone, which were agreed to be Freehold, and ideo not capable of being a Deodand.

And per Holt, Ch. J. A Mill is a known Thing in Law, and so are the Parts thereof; and therefore if the Owner of a Mill take out one of the Mill-stones to pick or gravel it, and devise the Mill while the Stone is severed from it, yet it shall pass as Part of the Mill: And a Bell cannot be a Deodand.

Et per omnes. Let Process upon the Inquisition stay.

S. C. 1 Salk. 166. Vid. 3 Mod. 42, 43. Libel for not coming to his Parish-Church on Sunday and not receiving the Sacrament. Motion for a Prohibition, for that he went to another Church, &c.

Britton *versus* Standish.

LIbel was against him in the Spiritual Court, for not coming to his Parish-Church on Sunday, and not receiving the Sacrament at Easter.

Parker moved for a Prohibition upon a Suggestion, that the Determination of the Bounds of Parishes, and the Interpretation of the Laws and Statutes of the Realm, belonged to the Queen's Temporal Courts, and that by them no Man is bound to go to his Parish-Church, so he go to some Church, and that the Defendant did constantly resort to another Church. And Day being given by the Court for the hearing Counsel of both Sides, Raymond against the Prohibition.

1. The Suggestion does not say, that he resorted to any Church in which there were Divine Prayers.

R. He is bound by old received Canons to go to his Parish-Church, &c.

2. By the old received Canons, every Parishioner is bound to repair to his Parish-Church on Sundays and Holidays, and it is no Excuse that he went to another Church without it be upon an extraordinary Occasion, and for a reasonable Cause which ought to come of his Side, and of which the Spiritual Court are Judges. Vide Linw. 184. de Paroch. and his Comment upon the Word Volentibus in the Canon, which implies a Liberty to Parishioners of not coming to the Parish-Church on other Days than Sundays and Holidays, which are Days of Obligation; and herewith agreeth Selden, ----- Vid. Sparrow's Collection 78. & Injunction 46. whereby it is directed, that some discreet Persons of the Parish be appointed to see that Parishioners do repair to their Parish-Church, and to present such as do fail, in order to a Compulsion by Ecclesiastical Censures: Vid. the 90th Canon of the Constitutions of 1603. idem, and the Statute of 1 Eliz. c. 2. Sect. 14. express in the Point, and the Act of Toleration, 1° W. & M. makes Alteration only in Favour of Protestant Dissenters, and therefore cannot avail the Defendant here, he having not shewed himself one as he ought if he would take Advantage of it.

Especially on Sundays and Holidays.

And 1 W. & M. cannot avail the Defendant.

As to Parishes at first, and Maintenance of the Priests.

Then as to the Reason of the Thing itself, it seems clear for us; for Parishes at first were Districts, certain Parts of the Diocese, and the Care of the Souls of the Inhabitants were charged upon certain Priests, who were maintained by the Diocesan by a Distribution of the Offerings made at Christmas; and by the ancient Canons, as well as by Acts of Parliament, such Priests having Care of Souls, were bound to a Residence upon their Parishes, the better to discharge that great Duty, which End they could not well answer, or minister fit Remedies to the Spiritual Diseases of their Parishioners, if the Parishioners might chuse whether they heard their Instructions or not.

And

And as to the other Charge in the Libel, viz. the not receiving the Sacrament at Easter, vid. Linw. 8. 143. that all Christians ought to receive the Sacrament at least once a Year, viz. at Easter, ibid. 227. And so is the Rubrick established by Parliament, and the twelfth Canon of the Constitutions of the Year 1603.

As to receiving the Sacrament.

Parker contra. As to the Statute of the 1st of the Queen, though the Words be, That every Parishioner should repair to his Parish-Church, yet the true Meaning of it is well expounded by other subsequent Statutes, where that Clause of it is taken Notice of, and recited according to the Meaning and Substance thereof, viz. that every Man should go to his own Parish, or some other Church, &c. Vid. 3 Jac. 1. c. 4. Sect. 27. Cawleigh's Law of Recusants, ----- the late Act of Toleration, 1 W. & M. Spelm. Consil. 1 Part 193. 2d Part 141.

Exposition of Stat. 1 El. to his own Parish-Church, or some other.

3 Mod. 43.

Vid. 1 Lev. 5, 167.

2 Cro. 480.

1 And. 138.

Holt, Ch. Just. seemed to doubt whether a Parishioner were compellable by Ecclesiastical Censures, to repair to their Parishes on Sundays; for at that Rate, the Gentlemen of Grays-Inn, Lincolns-Inn, &c. who have a Chapel of their own, in which they have constant Prayers, would be compellable to go to their respective Parishes, a Thing which was never thought they were obliged to: And he thought Parishes were instituted for the Conveniency of the Parishioners, that they might have a Place certain to repair to when they thought convenient; and a Parson, from whom they had Right to receive Instructions, and other Church-Rites: Yet he agreed, that it was not commendable for a Parishioner to absent himself humorously from his Parish. One is indeed bound to receive the Sacrament three Times a Year; but that Easter was only named for Direction, but not for Compulsion, and seemed to be mentioned for the Sake of the Offerings then.

If Parishioners are compellable by Ecclesiastical Censures to repair to their Parishes on *Sundays*, because of the Inns of Court, Chapels, &c.

Powell totis viribus contra. The Truth is, we live in an Age where Men are apt to bring those Things in Question, of which our Ancestors never doubted; and it is not fair to inquire so narrowly into the Original of the Jurisdiction of the Ecclesiastical Court on all Occasions, and it is plain they are in Possession of this Jurisdiction, and frequently exercised it; and if we will ask, how they come to have Conuzances of Testamentary Matters, we shall find no other Right they have to it, but constant and uninterrupted Usage, and as to the Instance of Grays-Inn, and such like, there will be Usage against Usage, and the Repairing to such a Chapel will be a reasonable Excuse, and ought to be pleaded; and for a full Authority in the Point, he relied on Brown's Case, 2 Roll. Rep. 455. where a Prohibition was denied, the Question there being on the Reasonableness of the Excuse pleaded: Of which the Court said, The Spiritual Court was the proper Judge; and the Reason of the Parishioners Obligation to come to Church, is not for the Sake of any Offering or Profit to the Parson, but in Regard that he has the Care of their Souls, which he could not discharge if they came not to hear him.

R. That the Ecclesiastical Court have such Jurisdiction.

Gould

Gould accord. That they have original Jurisdiction, is most plain in both the Instances in the Libel; and quoted Hard. 406, 407, 503. full in Point.

That no Canon since 1603. can *proprio Vigore* bind Laymen.

Holt, Ch. Just. A Jurisdiction allowed to them Time immemorial, must be taken to belong to them by Law; but what I doubt at present is, whether this be so: And if there be any ancient Canon for it, and received here before 1603. I will agree with you; but if not, no Canon since, though in full Convocation, can proprio Vigore bind Laymen: And it was proposed to them to stay below by Consent, and to declare in Prohibition forthwith, that the Matter might be judicially determined.

That if the Libel be grounded on 1 Eliz. they may compel them.

And at another Day, Montague moved for a Prohibition in the like Case; and then Holt, Ch. Just. having viewed the Authorities, and the Act of 1 Eliz. Clearly, if the Libel be grounded upon the Statute of 1 Eliz. they may compel you to come to the Parish-Church, for that Statute does directly subject People to the Ecclesiastical Law in this Point; and the Case in Hardres and Rolle before-mentioned are direct in the Point, and we must not sit here to encourage Irreligion, to which People are too prone now a-days; and if one does go to a customary Chapel within the Parish, it will be good Excuse, but must be pleaded.

If a professed Church-man may go to Meetings, &c.

And per Holt, Ch. Just. If a Man be a professed Church-man, and his Conscience will permit him sometimes to go to Meetings instead of coming to Church, the Act of Toleration shall not excuse him, for it was not made for such Sort of People: But no Rule was given, the Court saying, They would think of it before the End of the Term: And at last, a Prohibition was granted, and ordered to declare forthwith.

A Son is bound Apprentice to his Father, &c.

Per Cur', In a Case in which Mr. Brotherick was of Counsel for the Parishes of------ and Thursley in Surrey, upon an Order of Sessions concerning a poor Person; the Case was this: The Son was bound an Apprentice to his Father, and the Father gave up his Indenture to the Son, and bound him out to a Service into another Parish for a Year, where he served, but did not cancel the Indenture; and becoming poor, the Justices ordered him last legally settled in the Parish where the Father lived, because the Indenture being still in Force, his Apprenticeship continued: And though Broderick urged, and it was agreed, that an Accord with Satisfaction would be a good Discharge of this Covenant; and per him here is that which in its Nature tantamounts to a Satisfaction to the Father, for now he is discharged of the Obligation of providing for the Son as an Apprentice: Yet per Cur', The Indenture not being cancelled, the Obligation of the Apprentice continues; and if the Father should get the Indenture into his Hands again uncancelled, and sued the Son thereupon, the aforesaid Agreement would not be a good Plea for the Son; and

Per Cur', The first Obligation continues.

and it is a good Plea to a Covenant, or even to a Promise, that the Plaintiff agreed the Defendant should be discharged of it.

And Powel remember'd the Case in the Book of H. 7. where one was bound by Boyd, and the Obligee delivered it to the Obligor, who omitting to cancel it, Obligee having lit on it, put it in Suit; and all this was pleaded specially, and adjudged no Plea:--- But upon another Exception, a Rule was to shew Cause why the Order should not be quash'd.

Hodges *versus* Templer.

RULE was for Judgment in Hillary Term was Twelvemonth; but Costs being not taxed, Mr. Clarke, out of Kindness to the Defendant, gave Time for settling the Costs 'till Easter Term, and before Costs settled, and Judgment enter'd, the Plaintiff died: And now the last Hillary Term the Attorney enter'd up his Judgment as of Hillary Term before, viz. the Time that the Rule was pronounced. And now upon Motion, it was set aside for Irregularity; and they directed them if they pleased, to enter it as of Hillary last, being the Term that they really had enter'd it, and enter their Continuances till then, for the Court could not take Notice of the Plaintiff's Death.

Vide ante 59. Judgment of a precedent Hill. Term, and Plaintiff died before Costs settled; and next Hill. Term, Judgment being entered as of the first Hill. Term, was set aside.

And per Holt, Ch. Just. If one will enter a Judgment as of a Term, he must actually enter it before the Essoin-day of the succeeding Term, otherwise it shall only relate to the Term of which he enters it; and if Judgment be signed in Hillary Term, and in the subsequent Vacation the Defendant sells Lands, and before the Essoins of Easter Term the Plaintiff enters his Judgment, it shall affect the Lands in the Hands of the Purchaser; and if one enters Judgment so in Vacation, when indeed the Party was dead, if he was living in the precedent Term, the Judgment is good by Relation.

Ante 14, 184. 1 Salk. 401. Vid. post 241. 1 Mod. 1.

Domina Regina *versus* Inhabit'de Com' Wilts. Post 307.

1 Salk. 359.

THEY were informed against, for not repairing a common Bridge in their County: And now the Attorney General moved for a Ven' fac' to the County of Berks, the whole County of W. being concerned.

Vid. ante 150. Post 255, 307. Information for not repairing a common Bridge. 1 Vent. 61. See 1 Hawk. ch. 77.

And per Cur', The Attorney may choose which of the adjacent Counties he pleases, and he may have the Ven' fac' from the Body of that County, or de Vicineto of such a particular Place therein next adjacent to Wiltshire; and the Defendant is not intitled to an Imparlance upon Amendment of an Information.

Per Cur', An Under-Sheriff ought not to serve as an Attorney during his Sheriffalty.

Attornies.

Domina

S. C. 2 Salk. 680, 681.

Domina Regina *verſus* Baines.

Clerk of the Peace convicted of Miſdemeanors. Q. Carthew 426.

HE was convicted before the Juſtices of Peace at their Quarter-Seſſions, upon certain Articles of Miſdemeanors in his Office of Clerk of the Peace for the County of W. (purſuant to the Authority given to the Juſtices by the late Act of Parliament) exhibited againſt him: And the Order being removed up by Certiorari, Mr. Wells took ſeveral Exceptions to it.

Obj. To the Articles, &c. being only for taking exceſſive Fees.

1. The Offences examinable by the Juſtices, muſt be in Execution of his Office only; but all the Offences charged in the Articles, are for Extortion of exceſſive Fees, which is no Part of the Execution of the Office, but rather a Reward for it.

Per Cur'. An Office and Profits are as Lands and Profits.

Sed per Cur', That is a nice Diſtinction between taking Fees, and executing an Office; and ſure taking of Fees colore Officii, is an Act in Execution of an Office; and an Office and Profits are as much the ſame, as the Lands and Profits of them are one Thing.

Obj. That Articles were received by eleven, and the Conviction only before ſix.

2. The Words of the Statute are, That the Juſtices of Peace may at their Seſſions receive Articles againſt him; which ſaid Juſtices may, if they ſee Occaſion, convict him; and here it appears, the Articles were received by ſuch and ſuch, Eleven in all, by their Names, at ſuch a Seſſions, and the Matter adjourned to another Seſſions; and there before Six of the aforeſaid Eleven Juſtices & al', he was convicted; ſo the Words not purſued: Sed non allocatur; for the Meaning of the Statute is not, that the ſame individual Perſons who received the Complaint, ſhould amove; but it is enough they be virtually the ſame, viz. the ſame Court; and though not one of thoſe who received it were at the next Seſſions held by Adjournment, it would be notwithſtanding well.

Non allocatur.

Obj. It does not appear he was Clerk at the Time of the ſuppoſed Extortion.

3. It does not appear that he was a Clerk of the Peace at the Time of the ſuppoſed Extortion committed; but it is only ſaid, that he claimed and exerciſed the ſaid Office, and that might be, and he have no Right to it, or that he executed it as a Deputy: And this ſeemed a Good Exception; for if he were in by Wrong, or as Deputy to another, and committed Cauſes of Forfeitures, and after gets in by Title, or as Principal, he ſhould not by reaſon of thoſe precedent Miſdemeanors loſe his Office.

Obj. That the Articles were not direct and certain, but only more than his juſt Fees, &c.

4. In the Articles which where the Foundation of the Proceedings, and ought to be direct and certain, one Fact charged was, That he did extort and force ſuch a Perſon to pay him 2 s. 6 d. for a Subpœna for a Witneſs to appear at the Quarter-Seſſions, which was more than his juſt Fees; without ſhewing what the juſt Fees were, or laying it to have been colore Officii, or what Quarter-Seſſions the Witneſs was ſubpœna'd to; for it might be the Quarter-Seſſions of York, Cornwall, &c. and therefore not Matter in Execution of his Office.

5. Another Sum articled against him for, was said to be for Matter done at the Quarter-Sessions of his County, but not said to be colore Officii.

Obj. Not said to be *colore Officii.*

And per Holt, Ch. J. and Powel, clearly: These Articles being a Charge against the Defendant to bring him under Forfeiture of his Office, in which now by the late Act of Parliament he has a Freehold, ought to be as direct and certain as an Indictment; but as to the Want of ascertaining what the just Fees were, it is said to be more than the just Fees.

That these Articles which touch his Freehold, ought to be as direct and certain as an Indictment. 1 Vent. 19, 20.

And per Powel, That is enough, for the Justices are Judges of that where the Fees are not ascertained by Act of Parliament: And Per them two: We can't intend any Thing where a Man's Freehold is to be forfeited; and it does not appear that the first Sum was taken for any Thing under his Management as Clerk of the Peace, and the Conviction must be according to the Articles, and not exceed the Extent of them. And it being spoke to again, the said two Justices were clear of the same Opinion, for this Charge would be bad in an Indictment for Extortion in his Office; and this summary Way is severe enough, without having it more loose than an Indictment, which would only subject him to a Fine; whereas this is in order to a Forfeiture of his Freehold: And if this were an Indictment, the Extortion must have been laid colore Officii; and it is not enough, that the Title of the Articles is, That it was for Misdemeanors in his Office; but the Instances ought to be alledged so too, and the Recital in the Order that it was colore Officii, is only a false Inference of the Justices not warranted by the Articles, which are the foundation; and he can't be convicted of any Thing but what he is charged with in Writing; and he is charged with nothing directly in Execution of his Office.

Carth. 226.

And here the Court will not intend any Thing, &c.

Gould & Powys dubitantibus, Whether this need be as certain as an Indictment, for then without doubt it would be had; and because they were not satisfied, though the other two were very clear, (ut supra) it went over till the next Term.

And here per Holt, Ch. Just. If the Clerk of the Peace had committed a Misdemeanor, and to prevent a Forfeiture had surrender'd his Office to the Custos Rotulorum, and taken a new Grant, that should not purge the Forfeiture, for then it would be in the Power of him and the Clerk to frustrate the Intent of the Statute; and after Conviction of the Clerk of the Peace for a Misdemeanor in his Office, the Custos Rotulorum is to nominate another Person in convenient Time, and cannot name the same Person again; but if an Officer commit a Forfeiture, and he that is to take Advantage of it accepts a Surrender, and makes him a new Grant, the Forfeiture is purged; it is Extortion in Officer to take Fees when none is due, or more than is due, or before they are due: And though the Order be quash'd, yet he may be prosecuted again, as if Attainder of Felony be revers'd, the Party must be tried again.

Here, upon a Misdemeanor, a Surrender to the *Cust' Rot'*, and a new Grant would not avail.

But the Articles are no direct Charge.

And at another Day, in Michaelmas Term, Powys came over to the Opinion of the Ch. Just. and Powell, That the Articles were no direct Charge: But Gould perſiſted that this being in caſe of a Freehold, and by conſequence the Charge to forfeit ought to be certain: Yet it was a Freehold created by Act of Parliament; which Act ſubjects it to a Forfeiture for Miſdemeanors, and directs the Charge and Examination thereof in this ſummary Way and Manner, which he thought would not require ſo great Strictneſs as in caſe of an Indictment; and the Caſe of Dyer 114. was quoted, where a Filazer was removed by the Court by Parol.

And the Court being for quaſhing it, Att' Gen' moved to quaſh the *Certiorari*.

But per Cur', Not like this, for that Amoval is not peremptory, but the Cauſe may after come in Queſtion upon an Aſſize; but this Amoval is made final by the Statute: So the Court being clear for quaſhing it, the Attorney General moved to quaſh the Certiorari; de quo vide poſtea 206, 208.

Wey *verſus* Yally.

S. C. 2 Salk. 651.

Debt brought in *London* upon a Demiſe of Lands in *Jamaica*, &c. poſt 228. 1 Lev. 143.

DEBT for Rent upon a Demiſe of Lands in Jamaica, brought in London, and Plea to Juriſdiction of this Court, That there are Courts of Record there, in which all Actions concerning Lands there are determinable, and prays Judgment, if this Court has Juriſdiction: And on Demurrer, Broderick, in Maintenance of the Plea, quoted the Caſe of Parker and Damer in this Court, Hill. 1 & 2 W. & M. Rot. 505. that Debt does not lie here for Rent, againſt Aſſignee of a Term in Ireland; and in the principal Caſe, if the Defendant had a good local Plea, as an Entry and Ouſter made by Leſſor, ſuch a Plea would want Trial here, and quoted for this, 3 Keb. 150. where Debt was brought for Rent upon Demiſe of Lands in Ireland; and pleaded that the Duke of York was ſeiſed in Fee of the Lands, and enter'd, and ouſted the Leſſee, and Iſſue there upon the Entry and Ouſter.

The Caſe and Diſadvantage of the Defendant.

And per Hale, It is bad, becauſe the Iſſue could not be tried here: And he ſaid, In the principal Caſe his Client was at that Diſadvantage; for the Houſe demiſed, was caſually burnt, and by an Act of the State of that Country order'd never to be rebuilt, and a Reparation made to the Leſſor; and we cannot have Benefit of this Matter in Evidence here, becauſe the Jury cannot inquire of it; and the Plaintiff is at no Miſchief, for if he has not Juſtice there, he may have a Writ of Error hither.

Vid. 1 Saund. 238. Hob. 37. 1 Cro. 143, 183, acc. 7 Co. 2. 1 Jo. 43, 44. Vid. 1 Vent. 59.

Holt, Ch. Juſt. Your Caſe of Parker and Damer is good Law; for being brought againſt the Aſſignee, it is grounded upon the Privity of Eſtate, which is local, and therefore to be brought where the Land lies; but if it had been by Leſſor againſt the Leſſee, or by Aſſignee of Reverſion, Debt or Covenant upon the Statute 32 H. 8. c. 34. it were otherwiſe, for then it might be upon the Privity of Contract,

which is transitory, and therefore might be laid any where: If a Deed bear Date at a Place certain, the Action thereupon must be laid there: And it has been held, that if a local Issue arise in Ireland, in an Action laid here in England, it shall be either tried in the County where the Action is laid, according to Dowdale's Case in 6 Co. 46, 47, 48. or by suggesting that such a Place in such a County is next to Ireland, and have Jury from thence. And here the Defendant, upon nil debet, may give Entry, &c. or the Law of the Country in Evidence, if there be such a Law; and this we see every Day done before Committees of Appeals from thence.

Powell. The Diversity appears plain between local and transitory Actions. If a Deed bear Date out of the Kingdom, if the Place of the Date be not alledged somewhere in England, we cannot try it; but here the Action is grounded upon the Contract, which follows the Person wherever he goes. And if the Defendant had pleaded a local Plea, it might be tried where the Action is brought, or by Suggestion, as my Lord says, in the next Place, whereof we have Precedents in Cases from Ireland. And there may be a Law in Jamaica against Bonds; yet sure that will not confine the Action of Debt upon Bonds made there to that Country. And an Action of False Imprisonment has been brought here against a Governor of Jamaica for an Imprisonment there, and the Laws of the Country given in Evidence.

Vide Hob. 233. 2 Cro. 76. 1 Inst. 261. b.

Et per tot. Cur. Respond' ult'.

Winter *versus* Garlick.

DEBT upon Bond for Performance of an Award, and Award was, That Defendant should pay the Plaintiff 10 l. and the Costs of a certain Suit before depending in an inferior Court, and thereupon mutual Releases; and Exception was, that the Award was not certain nor final, no Body knowing what the Costs were; and then it was not mutual, the Releases being ordered upon Payment of the 10 l. and the Costs. Vide 2 Lev. Fintney *versus* Bullock. 3 Lev. 413.

Award to pay Costs of Suit depending in inferior Court, &c. Vide 1 Salk. 74, 75.

To which was answered Cro. Car. 383. where it is said, that the Costs may be ascertained by the Attorney's Bill, 2 Vent. 242, 243.

Holt, Ch. J. It has been held a good Award to pay such Costs as Prothonotary should tax, and that carries it far enough; but sure they shall either ascertain it themselves, or refer to a proper Officer.

1 Salk. 75.

Powell. That Case referring to the Officer of a Court has been settled on Debate, for id certum est quod certum reddi potest.

Et adjournat'.

Per Holt, Ch. J. There can be no such Thing as a Demurrer in Abatement. Vid. 1 Salk. 93, 94, 218, 220. Show. 91.

Vide post 198.

Harvey *versus* Broad. Vid. antea 148, 159. S. C.

S. C. 2 Salk. 626. Vide post 251, 252. Ante 148, 159.

If the Court can take Notice of the Miſtake of a Day, being told of it *Ore tenus*, &c.

IT was now the Queſtion, Whether the Court ought to take Notice of the Miſtake of the Day, by being told of it Ore tenus, and not aſſign'd for Error on the Record?

And Pengelly urged, That there was no Reaſon they ſhould; for the Court in their Judicial Proceedings, never reckon by the Days of the Month, but by the Days of the Week, as Die Lunæ prox' poſt ſuch a Return, and relied on 1 Cro. 53. where a Writ of Inquiry was returnable Die Lunæ prox' poſt Quinden' Hill. 1 Car. and the Sheriff returned an Inquiſition before him the 27th of January, a Day in Truth after the Writ was returnable, and yet the Court refuſed to take Notice of it, being not aſſigned on the Record. Vide 1 Lev. 196. a Precedent where it was aſſigned on the Record, 1 Sid. 301. the Caſe in Croke allowed to be Law. Plowd. 265. a. 266. b. Ro. Ab. 524. pl. 5. Dyer 181. pl. 52. 21 H. 6, 13. pl. 4. 3 Cro. 227. Latch 118. Sir Tho. Jones 228.

Contra, Broderick quoted 2 Cro. 506, 548.

Holt, Ch. J. You cannot ſay that the Monday is Tres Trin', for in Truth it is the Sunday; but becauſe the Eſſoins cannot be kept on the Sunday, they are kept on the Monday, and yet the Sunday is one of the Four Days.

A Calculation moveable for *Eaſter* for ever. Vid. ante 41. 81, 160. 1 Leon. 142. Poſt 252. 2 Keb. 59. Vid. 1 Jo. 301. contra.

At the Council of Nice, they made a Calculation moveable for Eaſter for ever, and that is received here in England, and become Part of the Law, and ſo is the Calendar eſtabliſhed by Act of Parliament. Vide the Statute de Anno Biſſextili. And can we take Notice of a Feaſt, without telling what Day of the Month it is? Or ſhall we take Notice of it becauſe you ſhew it on the Record, and not when we ſee it as plainly without your telling? Vide Gage's Caſe, in 5 Co. 45. In the Entries, the Teſte of the Writ of Covenant was after its Return, and this did not otherwiſe appear to the Court, but by their own taking Notice of it; and contrary to Coke's Report of it, it was not amended, but Judgment reverſed.

Note.

Et adjournat'.

And it being again moved in Michaelmas Term, they were all clear that they muſt judicially take Notice that Tres Trin' was on a Sunday, and that Gage's Caſe in Co. Entries, 250. Mo. 571. is full in the Point, contrary to Rep. in 5 Co. and ſo is Fiſh and Brocket's Caſe in Plowd. where a Fine was reverſed becauſe one of the Proclamations was on a Sunday.

Ante 148, 159.

Fan-

Fanſhaw *verſus* Morriſon. Vid. antea 157, 159.

1 Salk. 208.
2 Salk. 520.

Sci. fa. upon a Recognizance that they and either of them *recognovit.*

SCI fa. upon a Recognizance by Bail, ſetting forth, That they and either of them recognovit to owe the Sum of 40 l. to be raiſed of the Goods and Chattels, Lands and Tenements, of them and either of them, upon Condition, &c. And the Sci. fa. was to ſhew Cauſe why the ſaid Sum of 40 l. ſhould not be raiſed of the Lands, &c. of them and of either of them, with an Averment, Quas quidem ſeparales Summas of 40 l. they or either of them did not pay.

And Wells inſiſted, that the Sci. fa. was bad, for to levy 40 l. of the Goods and Lands of them and either of them, was to levy two ſeveral Sums of 40 l. and that ought not to be; and relied on the Caſe of Parry and Villars, where Judgment was to recover ſeparales Summas, the Recognizance being as here, and Judgment reverſed.

And he ſaid, that it was impoſſible for two to be jointly and ſeverally indebted in one individual Sum, though they may be jointly indebted, and bind themſelves jointly and ſeverally to the Payment; and therefore the common Form of Bonds by two are, Noverint Univerſi, &c. nos teneri, ſo making a joint Lien for the Debt, which, as to the Obligation of Payment, is diſtributed and made ſeveral by the ad quam quidem Soluc' obligamus nos & utrumque noſtrum, &c.

Holt, Ch. Juſt. remember'd and agreed the Caſe of Parry and Villars, but ſaid, that by the Words here one Sum was only payable, but leviable upon the Goods and Lands of them both, or of either of them, at the Party's Election.

And he ſaid, there was this Difference between a Bond jointly and ſeverally, and a Recognizance ſo; that upon the Bond you cannot ſue both jointly and ſeverally, but upon a Recognizance you may.

Et adjournat'. Vide Hill. 3 Annæ, the Reſolution.

Elmore

Elmore *verſus* Tucker.

In Replevin Conuzance as a Diſtreſs for Rent. Bar, that they eſcap'd into Defendant's Ground for Want of his Repairs, and there diſtrained, &c. Vide Hob. 265. 2 Saund, 282. 289. Carth. 122, 179, 186.

IN Replevin, Conuzance was as Bailiff to J. S. for Rent upon a Demiſe by the ſaid J. S. of the Locus in quo. Bar, that J. S. whoſe Fee it was, Time out of Mind uſed, and ought, to repair and maintain the Fences between the Place where and the Plaintiff's Land next adjoining, and thro' Want of Repair the Plaintiff's Cattle eſcaped into the Place where, and were diſtrained for the Rent; and on Demurrer, Eyre for the Demurrer relied on 2 Saund. Pool *verſus* Longville, the very Caſe.

Holt, Ch. J. I think it is hard to maintain that Judgment, that when the Plaintiff's Inheritance is charged with the Repairs, he ſhould take Advantage of his own Wrong in not repairing, by making the eſcaping Cattle a Diſtreſs for his Rent; and it is not like the Caſe of Lord and Tenant there quoted, for the Lord has nothing to do with the Land, but the Charge of Repairs belongs to the Tenant.

Per Cur. That Judgment is fit to be re-conſidered.

Adjournat'. Ideo adjournatur.

S. C. 1 Salk. 220.

Docmanny *verſus* Davenant.

Demurrer in Abatement.

Joinder in Bar.

Ex Officio. Skin. 620. Carthew 88.

THE Defendant demurred in Abatement, and Plaintiff joined in Bar, and Judgment final for the Plaintiff: For the Court ſaid, they knew not what a Demurrer in Abatement was, for if the Cauſe be apparent to the Court, they would abate the Writ, &c. themſelves, or elſe it ought to be pleaded, and they ſaid they would turn all ſuch Demurrers into Bars, tho' Eyre quoted Wimbiſh *verſus* Willoughby in Plowd. a Precedent of a Demurrer in Abatement. Vide antea 84, 88, 115, 195. of Demurrers to Pleas in Abatement, but not of Demurrers in Abatement.

S.C. 1 Salk. 7.

Lepiot *verſus* Browne.

One B. removed into *Cuſt' Mar'*, pleaded in Abatement for Want of diſtinguiſhing him from his Father.

BEing removed by Habeas Corpus into Cuſtod' Mareſchalli, the Plaintiff declared againſt him by the Name of J. B. of ſuch a Place, in Cuſtodia Mareſchalli; and he pleaded in Abatement, that his Father lived in the ſame Town, and that his Name was J. B. too, and concluded in Abatement, for the Want of the Addition of Junior, or ſome other, to diſtinguiſh him from the Father; and tho' this was by Bill, and ſo not within the Statute of Additions, yet by the Common Law there ought to be an Addition to diſtinguiſh in this Caſe of the Son; ſecus if the Father were ſued, for then J. B. without Ad:

Addition will be taken for the Father; and the being in Custod' Maresc' shall not help it:

1. Because there is no Description of the Person.
2. The Father may be there too. And he quoted Rast. Ent. 310. 33 H. 6. 54, 55. 37 H. 6. 29. b. 30. a. 4 Ed. 3. 31. 8 Ed. 3. 50. 21 H. 6. 26. b. 5 Ed. 4. 25. a.

Holt, Ch. Just. Suppose Father and Son be called J. S. and one by Will devises his Lands to J. S. this prima Facie shall be understood the Father; but if it be made out, that Devisor did not know the Father, &c. the Son shall take, quod fuit concess': And suppose one deals with the Son, and knows nothing of the Father, shall he at his Peril take Notice that he has a Father of the same Name, &c? Indeed, the Defendant, by bringing the Habeas Corpus, had concluded himself if you had relied upon it. If this were an Original, and the Father and Son had lived in different Counties, there had been no Occasion of Addition of Junior.

Where upon a Devise the Father shall be intended *prima Facie*.

Vide 11 Co. 89. 1 Keb. 182.

And per Cur', You should have also said, That the Father was in Custod' Maresc' too: And therefore respond' ult' Nisi before End of Term; but the last Day Pengelly speaking to it again, let it go over.

Let it go over.

Adams *versus* Tertenants of Savage. Vid. antea 134. Post 226.

S. C. 1 Salk. 40. 2 Salk. 601, 679.

SCi' fac' was to summon in the Tertenants of S. not naming them: And to this it was pleaded in Abatement, That J. S. was a Tertenant not summoned, and Concluded quod Breve cassetur; whereas the true Way had been to conclude, Si respondere debeat quousque, and thereupon to take a new Writ to summon in that Tertenant: But for Precedents of such Conclusions as here, Co. Ent. 604. Cliff's Entries 702. Vid. 2 Cro. 506, 507. Cro. El. 740. Mo. 524. Contra. All the Court took a Difference where the Writ is general, and where it goes about to name the Tertenants particularly, and omits one: In the latter Case, the Writ may be abated, for there the Party may have a better Writ of the Kind, viz. One naming them all; but in the first Case he cannot, and therefore we cannot give Judgment to quash the Writ, but only he shall not be put to answer till the other be summoned.

Plea in Abatement of *Sci' fac'* that *J. S.* was a *Tertenant* not summoned. Carth. 111. Skin. 273.

Difference where the Writ is general.

But because Darnell, Serjeant, urged he had a Multitude of Precedents contrary, they gave Day to shew them. Vide 1 Keb. 55, 310, 351, 352. *Adjornatur.*

1 Keb. 351. Tertenants cannot plead in Abatement if any be summoned.

Conclusion of a Plea in Abatement. See Carthew 363, 364. Inst. Leg. 512, 513, 523, 524.

Harwood

Harwood *verſus* Turberville.

Bond to pay on all Demands, if his Mother would not pay. Vide 1 Lev. 3, 45, 77. Raym. 27. 1 Sid. 105, 456. 1 Mod. 35. 2 Mod. 285. 2 Saund. 66, 78.

DEfendant borrowed Money for the Uſe of his Mother, and obliged himſelf by Bond to the Payment of it, on all Demands, if his Mother would not pay: And now in Debt upon this Bond, and Oyer thereof, he demurr'd to the Declaration, becauſe there was no ſpecial Requeſt with Time and place of the Mother, and licet ſæpius requiſitus would not do; for, as it was ſaid, the Defendant ow'd nothing till Want of Payment by the Mother, and no Fault could be in her, there being no Demand.

Requeſt where neceſſary. Vide poſt 260, 227. 2 Salk 457. Carth. 268.

Per Cur', When there is a Duty which the Law makes payable on Demand, there needs no Demand expreſly laid; but where there is no Duty till Demand, it is otherwiſe; and here was a Duty ab initio: If a Man be bound to pay Money on Default of Payment by another, but is not the original Debtor, there he is not chargeable till ſpecial Requeſt made of him who was to pay it.

Jud' pro quer'.

Walſmely *verſus* Ruſſel.

Caſe for ſcandalous Words ſpoken of a Juſtice of Peace, and Chancellor of a Conſiſtory Court, &c. Verdict and Damages for Plaintiff. Vide 3 Co. 191. 1 Lev. 535. 280. 3 Lev. 50. Fareſl. 107. 108, &c. Carth. 330. Skinner 98, 112.

PLaintiff in the Caſe declared, That he is a Man of Reputation, free from all Perjury and Subornation of Perjury; and that he is, and for ſix Months before the Words ſpoke was, a Juſtice of Peace, and is, and for ſeveral Years before was, Chancellor of the Conſiſtory-Court of the Biſhop of Coventry and Litchfield; and Writs did iſſue ſuch a Year for calling a Parliament, and that ſuch a Day in that Year was appointed for the Election of Burgeſſes for Litchfield to ſerve in the ſaid Parliament; that the Plaintiff intended to ſtand as Candidate, and of ſuch his Intention gave publick Notice; that the Defendant knowing the Premiſſes, to diſparage the Plaintiff in his Credit and Reputation, and to bring him under the Penalty of Perjury, and Subornation of Perjury, at ſuch a Time and Place, in hearing of ſeveral of the Queen's Subjects, and in the Preſence of the Plaintiff, ſpoke of him the Plaintiff theſe falſe and ſcandalous Words; There goes your rare Chancellor, innuendo the Plaintiff, to ſuborn Witneſſes to ſwear againſt the Parſon; Whereas the Plaintiff was not guilty thereof. Verdict and Damages for the Plaintiff.

That the Words are actionable, being ſpoken in Reference to his Office of Chancellor, &c.

Gould, Juſt. the Action well lies: If the Words were ſimply and abſtractedly ſpoken, without Reference to any publick Employment or Office of the Plaintiff, the Caſe would have been more doubtful, tho' I will not give any Opinion even in that Caſe; but here they are ſpoken in Reference to his Office of Chancellor, and of one that was then in Commiſſion of the Peace, and ſtood Candidate for a Mem-

ber of Parliament; and in that Reſpect they are as reproachful as can be, they wound his Reputation, and craftily obſtruct his Election.

That the Word *Chancellor* was an Indication of his Capacity, &c.

Object. They are not ſpoke with Reference to his Office.

Anſw. But they are; for they are ſpoken of one in an Office of Truſt, and having Adminiſtration of Juſtice, and ſpoken expreſly in that Capacity, There goes your rare Chancellor: And it cannot be taken here that the Word Chancellor was only meant for a Deſcription of the Perſon, but rather an Indication of Capacity in which he did ſuborn the Witneſſes; and it is not material to ſhew, that any Woman did ſwear againſt a Parſon before him; for if there did not, then the greater Falſity and Scandal, and the Word Subornation is always taken in an ill Senſe. 3 Inſt. 167.

And the Word *Subornation*, is always taken in an ill Senſe.

Obj. It is not ſaid, that he did, &c.

Obj. 1 Roll. Ab. 51. Yelv. 72. Thou haſt procured *J. S.* to come 30 Miles to commit Perjury before the Lord Biſhop of *Winton*, and gave him ſo much Money: Reſolved the Action would not lie, becauſe not ſaid, That they did commit Perjury; and therefore no Offence,

R. Words to be intended *in malam partem*, and according to their general Acceptation, Yel. 72. acc. Sed Cro. Car. 337. Cro. Jac. 151. con. See Skinner 183, 364. Carth. 330, 400, 498.

Anſw. This very Caſe was adjudged actionable, 5 Jac. & 3 Cro. 93. Thou haſt procured falſe Witneſſes to ſwear in ſuch an Action; held Action would lie, for it ſhall be intended in malam partem, Vid. 1 Vent. 50. 1 Lev. 180. He is a forſworn Juſtice, and not fit to ſit on the Bench, ſpoke of a Juſtice of Peace, actionable; and Words are to be taken according to their general Acceptation; and the general Acceptation of theſe Words cannot be otherwiſe than criminal, 1 Cro. 14, 15. I have often been with Juſtice *B.* for Juſtice, but could get nothing but Injuſtice at his Hands, actionable; and it ſhall not be intended of any Demand of private Juſtice: Beſides, theſe Words are ſpoke of one who deſigned to ſtand for Parliament-man, and with Intent to hinder his Election; and he quoted the Caſe of Sir Walter Clarges. To ſay of a Man, That he is a Papiſt, though not actionable in themſelves, yet they were adjudged actionable, becauſe ſpoke of one who ſtood for Parliament-Man: The like Judgment in the Caſe of one Stowell, ſince. Hard. 103. You and your Crew brought the late K. to Death, actionable; though it might be ſaid, That they only attended him to the Place of Execution: Yet becauſe the Words ſound in Scandal, and that the common Acceptation and Conſtruction of them muſt be, that they were concerned and buſied in bringing the K. to Death; and concluded for the Plaintiff.

Obj. Actionable becauſe ſpoke of a publick Officer, and in Reference to his Office.

Powys doubted how it would be, if the Words had no Relation to his Office, or ſpoke of a Man not in Office; but held them actionable here, for theſe two Reaſons, viz. Spoke of a publick Officer, and in Reference to his Office; for he held the Word Chancellor was not a deſignatio Perſonæ, or as his Name, as Parſon or Dean is; but an Innuendo of his Corruption quatenus ſuch, i. e. quatenus a Chancellor: And he denied the Caſe in 1 Roll. Abr. 79. p. 2. but agreed, 2 Cro. 190. Thou art forſworn in Collet-Court, and ſame Book, 436.

Vide Cro. Jac. 158. 1 Danv. 107, 153.

Thou art perjured, for thou art forſworn in the Biſhop of G'.s Court' not to be actionable; and would diſtinguiſh thoſe Caſes from this, becauſe ſpoken here of an Officer, and with Relation to his Office: Subornation is a known Term in the Law, and is the Word of Art for corrupting one to commit Perjury, 3 Inſt. 167. The Statute of 32 H. 8. c. 9. ſpeaks of Subornation of Witneſſes: 5 Eliz. c. 9. Subornation of falſe Procurement of a Witneſs, Vid. 1 Lev. 118. Hard. 501. Mo. 243.

Per Anderſon, A private Man cannot be ſlandered but by particular Words, but general Words ſuffice to ſlander a Magiſtrate; and concluded pro Quer'.

1 Vent 59,60. R. That the Words are expreſs as to Subornation.

Powell contra: 1. He agreed, the Phraſe of Expreſſion was as direct as if the Defendant had actually ſaid, That the Plaintiff had ſuborned Witneſſes to ſwear againſt the Parſon: I cannot well find whether my Brothers think the Words actionable in themſelves, if ſpoken of any Perſon whatever, or by reaſon of a Relation to his Office, or other Circumſtances of the Plaintiff on the Declaration; but I hold them not actionable upon any Account.

2. Not without a Relation to his Office, one cannot be a Suborner of Perjury, without there be a Perjury committed: One indeed may ſuborn to ſwear, and yet no Oath taken; or an Oath may be taken, and yet it be no Perjury, for it does not appear to be in any Court of Juſtice; the Caſe in 3 Cro. not like this, for here is neither Court or Cauſe mentioned, where the Swearing was; and he agreed the Caſe in Cro. Jac. 158. for there was a Perjury ſaid to have been committed: And as to the Caſe in Hard. 501, a Perjury is likewiſe charged; It is not actionable to ſay, That one did forſwear himſelf, a fortiori, how can the ſuborning one to forſwear himſelf, be Slander to bear an Action? And Subornation, ex vi termini, does not import a Subornation of Perjury; and the Caſe in 1 Roll. 79. is much ſtronger than this; Subornation indeed is never taken in a good Senſe, no more is Forſwearing, yet no Action lies for ſaying a Man did forſwear himſelf.

It does not appear any ſuch Caſe was before the Plaintiff. 2 Cro. 143.

Then as to the Relation of theſe Words to his Office, or that he alledges himſelf to be a Juſtice of Peace, and Candidate for Parliament: I agree, Words ſpoke of a Magiſtrate will bear Action, that would not do ſo if ſpoke of another, but they muſt touch him in his Office: If there had been a Caſe in which a Parſon had been Party before the Plaintiff, and Women had been ſworn in it, and that had been ſet forth, then theſe Words might be applied by innuendo to that, and ideo actionable. Vid. Cro. Jac. 30. Yel. 220, 221. And the Word [Chancellor] does not neceſſarily import, that this was charged upon him in his Office of Chancellor; and Words muſt be either actionable in their Nature, and bear Action if ſpoke of any Body, or ſcandalize him in Office, &c. to bear an Action.

[Chancellor] does not neceſſarily import his Office.

Holt, Ch. Just. acc. My Brothers for the Plaintiff are not well agreed, whether the Words be actionable in themselves; but rather incline not; and I think they have great Reason for that Opinion, because here is no Charge upon the Plaintiff of any Subordination of Perjury, or that he did suborn Witnesses to forswear themselves: And suppose it were the first, and no Colloquium of any Cause, or Court where there had been an Oath, it would not be actionable; nor is there any Precedent for it, and there is reason they should not: For to say a Man has forsworn himself, is not actionable; Ideo not to suborn Witnesses to forswear: But the Words are not so strong in this Case, for they are, that he did suborn Witnesses to swear; sure the Suborning Witnesses to swear is no Crime, and Suborning ex vi termini is not a Crime otherwise than it relates to Perjury; and Suborning Witnesses to swear, does not imply that they do swear; and in the Case in 1 Ro. 79. lays a Colloquium of a Suit in Chancery, and Witnesses sworn there: So first one would think here was a Subornation of Perjury; and the Words go farther, and say, that he would sue in the Star-Chamber for it, a proper Court to punish Perjury in; yet held not actionable: Then how do these Words touch him in his Office? For if a Chancellor will suborn Witnesses to swear, does this relate to his Office? If he does it in another than in a Spiritual Court, it cannot; if it be in a Spiritual Court, it may not be before himself: In short, it does not appear to have been before himself, and we must not intend it to maintain an Action: And the naming him Chancellor is no more, and so commonly understood, than a designatio Personæ, as My. Chancellor: To make Words actionable in themselves, it is necessary to charge some scandalous Crime by them: If a Communication had been laid concerning an Oath which a Man had taken in a Court of Justice, and that the Man did forswear himself, that had been charging him with Perjury, and therefore actionable: But barely to say, That a Man did forswear himself, or suborn another so to do, is not charging an Offence punishable, and therefore not sufficient to ground an Action; and concluded for the Defendant. And the Court being thus divided, the Question was about the Judgment, If Rule be for a Cause to stay till the Court be further moved, and the Court is divided, there need no new Rule from Court, and the Plaintiff without more may enter Judgment upon the Verdict; But if the Case be ruled to be put in the Paper for Argument, or last Rule be a Cur' adv' vult, and the Court be divided, there can be no Judgment: And the Case of Iveson and More stands upon that Point to this Day.

Ch. J. Here is no Charge of any Subornation of Perjury, &c.

Suborning Witnesses to swear, no Crime, &c.

These Words do not touch him in his Office.

What is necessary to make Words actionable in themselves.

How Judgment may or may not be when the Court is divided.

Domina Regina *versus* London.

Vi. *Blackerby's* Caſes 228, 229. 2 Salk. 442. Motion to quaſh an Order for Payment of the Wages of a Labourer, &c. See Skinner 80, &c. Dyer 265. a. Jenk. 135. Vid. 9 Co. 88. Mo. 698. 1 Brownl. 62. *Obj.* That the Stat. only extends to Labourers in Husbandry. Ante 91.

AN Order for Payment of Labourers Wages, did recite the ſpecial Matter, viz. That two Perſons were retained by the Defendant, being Overſeer of the Works of the King's Garden at Hampton-Court, at ſo much a Day, and employed in Garden-Work there; and the Order made to enforce Payment, and removed by Certiorari from Hicks's Hall: And to have it quaſhed, was now moved: For the Juſtices have no Power by the Statute of 5 El. c. 4. to order Payment of the Wages of a Coachman, Footman, or any other Labourer or Servants, but ſuch as are Labourers in Husbandry: They cannot make Orders upon Bricklayers, Carpenters, &c. Works; but in caſe of Servants in Husbandry, where the Juſtices may ſettle their Wages, and force them to ſerve by the Act of Parliament, they may compel Payment; and the Juſtices have Power to regulate Wages in Abundance of Caſes, where they cannot compel Payment; and the Caſe of the Queen *v.* Corbet, here before, and Fitz. N. B. 168. Bro. tit. Labour, were quoted, and this Diſtinction was taken; If the Order had been generally for Wages, there the Court would not intend it to be other than Wages in Husbandry, and it might hold; but where on the Face of the Order it appears otherwiſe, as here it does, it is in it ſelf void as touching a Matter whereof they have no Juriſdiction, and indeed it does not appear that this was for Wages ſettled by Juſtices, and they never did pretend to a Juriſdiction but where the Wages was ſettled by them: Then this is a Queſtion of Juriſdiction, and Acts of Parliament concerning Juriſdiction ought to be taken ſtrictly; and all the Matter of Equity that may be urged on the other Side, is ſhut out by this one Anſwer, That it is againſt a poſitive Law.

R. The Juſtices have exerciſed this Juriſdiction ever ſince the Statute, and Work in a Garden is Service in Husbandry, &c.

Broderick contra. 1. This Juriſdiction has been exerciſed by them ever ſince the making of the Statute, which is a great Argument of Right: He quoted Paſch. 3 W. & M. King & Queen, *v.* Jammer, where it did not appear to have been a Service in Husbandry; and there it was held, they could enforce their Order by Commitment; and he inſiſted, that Work in a Garden was a Service in Husbandry; and they have always been allowed a Juriſdiction in that Caſe: And taking the ſeveral Clauſes of the Statute together, they neceſſarily intend to give Remedy by the Juſtices in all Caſes of this Kind. Sect. 7, & 15. they are to fix and ſettle Wages and Day-hire of Labourers, and ſo of Apprentices in Husbandry: Sect. 14. That a Party retained ſhall not go, if he be duly paid, till the Work be finiſhed, under Penalty of a Month's Impriſonment, to be inflicted by the Juſtices: Sect. 18. They are to convict Maſters for keeping contrary to the Act: Sect. 37. All Juſtices are required to make ſpecial and diligent Inquiry into the Breaches made of any of the Branches of this Statute. If then by this Statute they are to aſcertain Wages and Day-hire, to examine and puniſh Maſters that give more, or Servants

that will take more, than the eſtabliſhed Rate; if Servant cannot leave Maſter without Leave, but that they may puniſh him, and that all Offences contrary to this Act are determinable by the Juſtices; Why ſhall not they, by Virtue of thoſe comprehenſive Words, compel Payment of ſuch Servants and Labourers Wages?

Holt, Ch. J. Two Queſtions may well ariſe here: 1. Whether the Defendant be bound to pay thoſe Wages at all? For if he be employed as a Surveyor of this Work, and brings in others, and agrees with them, it may well be that he ſhall be chargeable by them: As if I put out Cloth to a Taylor, and he employs Journeymen to make it up, he, and not I, ſhall pay them, and he by me is to be paid for the whole Work. It may be on the other Hand, the Contract was not made by the Defendant upon his own Credit, but upon the Credit of the Crown; and neither appears on the Order, but it only ſays, the Retainer was by him. Ch. J. It does not appear, whether the Contract was upon his own Credit as Surveyor, or on Credit of the Crown.

2. Suppoſe the Contract be with him, and upon his Credit, whether a Gardiner working for Day-labour in a Garden, be within the Power given to the Juſtices in Point of Payment of his Wages? And what ſticks with me is, why they ſhould have Power over Wages and Day-labour in Husbandry, and not in Caſes of other Labourers: You ſay, it is by Implication the ſame, becauſe of the Powers given to them by the Statute over ſuch Labourers: And he remembered an Order made upon my Lord Oſſulſton, for his Coachman's Wages, which was quaſhed; and ſaid, Sure they cannot order a Journeyman Taylor's Wages, or Hire; and their having exerciſed this Juriſdiction all along, will not make it legal, if without Foundation; and in that Reſpect it is not like Suit in the Admiralty for Seamens Wages, for that may ſtand upon this Reaſon: The Admiralty is a Court Time out of Mind, and it may be by ancient Cuſtom they have Juriſdiction over Seamen's Wages; but this here is a Juriſdiction ſet up within Memory of Man: Eccleſiaſtical Court have Juriſdiction of Wills and Teſtaments, but not by Commune Jus, but by Preſcription, and no Act of Parliament is to give them Juriſdiction: But it is ſaid in Henſloe's Caſe, and ſo in Selden, That it was given to them by the Laws of the Kingdom, and it is not ſo any where but in England; ſo ſince the Caſe of Seamen's Wages was always determinable in the Admiralty, we muſt now underſtand that it had a legal Commencement. Q. If for Labour in a Garden be in the Juſtices Power. That they cannot order a Journeyman Taylor, &c. his Wages or Hire. Q. Skinner 671.

And at another Day, the Order was quaſh'd per tot' Cur', for that it appeared upon the Face of it not to be for Labour in Husbandry; but if that had not appeared ſo, we would perhaps intend it Husbandry, but now there is no Room for ſuch an Intendment. The Order quaſh'd, it appearing 'twas not for Husbandry.

Carleton

Carleton *verſus* Mortagh.

S. C. 1 Salk. 268. Ante 113, 114. Vide *Davenant's* Caſe, Poſt 235. Error of a Judgment in Debt, and Want of Original aſſign'd for Error. Noy 83, 84. Lat. 152. 1 Sid. 39. 1 Lev. 99. 1 Keb. 225. Fareſt. 104. Qr. 1 Show. 213. Ante 113, 134, 174. Carth. 70, 200, 339. Poſt 235.

ERror of a Judgment in Debt by Confeſſion in the Common Pleas, and Want of Original aſſigned for Error, and certified. Defendant pleads a Releaſe, but no Venue is laid; whereupon the Plaintiff demurs, and the great Queſtion now was, Whether the Court, being informed that there was an Original below, could by Law award a Certiorari ad informand' Conſcient' Cur', before they revers'd a Judgment for a juſt Debt?

Argument, That the Court may award a *Certiorari ad inform' conſcient' Cur'*, tho' Def' cannot demand it.

Gould. We may do it, and this Caſe ſtands upon its own Foot, and diſtinguiſhed from other Caſes: And in all Caſes where the Court after Demurrer over-ruled againſt the Defendant, or ruled for a Plaintiff in Error, or let in to examine the Record for Error before Reverſal of the Judgment, they ought to award a Certiorari to have the whole Record below before them, though now the Defendant cannot of Right demand it; for notwithſtanding any Confeſſion or other Plea of the Defendant admitting Error, yet if no Error appear to the Court on Examination of the Record, they ſhall affirm the Judgment. 21 Ed. 3, 54. If a Fact be pleaded in Bar of Error, as a Feoffment or Releaſe, ſays the Book, and Iſſue is taken thereupon, and found for the Plaintiff, which is this very Caſe, yet the Court ſhall examine the Judgment; and if no Error appear to them therein, ſhall affirm it. And tho' Error be aſſigned in the Want of an Original, yet ſince there may be an Original below, the Court upon their Examination of the Record, cannot be barred from awarding a Certiorari to be certified thereof. It is true, formerly, as appears by 28 H. 6. 10. It has been held, That after In nullo eſt erratum pleaded, the Court would and ought not to inquire farther, and that the whole Record muſt be preſumed to be laid before them; but ſince the Books are very full, that after In nullo eſt erratum pleaded, though a wrong Original be certified, the Court may be informed that there is a right Original, and they ex Officio ought to award a Certiorari for it to affirm the Judgment. 7 Ed. 4, 25. 1 Ro. Ab. 764, 765. 2 Cro. 60. Latch 152. 1 Jo. 139. 5 Co. 36. Biſhop's Caſe, which in Truth was after a Nil dicit & remanet indefenſ. tho' Coke reports it to be after In nullo eſt erratum. And this I take to be a ſtrong Authority for me, for the Releaſe in our Caſe does not confeſs more than that does, and yet there the Court did grant a Certiorari. In ſome Books, it is ſaid to be diſcretionary in the Court to do it or not; and if ſo, Can we have a better Motive of our Diſcretion, than here to affirm a Judgment for a juſt Debt, where a Releaſe of Error is unfortunately ill pleaded: And concluded for Certiorari?

Lat. 152. accord.

If the Court may ſend a *Certiorari* after *In nullo eſt erratum* pleaded. Carth. 339.

Powys acc. It has been held formerly, that In nullo eſt erratum was a Demurrer on what was produced of the Record; but in 9 Ed. 4. 32. b. adjudged that Court may at Diſcretion ſend Certiorari after In nullo eſt, &c. pleaded; and Biſhop's Caſe allows that, and Jo. 140.

and Latch 152. that after the Plea pleaded, the Party cannot pray Certiorari, and if he does, it shall not go at all; and the Entry ought to be that it was by Court, and not at Prayer of Party, and no Difference between this and In nullo est errat. in Point of Reason, for one is Matter of Law, and the other of Fact: And why should it be when the Issue in Law is against him, and not when the Issue in Fact is? And in those Books it is said, that the Court may send Certiorari, as well to reverse as to affirm, after In nullo est erratum. 1 Leon. 22. Noy 83, 84. 1 Sid. 109. Vide 1 Co. 36. 5 Co. 37.

Powell acc. The Release being as none, because not well pleaded does not tie our Hands, but that we may award a Certiorari to know whether this is Error or not; and the Court may do it to be informed of any Error in Law, where they are not foreclosed by the Act of the Party, and this is such. And where-ever the Court are not barred from examining the Errors on the Record, they may inform themselves thus of the true State thereof, tho' the Parties have foreclosed themselves of that Advantage by Pleading or Confession; for they must affirm or disaffirm the Judgment, upon View of the whole Record, according to their Knowledge and Conscience, without Regard to Party's Admission, and therefore ought to know of their own Knowledge whether there be Error in Law, and not to rely upon the Party's Admission. 2 Ed. 4. 32. is the first that I find in the Books of Certiorari's ex Officio Cur. and there the Parties agreed the Record as removed to be perfect, and yet the Court did award a Certiorari. And I cannot tell but in many Cases the Court are bound to do it, especially to affirm a Judgment. It cannot be at the Prayer of the Parties, because they have estopp'd themselves by their Plea, and in some Cases the Court have denied it to reverse a Judgment. Palm. 520. Young *versus* Young. Infant brought an Original, in which Case he need not find Pledges; but if he come of Age before Judgment, he ought to add them, and that being the Case, Want of Pledges was assigned for Error, and there the Court would not grant a Certiorari to make Error, and with this agrees the Case in Jo. 139. and Latch 152. This Release as pleaded, is as none, and therefore the Court is not foreclos'd by Act of the Party.

The Difference is between the Case of the Plaintiff in Error, and of the Defendant: If the Plaintiff assign Error, and take a Sci' fa' ad audiend' Error', and that it is returned served, and then the Plaintiff is nonsuited, or enters a Retraxit, the Court without more will affirm the Judgment. 21 Ed. 4. 38, 39, 44.

Another Difference is between Errors in Law and Errors in Fact: If Error in Fact be alledged, and In nullo est Erratum pleaded to it, or a Release, and that found against the Pleader, that is a Confession of the Error, and the Court thereupon shall without more reverse the Judgment; but pleading a Release of an Error in Law is not so, for a Release will not make that Error that is not so, as appears to the Court on Record; but the Release there is only a Bar of the Operation of the Suit of the Writ of Error, for the Court cannot proceed but upon a Writ of Error, and the Release may bar that; but if Release be pleaded which does not bar the Writ, the Court may proceed to examine the Record: And so is the Case, 21 Ed. 3. 54. And Difference between Errors in Law, and Errors in Fact.

54. And where-ever they can go to examine Errors, there they must take all legal Ways to be informed of the whole Record. And he quoted the Case of Done *versus* Smithers, which was, 1 Cro. 415, 416. 1 Jo. 373, 374.

Bishop's Case. Vide 1 Cro. 84. Mo. 700. 1 Leon. 22. Yel. 117, 118. 1 Rol. 754, 755. 1 Keb. 225.

And as to Bishop's Case, as reported by Coke, it was after In nullo est erratum pleaded, but there the Party took out a Certiorari without Leave of Court, and they held he could not have that Writ after that Plea, whereby he had concluded himself, but that the Court might ex Officio award it; and tho' it was annex'd to the Record by the Act of the Party, yet the Court took it off, and awarded one themselves. 7 Ed. 4. 16. Br. Err. 165. Fitz. Err. 4. The Difference between Error in Fact and in Law: Fact may be confess'd, but Error in Law cannot, so as to tie up the Hands of the Court; for tho' the Party does confess the Want of a Writ Original, Cap. &c. the Court cannot take his Word, and reverse the Judgment, but they must inspect the Record, and be informed. And the Form of Entries in case of awarding Certiorari ex Officio, is quia expediens Cur. videtur, to know whether there be such a Writ or not.

Certiorari ex Officio. See Skinner 419 to 422. Ante 194.

Obj. The Nature of this Error is such as may be confess'd, for it is only whether there may be such a Writ or no.

Answer. But it is Matter of Law, whether there be Original in the Cause or no: And concluded to award the Writ.

Ch. J. against the *Certiorari.*

Holt, Ch. J. contra. I am glad my Brothers can be against me in this Case for supporting a Judgment, but am sorry I cannot agree with their Reasons.

The Question is, Whether the Plea in Bar, as pleaded, be good or not?

1. Because the Question now before us is not whether there be Error or no, but whether the Plea in Bar be good as pleaded. When Error is assigned, and In nullo est erratum pleaded, or a Default is made, there the Matter of Error is the Question before the Court; but now the Matter put in our Judgment is, whether the Plea be good or not; so that now we are determining another Question than is in Judgment before us. If In nullo est erratum be pleaded, or a Default made, no Doubt the Court may award a Certiorari. In Done and Smither's Case, that which was assigned for Error, appeared to the Court to be no Error; then the Matter pleaded in Bar of that Error, tho' against the Defendant, was impertinent, because it appeared to the Court to be no Error. If in Debt upon a Bond the Declaration be bad, and the Plea in Bar be so too, yet Judgment shall not be for the Plaintiff upon the bad Bar, but against him, because the Declaration appearing bad, the Bar was insignificant: So in Writ of Error, if Release be pleaded, and Issue thereupon found for the Plaintiff, if there appear no Error on the Record, the Judgment shall be affirmed, because the Court are to judge of the whole Record before 'em. If a bad Plea in Bar be to a bad Declaration, or to a bad Assignment of Error, it is idle, and the Court shall take no Notice of the Insufficiency of it, but shall judge on the Record. And so agrees the Case of 21 Ed. 3. that notwithstanding a

Done and *Smither's* Case.

Releaſe found for the Plaintiff in Error, yet if there be no Error, Judgment ſhall be affirmed; but here is apparent Error, viz. the Want of an Original in an Action in the Common Pleas: Suppoſe then the Defendant had not come in gratis, and pleaded a Releaſe, but the Plaintiff had aſſigned Errors, and taken out a Certiorari, and it were certified that there was no Original, and then the Defendant had come and pleaded the Releaſe, as here; you would not in that Caſe have granted a Certiorari, and yet you might as well do it then as now; for now the Defendant by coming in gratis ſaves the Plaintiff the Trouble of a Certiorari, and admits Error, but pleads a Releaſe: So it appears to the Court, there is a good and ſubſtantial Error, and that the Defendant has not barr'd it by his Plea, therefore it is not in Judgment before the Court whether there be Error or not, there being apparent on the Record before them. Vi. Keb. 225. 2 Cro. 445. Godb. 4[illegible]

2. This is a Demurrer to the Plea in Bar, and the whole Event of the Cauſe is put in Judgment upon the Demurrer: When there is a Demurrer and Joinder in it, the Court is bound to give Judgment upon that; now if you award a Certiorari here, you ſtrike the Plea, the Demurrer and Joinder in it out of the Caſe, and was ſuch a Thing ever done? If it be certified, that there is an Original, what will become of the Demurrer? For if you give Judgment upon Certiorari, you muſt ſet aſide the Demurrer, for you cannot give Judgment upon both; for if you do, you muſt give it for the Defendant upon the Certiorari, and for the Plaintiff on the Demurrer, a manifeſt Contradiction: If Original be certified, and you give Judgment for the Defendant, you muſt waive the Demurrer put to your Judgment by Conſent of Parties: And no Caſe is parallel to this; for conſider you are not upon the Iſſue of Error or not, but upon the Point of Bar or not, for that is it the Parties demand your Judgment in. That the whole Event of the Cauſe is put in Judgment upon the Demurrer. 2 Keb. 27. pl. 21.

3. The Want of an Original is confeſſed here as flatly as can be: Indeed the Aſſignment of Error is not compleat till a Certiorari returned for the Plaintiff; and here you for the Defendant have prevented him of that by coming in gratis, and admitting the Want of an Original; but depend upon it, he ought not to aſſign Error, becauſe of his Releaſe: So he having admitted it in this manner, both Parties demand Judgment upon the Releaſe; and for the Court to go upon another Point than what is put in their Judgment by both Parties, is a kind of a Departure from the Point in Iſſue: 7 Ed. 4. 16. It is ſaid arguendo, That if Error be aſſign'd out of the Record, as the Want of an Original, or the like; though the Defendant does confeſs this Error, the Court are not bound by ſuch Confeſſion; and that I agree, If the Queſtion be, whether Error or not, as in an In nullo Eſt erratum pleaded, or in Default to the Sci' fac', which are not full Admiſſions, but quaſi Admiſſions, and not near ſo full as Pleas in Bar; but where the Defendant agrees that there is Error, but inſiſts upon it that the Plaintiff releaſed it, the Court does not go ſo far as to ſay, that they may ſcruple, and ſend a Certiorari there too. If the Defendant in Error comes in before any Certiorari, and pleaded a Bar, and a Demurrer is thereunto, and it never was queſtioned but he That the Want of an Original is flatly confeſſed, and both Parties demand Judgment on the Releaſe.

might well do ſo, and then it would be the ſame Thing as if it had been certified no Original: If ſo, ſuppoſe, inſtead of Demurrer, Iſſue had been upon this Plea, and found for the Plaintiff, would you in that Caſe award a Certiorari? Yes: You muſt maintain it, that you are at Liberty even after a Verdict, to try whether the Trial was to any manner of Purpoſe: And what will the Conſequences of theſe Things be? No doubt, after In nullo eſt erratum pleaded, the Court may grant it, though the Party has foreclosed himſelf from praying it; but if the Court be informed, that Matters are right below, I think, ex debito Juſtitiæ in that Caſe, they are bound to ſend for it; and where they can do, I ſay, I think, ex debito Juſtitiæ, they ought to do it. It has been ſaid, They could not do it to reverſe a Judgment; tho' there are other Opinions to the contrary, 3 Cro. 836, 837. it was granted; ſo is 2 Cro. 445, 446. If the Plea-Roll be certified, and it appears to be erroneous, the Defendant before In nullo eſt erratum pleaded may allege Diminution, and get the Roll amended below, and certified up right; and an Amendment may be below in the Body of the Record, even after In nullo eſt erratum pleaded; and that is the Reaſon, that upon Diminution alledged we order the Clerk of the Treaſury to attend, where there is an erroneous Judgment through Fault of the Clerk, as in the late Caſe of Morriſon *v.* Fanſhaw; where the Judgment was in a Sci' fac' upon Recognizance upon Writ of Error for Coſts for Delay of Execution, the right formal Way had been to have it amended below, and to ſend a Certiorari to have it ſent up as amended; but we take a ſummary Way, deſiring them to get it amended below, if it may be; and upon the Clerk's coming up, it is ſet right here: And he quoted the Caſe of Gwyn and Gwyn 30 Years ago; Judgment was in Wales, ideo conſid', &c. quod querens teneat, inſtead of recuperet; and this held to be Error, and great Endeavours made to have it amended: The Docket-Book was right, and the Court ſaid, If the Docket had been made they would amend by it; and he put the Caſe of Done and Smithers.

1 Keb. 91, 211, 225.

2 Cro. 6, 141. 1 Jo. 141. that it be in both Caſes.

How upon a Judgment in *Wales, ideo conſ', &c.*

Anonymus

Several Houſe-keepers, being Quakers, were indicted for keeping their Shops open on a Day ordained by Proclamation for a publick Humiliation and Prayer; and becauſe they were ſeveral diſtinct Crimes in every diſtinct Offender, and therefore not to be joined in one Indictment, it was quaſh'd.

Indictment againſt Quakers for keeping their Shops open, quaſh'd. Vi. Hob. 251.

Powell *verſus* Ball.

If a Bailiff has a Warrant to arreſt a Man, and another hinder him from doing it, there being no actual Arreſt, it is not a Reſcous, yet it is a Contempt of the Court. Vide prox. pag.

'Tis a Contempt to hinder a Bailiff to arreſt a Man. Vi. ante 105, 173.

Per

Poſt 211. 1 Cro. El. 909, 910, 753. Yel. 28. 2. Rol. 294. Hob. 62, 263. Ow. 63. 11 Co. 82. 12 Co. 131. Cro. Car. 537, 538. Cro. Jac. 280, 556, 486.

Per Cur', Where a View is proper, there upon Motion before Trial we will grant it, in like manner as we used at the Assizes, and that is after the Jury sworn, and then it must be by Consent, and a Juror withdrawn. 2 Salk. 665. Rule, upon granting a View where proper.

And per Holt, Ch. Just. I think we may award a View without Consent; and notwithstanding this View, a Juror may be challenged when he comes to be sworn.

Wilson *versus* Gary.

Vid. 1 Salk. 79. 2 Salk. 586. Ante. In case for rescuing a Person arrested, at the Plaintiff's Suit, &c.

IN Case against him for Rescuing a Person arrested on mean Process at the Plaintiff's Suit.

At Nisi prius, coram Holt, Ch. Just. in Middlesex, The 1st Point of Evidence was the original Cause of Action.

2. The Writ and Warrant, by producing Copies of them sworn, to be examined and true.

3. The Arrest shewing the manner of it, that it might appear to the Court to have been legal, for otherwise there could be no Rescous; and in Point of Damage, they proved the Loss of their Debt, for that the Prisoner became insolvent, or could not be had. Ante 105, 173, 210.

But as to that, Holt, Ch. Just. said, In case of Rescous you shall have no Favour, because guilty of a Violence against the Process of the Law, and therefore not like the Case of a negligent Escape. Vid. ante, 141, 210.

Note; The Case upon Evidence appeared thus; The Bailiff stay'd below at the Street-door, and sent his Follower with the Warrant up three Pair of Stairs in Disguise, who there laid Hands on the Prisoner, and told him, He arrested him: The Prisoner, with the Assistance of some Women, got from him, and run down to the first Floor; and the Defendant being below in his Shop, and hearing the Noise, ran up before the Bailiff, open'd the Door, and put the Prisoner in, and would not suffer the Bailiff to go and take him. The Case.

And Holt, Ch. Just. seemed to doubt whether this were a good Arrest, being only by the Bailiff's Servant, or if it had been done by the Servant even in the Bailiff's Presence; but yet charged the Jury generally, who found for the Plaintiff: But he ordered the Postea to be stayed till he had marked it. Whether the Arrest by the Bailiff's Servant was good. Vid. Pa. 210.

Here the Party rescued appeared, and was sworn as a Witness for the Defendant, not being made Party to the Action: Which Holt, Ch. Just. hæsitanter allowed upon the Reason that he swore to charge himself, if by his Evidence he discharged the Defendant; but said, It was what he never had seen before, and that if the Defendant was guilty of the Rescous, he could not but be particeps Criminis: However he was sworn, and his Credit left with the Jury. The Party rescued allowed as a Witness, and why. Vid. 3 Mod. 114, 115.

Vi. 1 Hawk. Cap. 65. Blackerby's Caſes 211, 212, &c. Upon an Indictment for a Riot againſt a great Number, to try it only againſt 3 or 4, &c.

Domina Regina *verſus* Middlemore.

A Great Number of People were indicted for a Riot; and it was moved, That the Proſecutor ſhould pitch upon three or four of them, and try it only againſt them, the reſt entring into a Rule, if they were found guilty, to plead guilty too; and this was ſaid to be done frequently to prevent Charges of putting them all to plead; and the Rule was ſo.

Judgment upon a Warrant of Attorney, when to be entered. Ante 14, 191, poſt 288.

If Judgment upon a Warrant of Attorney be not enter'd within the Year, it cannot be without Leave of Court on Motion.

Baldwin *verſus* Cole.

In Trover, for that the Surveyor of the Queen's Yard detained the Carpenter's Tools upon a pretended Uſage.

IN Trover at Niſi prius, coram Holt, Ch. Juſt. upon Evidence the Caſe was this: A Carpenter ſent his Servant to work for Hire to the Queen's Yard; and having been there ſome Time, when he would go no more, the Surveyor of the Work would not let him have his Tools, pretending a Uſage to detain Tools to enforce Workmen to continue till the Queen's Work was done, and a Demand and Refuſal being proved at one time, and a Tender and Refuſal after.

Where the very Denial of the Goods is a Converſion. 1 Lev. 173. 10 Co. 56. 1 Cro. 262. Q. 2 Salk. 655. 1 Danv. 21. L. 2. 2 Mod. 245. 3 Mod. 2. 5 Mod. 426. 2 Show. 148, 175. b. 213.

Holt, Ch. Juſt. The very Denial of Goods to him that has a Right to demand them, is an actual Converſion, and not only Evidence of it, as has been holden; for what is a Converſion, but an aſſuming upon one's ſelf the Property and Right of diſpoſing another's Goods, and he that takes upon himſelf to detain another Man's Goods from him without Cauſe, takes upon himſelf the Right of diſpoſing of them; ſo the taking and carrying away another Man's Goods, is a Converſion: So if one comes into my Cloſe, and takes my Horſe and rides him, there it is Converſion; and here if the Plaintiff had received them upon the Tender, notwithſtanding the Action would have lain upon the former Converſion, and the having of the Goods after would go only in Mitigation of the Damages; and he made no Account of the pretended Uſage, but compared it to the Doctrine among the Army, That if a Man came into the Service, and brought his own Horſe, that the Property thereof was immediately altered and veſted in the Queen, which he had already condemned: And here one of the Particulars in the Declaration being ill laid, the Defendant was found not guilty as to that, and guilty as to the reſt.

Defendant guilty to Part, and not guilty as to the Reſt.

Regina *verſus* Foxby. Vid. antea 11, & 178, poſt 239.

A Man, and his ſcolding Wife, in a Writ of Error upon an Indictment, aſſign Error in Perſon.

SHE brought a Writ of Error of a Judgment againſt her upon an Indictment for being a common Scold; and upon Affidavits, That ſhe was ſo ill, that without Danger of her Life ſhe could not come up out of Kent, where ſhe lived, to aſſign Error in Perſon; according to the Courſe of the Court, it was moved by Broderick and Wells, That ſhe might have Leave to aſſign Error by her Clerk in Court: And Wells ſaid, He knew no Law for ducking of Scolds.

Vid. Black. Caſes 277. Ante 11, 178. 2 Ro. Abr. 79. 1 Mod. 71, 288. 1 Hawk. 243, 244.

Per Cur', Scolding once or twice is no great matter; for Scolding alone is not the Offence, but the frequent Repetition of it to the Diſturbance of the Neighbourhood makes it a Nuſance, and as ſuch it always has been puniſhable in the Leet, and ideo indictable: And we have of late indulged People upon Writ of Error of Judgments on Indictments, to appear by Attorney: And here they enlarged the Time till next Term, to ſee how ſhe would behave her ſelf in the mean Time: For Holt, Ch. Juſt. ſaid, Ducking would rather harden, than cure her; and if ſhe were once ducked, ſhe would ſcold on all the Days of her Life.

And in Michaelmas-Term her Husband and ſhe came into Court, and Broderick, That they might aſſign Error, which they did. Vid. poſt 239.

Inhabit' Paroch' de Weſtbury in Com' Wilts *verſus* Inhabit' de Coſtham.

1 Salk. 121. 2 Salk. 474, 532. Blackerby's Caſes 41, 40, 195, 239. A poor Woman removed from *W.* to *C.* and delivered there before Seſſions, &c.

A Poor Woman with Child was removed by Order of two Juſtices from W. to C. and before the Seſſions brought to Bed there, and then the Order was quaſhed upon Appeal.

So if travelling without Fraud, Child ſhall be ſettled where born.

Per Cur', The Child is legally ſettled in the Pariſh of W. from whence the Mother was illegally removed, for they ſhall not take Advantage of their own Wrong; and ſo it would have been if they had not known of the Woman's being with Child at the Time of the wrongful Removal: If a Woman with Child be travelling without Fraud of the Pariſh in which ſhe is ſettled, and in ſuch Travel is delivered of her Baſtard, it ſhall in that Caſe be ſettled where it was born, ſecus if there be Fraud; and according to this was quoted the Caſe of the Pariſh of Bowham in Eſſex ſome Years ago: Vide 2 Bulſt. 349.

Note; Alſo it appear'd upon the Order of Removal, that the Woman had a Husband who had left her ſeven Years before, but not ſaid that he was dead, ſo it could not be a Baſtard clearly.

Per Cur'; So both Points were clearly againſt the Pariſh of W.

Tracy

Tracy *verſus* Talbot.

Replevin upon a Diſtreſs for a Poors Rate upon Tenant of Part of a Houſe, made before Quarter-day, by Vertue of a general Warrant, &c. 1 Vent. 350.

IN Replevin, the Caſe upon Evidence before Holt, Ch. Juſt. at Niſi prius, was this: The Plaintiff having been a Lodger in the Pariſh for ſome Time before, took Part of a Houſe there the Third of December, and was rated to the Pariſh as an Inhabitant for the Quarter expiring at Chriſtmas; and before Chriſtmas the Diſtreſs taken for the Rate, by Vertue of a general Warrant made long before for the whole Year, firſt in reſpect of ſeparate Tenements chargeable to the Pariſh.

How one Houſe originally entire, may become ſeveral, &c.

Holt, Ch. Juſt. ſaid, One Houſe originally and entire and undiſtinct, may become ſeveral and diſtinct, by dividing it into diſtinct Partitions, and allotting them diſtinct Avenues, ſo as the ſeveral Inhabitants have no Communication one with another: And in that Caſe, if the Owner of the Houſe live in one of the ſeparate Apartments himſelf, and an Inhabitant of another ſeparate Apartment goes away, that Tenement which he occupied is not now an empty Tenement, but the Poſſeſſion of it devolves upon the Owner, and that with the Tenement in his Poſſeſſion before make now but one entire Tenement, for which he is ratable to the Pariſh: But if there be two ſeveral Tenements originally, and they become inhabited by ſeveral Families, who make but one Avenue for both, and uſe it promiſcuouſly; yet, in reſpect of the Original ſeverally, they continue ſeverally ratable.

But two Points were allowed by Holt, Ch. Juſt. to be found ſpecially.

Whether one coming in three Weeks before Quarter-day, may be rated, &c.

1. Whether if an Inhabitant comes into a Pariſh three Weeks before Quarter-day, he can be rated to the Pariſh for the whole Quarter?

2. Whether the Diſtreſs could be taken by Vertue of a general Warrant made before the Rate? And yet he was very clear in the Negative in both Points; for by the Statute, Poors Rates are to be made Monthly, and the Reaſon is, becauſe of frequent Changes of Poſſeſſion, in reſpect whereof only one is ratable; whereas at this Rate none could remove in the midſt of a Quarter without being doubly chargeable.

3. He held, in no Caſe one could be taken up by Vertue of a Warrant made before the Offence committed, or by Vertue of a general Warrant, but where the taking would be juſtifiable without any Warrant at all, other than a Warrant in Law.

Whether a Diſtreſs may be for a Quarter's Rate before End of the Quarter, and it ſeems it may.

A 4th Point which Holt, Ch. Juſt. ſeemed not ſatisfied in, was, Whether when a Rate is made for a Quarter, whether they may diſtrain for it before the End of the Quarter?

But all the Jury ſaid, That the conſtant Uſage was to do it, and that to avoid the Miſchief that would enſue if the Party ſhould remove out of the Pariſh before the Quarter.

To

To which Holt, Ch. Juſt, anſwered; If he removed into another Pariſh in the ſame County, they might diſtrain by a Warrant from the Juſtices, as well as in the ſame Pariſh; but if he removed out of the County, he agreed that Remedy failed: So he gave Way to the Uſage in that Point.

Remedy upon removing out of one Pariſh into another, &c.

Dod *verſus* Monger.

IN caſe for reſcuing Goods, which the Plaintiff had diſtrained for Rent: The Plaintiff declared, that he was ſeiſed in Fee of a certain Meſſuage, &c. and ſo ſeiſed, demiſed it to J. S. for a Year, and ſo from Year to Year as long as both Parties ſhould pleaſe, by a Parol-Demiſe, reſerving Rent; and for Rent-Arrear he diſtrained, and the Diſtreſs was reſcued from him by the Defendant, for which the Action was brought: And here the Plaintiff having laid a Seiſin in Fee in himſelf, was fain to prove it; and in proving the Leaſe, it appear'd to be for a Year, and ſo from Year to Year as long as both Parties pleaſed; and that the Leſſee ſhould not go away without giving a Quarter's Warning: And it was inſiſted on by Eyre and Parker, That the Leaſe given in Evidence varied from the Leaſe declared on, ſo they failed in proving their Declaration.

Caſe for reſcuing Goods, the Plaintiff had diſtrain'd for Rent upon a Demiſe from year to Year, &c. Vide Co. Lit. 47. b. Salk. 247. 1 Rol. Ab. 673. Cro. El. 720. 1 And. 71, 72.

But per Holt, Ch. Juſt. It is well enough; for the Agreement concerning the Quarter's Warning is only a collateral Agreement, not at all affecting the Land in Point of Intereſt, but collaterally binding the Perſon of Leſſee, and therefore it need not be mentioned in the Declaration: And in this Caſe, if at the Year's End the Leſſee had given up the Poſſeſſion without any Warning, he would be liable to pay a Quarter's Rent by Vertue of this Agreement; but if he had given a Quarter's Warning, he might quit without more ado; but if he once entered upon the ſecond Year, he would be bound for all that Year, and to a Quarter's Warning, and ſo on; and ſo it would be if ſuch a Leaſe had been by Deed: If a Leaſe be for a Year, and ſo from Year to Year, as long as both Parties ſhall pleaſe, that is a Leaſe binding but for one Year; but if Leſſee, without Countermand of Leſſor, enter upon the ſecond Year, he is bound for that Year, and ſo on: But if Leaſe be for a Year, and ſo from Year to Year, till ſix Years expire, that is a certain Leaſe for ſix Years: If it be for a Year, and ſo from Year to Year, as long as both Parties ſhall agree, till ſix Years ſhall expire, that is a Leaſe for ſix Years determinable at every Year's End at the Will of either Party. And likewiſe held, That if a Landlord come into a Houſe, and ſeizes upon ſome Goods as a Diſtreſs, in name of all the Goods in the Houſe, that will be a good Seizure of all: But he muſt remove them in convenient Time at Common Law; and now ſince the late Statute of W. & M. immediately, except it be Hay or Corn; and here, for that the Seizure was on Monday, though of Barrels of Beer, not eaſily removeable, if at all, without Damage, and no Removal till Wedneſday, when the Defendant took them by Vertue of a Replevin, in which the Leſſee,

The Agreement, That Leſſee ſhould give a Quarter's Warning was only collateral.

Note.

Diſtreſs when to be removed. Stat. 2 W. & M. ſ. 1. c. 5.

see, not the Distrainant, was made Defendant; and besides, the Plaintiff quitted Possession of them the two intervening Nights, and had not the Possession at the Time of the Taking by Vertue of the Replevin, without which there could be no Rescous: The Plaintiff was nonsuited. In this Case it appeared also, that the Distrainant drew Beer out of one of the Barrels; which, per Holt, Ch. Just. made him a Trespasser ab initio as to that Barrel only.

5 Co. 146.

Rich *versus* Aldred.

Detinue upon Bailment of *O. C.*'s Picture, *&c.* Vide 1 Salk. 223.

IN Detinue for Oliver Cromwell the Protector's Picture:

Per Holt, Ch. Just. at the Trial: If A. bail the Goods of C. to B. and C. bring Detinue against B. for them, B. may plead the Bailment to him by A. to be redelivered to A. and so bring in A. as Garnishee, to interplead with C. And if A. bail Goods to C. and after give his whole Right in them to B. B. cannot maintain Detinue for them against C. because the special Property that C. acquires by the Bailment is not thereby transferred to B.

Johnson *& Ux' versus* Browning.

Case for maliciously indicting the Plaintiff's Wife for Felony. Vide 1 Salk. 14, 15. Ante 25. Post 261. 5 Mod. 349. 405. *Materiam sequentem.*

IN case for maliciously indicting and prosecuting the Wife for Felony, whereof she was acquitted: Declaration recited the Indictment, continent' materiam sequentem; and in the Recital of the Goods supposed to be stole, it was Valoris of so much; whereas the Indictment was Valentiæ of so much: And it was objected, That this was a Variance from the Indictment, but over-ruled; for that was the same in Substance, and so materiam sequentem; but if they had undertaken to set forth the Indictment in hæc Verba, it would have been a fatal Exception.

How the Plaintiff ought to have proceeded in this Action.

Nota; Per Holt, Ch. Just. To do the Business fully, the Plaintiff ought to have proved Copy of the Bill exhibited, and that it was found upon the Oath or Procurement of the Defendant; but their Names upon the Back of the Bill is sufficient Evidence of their being sworn to the Bill, tho' the Writing upon the Back be no Part of the Record: But it may be proved, That the Defendant was a Witness without having the Bill; but it were, I say, more clear to have the Bill: And the first Part of the Defendant's Defence in this Case, must be to prove a Felony committed; for without that it is impossible he could have a probable Cause of Prosecution; and here, because no Body was by at the Time of the supposed Felony committed but the Defendant's Wife, who could not in this Case be a Witness to prove the Felony committed, Holt, Ch. Just. allowed her Oath, which she made at the Trial of the Indictment, to be given in Evidence to prove a Felony committed; for otherwise, one that should be

Former Oath of the Defendant's Wife allowed for Evidence of a Felony committed.

be robbed, &c. would be under an intollerable Mischief; for if he prosecuted for such Robbery, &c. and the Party should at any Rate be acquitted, the Prosecutor would be liable to an Action for malicious Prosecution without a Possibility of making a good Defence, though the Cause of Prosecution were ever so pregnant.

To which Darnell for the Plaintiff said, If Oath had been made freshly after the Fact committed, that Oath might be admitted as Evidence of it; secus not; but here it appeared a Warrant was taken out immediately, but nothing done thereupon till the Defendant had subsequent falling out with the Plaintiff. Ob'. That the Oath ought to have been freshly made after the Fact.

And Holt, Ch. Just. said, The Fact of Pigot's Case in 1 Cro. was this: A Son-in-Law indicted his Step-mother for poisoning her Husband his Father; and she being acquitted, brought an Action for malicious Prosecution against him, and recovered Damages against him; and he to requite her Kindness, brought an Appeal of Murder: Whereupon she was tried, and convicted at the King's Bench Bar, and carried down, and burnt in Berkshire, where the Fact was committed. And he remember'd another very lately, where a Fellow brought an Action for saying of him, He was a Highway-man; and it appearing upon Evidence that he was so, he was taken in Court, committed to Newgate, and convicted and hanged the next Sessions: So People ought to advise well before they brought such Actions. Cro. Car. 383.

And Darnell remember'd the like Fate, which befel a Client of his.

Bushell *versus* Pasmore.

S. C. Salk. 274. Vide 3 Keb. 142.

DEBT upon a Bond: The Defendant pleads, that the Bond was delivered as an Escrow to a third Person to be his Deed to the Plaintiff, upon his vacating a certain Judgment, which was not done, Et sic non est Factum, & de hoc ponit se super Patriam; without adding, Et Præd' the Plaintiff similiter; The Plaintiff replies, That it was delivered as an Escrow to be delivered to him upon his Payment of 20 s. towards vacating the Judgment, and Issue thereupon; that is, upon a Traverse of its being delivered as an Escrow to become his Deed upon vacating the Judgment; and on Evidence, it was sworn to have been delivered as an Escrow to become the Defendant's Deed upon the Plaintiff's vacating the Judgment. Debt upon a Pond: Plea, That it was delivered as an Escrow, &c. *Et si non est Factum.* Repl', with a Traverse of Defendant's Plea, and Issue thereon.

And here Holt, Ch. J. held, That there is no Difference between delivering a Deed as an Escrow, to become the Party's Deed upon his doing such a Thing; and to be delivered to the Party as his Deed upon his doing such a Thing, for in neither Case it is his Deed till the second Delivery: And he said, If a Man delivers a Writing as his Deed to a Stranger, to be delivered by him to a third Person upon his doing such a Thing, that is a Deed ab initio in Trust for Where no Difference as to the Conditions of Delivery. Vid. Savil 71.

the third Perſon upon a Contingency: But upon the Saying in 5 Cro. Periman's Caſe, 84. b. he was content to have the Matter found ſpecially, but the Plaintiff was nonſuited upon another Point.

That theſe ſpecial *Non eſt Factums* are impertinent, and thereby Defendant bringsall the Proof upon himſelf, &c. Vid. Savil 71. 1 Salk. 274.

And Holt, Ch. Juſt. ſaid, In all his Time he never knew ſuch a Plea as this; for all theſe ſpecial Non eſt Factums, in Caſe of Eſcrow and Raſure, &c. are impertinent, for thereby the Defendant brings all the Proof upon himſelf; whereas if he had pleaded non eſt Factum generally, he would turn the Proof of whatever is neceſſary to make it his Deed upon the Plaintiff: And it was agreed by all, that the Deed cannot be an Eſcrow to the Party himſelf.

Where a Defendant ſhall be compelled to plead Inſtanter, ſee Carth. 320.

Plea of another Action and Judgment therein. Ibid. 455, 456, ante 157.

DE

DE

Termino S. Mich.

Anno 3 Annæ, in B. R.

Coram Holt, *Chief Juſtice*,

Powell,
Powys,
&
Gould,
} *Juſtices.*

Culliford's *Caſe*.

S. C. 1 Salk. 382.

An Appeal brought againſt one acquitted at the Aſſizes upon an Indictment of Murder, &c.

Vide 1 Salk. 61, 62. Carthew 16, 331, 395. Skinner 48, 443, 553, 634, 670. 2 Hawk. ch. 28. Sect. 4. ch. 23. Sect. 124.

HE being acquitted upon an Indictment of Murder in the Country, and an Appeal brought, and Time given by the Judge of Aſſize till the next Aſſize to plead: In the Interim the Appellant brings an Habeas Corpus and Certiorari, to remove the Record and Body of Appellee up hither, and at a Judge's Chamber the Parties agreed, ſo that the Appellee was let go upon Bail. The Agreement being now perfected, and a Releaſe given by the Appellant, and the Appellee appearing upon his Recogniſance, Eyre moved to have him diſcharged, producing the Releaſe, and a Counſel appearing for the Appellant to conſent to it.

Motion to have the Appellee diſcharged.

Vide Kelynge's Rep. *R.* He muſt be arraigned here, and then he may plead his Releaſe, &c. *Auterfoits Acquitt'*. 1 Salk. 382. 2 Hawk. ch. 35. Sect. 2, 3, 4, 5, &c.

But per Cur', The Certiorari and Habeas Corpus muſt be return'd here; and then when we are thus poſſeſſed of the Record, he muſt be arraigned upon it, and then he may plead his Releaſe; or if the Appellant be not ready at the Return thereof to arraign him, and does not appear, he ſhall have a Sci' fac' to bring him to do it; and if he does not come at the Return thereof, he ſhall be nonſuited, and the Appellee is not thereby diſcharged; for here being a Record againſt him, he ſhall thereupon be arraign'd at the Suit of the Queen, and then he may plead auterfoits Acquitt': For there being a Record againſt him, that Record muſt be diſcharged: And it was compared to the Caſe where two Indictments are againſt a Perſon for one Fact, as one by the Coroner's Inqueſt, and the other by the Grand Jury, and he is arraigned, tried and acquitted upon one of them;

yet he is not thereby discharged, but shall be arraigned de novo upon the other, to which he may plead the former Acquittal on the other; but now the Course is in the Old Baily, and indeed most easy and fair, to try him upon both the Indictments at once.

Domina Regina *versus* Weekes.

Return of a Rescous quash'd for Repugnancy. Vide 2 Salk. 586. ant. 141, &c. ib. 2 Hawk. ch. 21. Sec. 4.

THE Sheriff returned a Rescous thus: First, Non est invent. in Ball. mea, and Executio Residui istius Brevis patet in Schedula huic Brevi annex', and that was of a Taking and Rescous, and the Return of the Rescous was quashed for the Repugnancy. For per Cur', After non est invent. all the rest is idle, and there remains no more for the Sheriff to do. But note, upon the Return of Rescous, the Sheriff always concludes, that after the Rescous made, the Defendant non est invent. in Balliva.

Domina Regina *versus* El. Franklin.

S. C. 1 Salk. 317. Vid. ib. 373, 380, 382. Ante 128. A Woman indicted for exercising the Trade of a Goldsmith, not having served seven Years Apprenticeship to it. 4 Mod. 145, 146. 5 Mod. 425. See Carthew 163.

SHE was indicted at the Quarter-Sessions of a Borough for exercising the Trade of a Goldsmith, not having served Seven Years Apprenticeship to it. And Eyre moved to quash it; for it appeared that it was a Year after the Offence committed.

But per Cur. upon View of 5 El. c. 4. Where a Moiety of the Penalty goes to the Informer, a Prosecution upon that Statute must be within a Year by the Informer; but where it is purely at Suit of the Queen, she has two Years; and where the Penalty is distributed as Moiety to the Queen and Moiety to the Informer, and no Prosecution within the Year, the Queen has another Year, and shall have all the Forfeiture.

2. Exception was, That the Quarter-Sessions of Boroughs ought not to receive such Indictments, but only those of the County at large: And for this he quoted the King *versus* Taylor, and another Case in 13 W. 3. where the Indictment was quashed upon that Exception.

But per Cur. The Contrary has been settled on Debate since, and there is no Danger of Oppression, because a Certiorari lies.

1 Salk. 370, and 371.

3. Exception was to the Caption, and was this: Juratores, &c. super Sacramentum suum presentant existit. And this being Nonsence, the Indictment was quash'd for it.

Note; per Cur. When one removes an Indictment by Certiorari, he ought to appear above the Term it comes in, or else he forfeits his Recognizance that he enters into for Trying of it; but such Appearance need not be in Person, but by his Clerk, and without it he cannot have a Copy of the Indictment to quash it.

1 Salk. 270, 380.

Note likewiſe, one cannot move to quaſh an Indictment for a Fault in the Caption the ſame Term it comes in. See 2 Hawk. Sect. 148 to 153.

Per Cur. After Writ of Error brought, if the Record be not certified at the Return of it, upon Certificate thereof from the Officer of the Court in which the Writ of Error is returnable, the other may have a Writ de Executione Judicii of Courſe, and the Party cannot hinder Execution without a new Writ of Error. Writ *de Executione Judicii* upon a Writ of Error brought.

Boiſloe *verſus* Baily.

S. C. 1 Salk. 76.

TReſpaſs for Aſſault, Battery and Wounding. Defendant as to the Vi & Armis pleads Not guilty, and quoad Reſiduum Tranſgr' pleads a Submiſſion to an Award of all Controverſies, and ſets forth an Award made, viz. That the Defendant ſhould provide two Fowls at his Manſion-houſe in Old-Bedlam in London, to be eat by the Plaintiff and his Friends on Wedneſday or Thurſday in ſuch a Week, in Satisfaction of the ſaid Treſpaſs; and avers, that on Thurſday in the ſaid Week he did provide two Fowls at his Manſion-houſe aforeſaid, &c. but that the Plaintiff nor his Friends did not come. To this it was replied, that Wedneſday was the Day appointed for the Fowls, and traverſe that it was Wedneſday or Thurſday. To this a Rejoinder and Demurrer; and it was urged, that the bare Award in this Caſe was not a good Bar without an Execution of it, becauſe it was of a collateral Thing, of which the Plaintiff could not have an Action: And for this was quoted Keilw. 121. for an accord without a ſatisfactory Conſideration cannot be good, and if we have no Remedy for what is awarded, it is in the Power of the Defendant whether he will ſatisfy us or not. 9 Ed. 19. a. 9 Co. 79. 17 Ed. 4. 8. a. that Accord, and Tender and Refuſal, is not a good Bar; and the Reaſon is becauſe an Action would not lie upon the Accord for the Plaintiff. 16 Ed. 4, 8, 9. 1 Ro. Ab. 128. Style 245.

Treſpaſs for Aſſault and Battery. Award pleaded. See 2 Hawk. ch. 46. Sect. 44, &c. Carth. 159, 188. Skinner 679.

Obj. That this Award is a collateral Thing, &c. 1 Salk. 76.

2. Exception was, That the Treſpaſs declared on was quare Vi & Armis, &c. and there was no Conſideration or Submiſſion of the Vi & Armis, and ſo this Award could not be a Bar to the Declaration.

2. No Conſideration of the *Vi & Armis*.

3. That it being at the Election of the Defendant to provide the Fowls on Wedneſday or Thurſday, he ought to give the Plaintiff Notice on which of the Days he would provide them, and the Time of the Day on which he would have them ready; for otherwiſe, if the Plaintiff came on Wedneſday to his Houſe with his Friends, the Defendant might ſay he ſhould not provide the Fowls till next Day, and if the Plaintiff did not come on Wedneſday, the Defendant might ſay he provided them the Day before.

3. That Defendant ought to give Notice of the Day, and Time when, &c.

4. In this Caſe it was not enough to ſay, that he had provided the Fowls, but he ſhould have tendered them, for the Words of the Award are, provide and give, &c.

4. He alſo ſhould have tendered the Fowls.

5. There

5. No Venue laid where they were provided.

5. There is no Venue laid where the Fowls were provided, only laid to be at the Defendant's House in Old Bedlam, London: And in London the Venue ought to be laid in the Ward, which is like a Hundred, or in a Parish at least, which is in the Nature of a Gift in another County.

Vi. Sir Tho. Jones 6, 158. If Award of collateral Matter in Satisfaction of Damages be a good Plea in Bar, without alledging Performance.

To the First it was answered by Serjeant Hall, That indeed old Books did hold, that an Award of a collateral Matter, in Satisfaction of Damages, was not a good Plea in Bar without alledging Performance; because, as was then held, no Remedy lay upon the Award: But that Reason fails; for tho' it be true that no Remedy lies upon the Award it self for it, yet an Assumpsit lies upon the Submission, which is a Promise of Performance. And to that Opinion Chief Justice Holt did very strongly incline; for he said, It had been often held of late Days, that the Submission mutual was an actual mutual Promise of Performance; and if this had been upon a Bond, awarding a collateral Matter had been a good Award, because the Party has Remedy upon the Bond of Submission; and if there be Remedy for the Thing awarded, it needed not be averr'd executed, and if so, the Fourth Objection, viz. the Want of pleading of Tender, falls to the Ground. As to the not submitting the Vi & Armis, it concerns the Queen, and cannot be submitted by the Parties. As to the third Objection, it was answered, that the giving of Notice was not necessary, for the Defendant by the Award had the Advantage of an Election given him: And to the Fifth, that the not laying of a Venue was helped by Verdict.

See Carthew 108.

The Want of a Venue how curable.

To which Holt, Ch. J. said, The Want of a Venue is only curable by such Plea as admits the Fact for the which it was necessary to lay a Venue; as if Debt be upon a Bond, and no Venue laid where the Bond was made, if Demurrer be to it, it will be ill; but if the Defendant plead a Release whereby the Bond is admitted, that helps the Declaration. But in this Case, by reason of the Frivolousness of the Action, the Court gave no Judgment, but wish'd them to compromise the Matter.

Court advised them to compromise the Matter.

Per Cur. If one pretending Title to the Land give Security to the Tenants to save them harmless upon paying him the Rent, and after another recover in Ejectment against them, they have not yet a Remedy upon the Security till Recovery of the mean Profits, which is from the Time of the Action brought, and without an actual Entry there can be no Recovery of the Profits.

Mean Profits.

Venue in Ejectment Ante 130. Post 309.

Per Cur. If a Man sign a Lease in one County or Gift of Lands in another, yet the Jury must come from the Place where the Land lies in an Ejectment upon such Lease.

Vide 1 Salk. 273. 2 Salk. 645, 646, 647. Ante 22. Post 242.

Per Cur. A new Trial is never granted for Want of Evidence whereof the Party was apprised, and which he might have at the Trial.

Per Cur. If one levy Part of his Debt by Fi. Fa. he cannot after take out a Capias for the whole, but his Way is to return Fi. Fa', by which it may appear how much is levied, and then take a Ca. Sa. for the Residue.

Per Cur. No Tithe due for Fish of common Right, but it may be by Custom. (No Wood is Tithable of Common Right, but only by Custom.) See Carth. 303, 379. See also Skinner 51, 239, 341, 356, 560, &c.

Tithe Fish. 1 Cro. 329. 1 Vent. 5. 1 Keb. 454. 2 Keb. 2, 447.

In Replevin, the Avowant said, That he was possess'd for Years, and made an Under-lease, reserving Rent, &c. for which Arrear he distrained. The Plaintiff is nonsuited, and Return irrepleviable awarded; and upon the Return of the Writ of Inquiry, the Exception taken is that the Avowry was naught, for that the Avowant pleaded a particular Estate; without shewing who had the Fee, and the Commencement of the particular Estate; but tho' that were bad, yet being after the Nonsuit, it was too late; for the interlocutory Judgment is such on which a Writ of Error lies, as in Judgment on Writ of Dower.

Upon an Avowry in Replevin. *Obj.* That he pleaded a particular Estate without shewing who had the Fee. Vid. ante. 158. 5 Mod. 150.

Stanyon *versus* Davis.

S. C. 1 Salk. 404.

ERror of a Judgment in the Marshal's Court, wherein the Plaintiff did declare, that at such a Day, in such a Parish, in Com' Midd', he did deliver into the Stable of Defendant (thus, præd' D. com' Hospitat' adtunc & ib'm existen' in Stabulum deliberavit) a certain Gelding, to be by him safely kept at a reasonable Rate, and to be safely re-delivered by him to the Plaintiff; that the Defendant adtunc ib' tam negligenter the said Gelding did keep, that through his Defect it was taken out of his Inn, and so immoderately rid and whipped, that he was quite spoiled. Verdict and Damages for the Plaintiff, and Judgment for him below. And now upon the Writ of Error, Raymond and Cheshire, at several Times, excepted:

Error of Judgment in the Marshal's Court, &c. Post 227. See Danv. Abr. Tit. *Error*, post 303.

1. That the House for ought appears was put into the Defendant's Stable without his Privity, and if so, he was not bound to take any Care of it; for as the Declaration is worded, it is to be understood that it was delivered into his Stable, he being a common Innkeeper, for præd' D. com. Hospitat' existen' must be taken in the Ablative Case: But the Words being indifferent to an Ablative or Dative, and taking them in a Dative making the Declaration good, and the other bad; per Powell, Powys & Gould, absente Holt, It shall be taken in that which makes it good.

Words indifferent shall be taken in that Case which makes the Declaration good.

2. Objection was, That no Place was laid where the immoderate Riding was, nor that it was within the Jurisdiction of the inferior Court: And it was laid down for a Rule, and agreed unto by the Court, That whatever is essentially necessary to maintain an Action, if the Action be brought in an inferior Court, that Matter must be averr'd to have been within their Jurisdiction, otherwise they have no Juris-

Rule of Averment upon Action in an inferior Court to shew it to be within their Jurisdiction. Ante 3. post 306.

For particular Jurisdictions are not to be supported by Intendment. Raym. 75. 1 Lev. 50, 69, 96, 105, 137.

Jurisdiction; for whatever is not averr'd to be within their Jurisdiction. shall be intended out of it. Vid. 1 Saund. 73. It was also agreed clearly, that if that which is the Gist of the Action, and the compleat Cause of it, be laid within the Jurisdiction, and the Declaration shews further Matter, which is only Aggravation or consequential Damage without which the Action would have lain, such Matter need not be averr'd to be within the Jurisdiction; as in Case for calling a Woman a Whore, whereby she lost a Marriage, there not only the Words, but also the Loss of Marriage, must be alledged to be within the Jurisdiction, because the one without the other would not maintain the Action; and there one may confess the Words, and traverse the Damage. So in Trespass by Master for the Battery of his Servant, whereby he lost his Service, the Loss of Service, as well as the Battery, must be laid within the Jurisdiction. But in an Action by a Tradesman for calling him a Cheat in his Trade, whereby he lost his Customers, there the Loss of Customers need not be alledged within the Jurisdiction, because the Words are actionable without it, and it is only Aggravation. 1 Cro. 570. 1 Ro. Ab. 546. 1 Jo. 448. Action for arresting one in another Man's Name, without Consent of the other, per Quod his Creditors came all and arrested him. It is not needful to alledge that the Creditors came upon him within the Jurisdiction, because the arresting in another's Name, without the other's Consent, is in it self actionable. Then the Doubt was, Whether the Defendant's Neglect, in suffering the Gelding to go out of his Custody, was a compleat Cause of Action, without any Regard to the Riding, &c.

The sole Cause of Action was not keeping the Gelding safely.

And Ward urged, That the sole Cause of Action was the not keeping the Gelding safely, according to the Contract, and for this quoted the Register 106. Rast. Ent. 3. and then it being a Nonfeasance, no Venue need be where the Nonfeasance was. Vid. 1 And. 139. and Walker *versus* Ashwood, Mich. 10 W. 3. in B. R. And in Pasch. ult' upon Argument of this Case, Holt, Ch. J. ask'd the Counsel for the Plaintiff in Error, If the original Declaration had been in this Court, whether they would venture to demur to it for not shewing the Place the Horse was immoderately rid in? And he said, sure they would not. And then if this were a good Declaration in a superior Court without that, then it will not be necessary to aver it within the Jurisdiction of an inferior Court in an Action brought there. To which it was answered by Cheshire, that the Inference did not follow; for if Indebit' assumpsit be in a superior Court for Goods sold and delivered, though no Place be laid where the Sale or Delivery was, yet it is no Cause of Demurrer, but the not alledging it to be within the Jurisdiction of an Inferiour Court would be fatal. Vide Simile, 37 H. 6. 2, 4.

Judgment affirm'd.

But per tot. Cur. The Judgment was affirm'd, for the Neglect of not keeping according to the Contract is the sole Gist of the Action; for if the Declaration had been, that the Defendant did so negligently keep the Horse, that he was taken out of his Stable, and rid into

Somerſetſhire to his Damage, &c. the Action would lie: Or that he ſo negligently kept him, that through his Neglect he was beat or abuſed, or wanted reaſonable Provender in his Inn. And the ſole Cauſe of Action is his Neglect of due Care of him. Jud. affirm'.

Note; The Chief Juſtice remember'd the Caſe of Mayo and Combe in my Lord Hale's Time, where the Counterpart of an ancient Deed was admitted in Evidence, and a ſpecial Verdict being found in the Caſe, finding the original Deed, it concluded prout per le Counterpart it did appear: And this was ſo done to preſerve the Precedent. 1 Mod. 4, 94, 114. 2 Keb. 31, 546. 3 Keb. 1, 2. 5 Mod. 211, 386.

Q. 3 Keb. 477. Hard. 119. 1 Lev. 25. Counterpart of an ancient Deed loſt, &c. admitted for Evidence. Vide poſt 248.

And now all the Court held, that the Counterpart of an ancient Deed which might be loſt, was good Evidence with other Circumſtances, but not of it ſelf without other Circumſtances; but that a Counterpart of a Deed leading the Uſes of a Fine was of itſelf good Evidence. See alſo Carthew 79, 80, 142, 181, 220, 225, 265, 346. and Skinner 15, 24, 82, 174, 205, 431, 579, 584, 623, 624, 639, 640, 672, 673.

Fox *verſus* Tilly.

Quære 2 Salk. 653.

DEBT upon a Bond conditioned to ſave the Plaintiff harmleſs againſt all Eſcapes, which he had ſuffered as Warden of the Fleet Priſon, and on Demurrer to the Rejoinder, which was in it ſelf a Departure from the Plea, which was a Non fuit damnificatus, and a ſpecial Damage replied, and Continuance given to the firſt Day of this Term: The Court took a Diverſity between a Bond to ſave harmleſs againſt future Eſcapes, for that would be void, and a Bond to ſave harmleſs againſt paſt Eſcapes; for though it were unlawful to ſuffer them, yet one may contract to indempnify one againſt a Penalty already incurr'd againſt Law. And note, here the Court was informed that the Plaintiff was dead, and therefore they ought not to go to Judgment. To which they anſwered, If that were ſo, the Defendant muſt come and plead it as a Plea puis Darrein Continuance, and make Oath of the Truth of it, otherwiſe they would not take Notice of it, and if the Plaintiff were alive on the Continuance-Day, they might well give Judgment; and accordingly the Plaintiff had Judgment. For, per Cur. if he dies before the firſt Day of Term, we cannot take Notice of it without it be pleaded as puis Darrein Continuance; and if he were alive the firſt Day of Term, the Judgment ſhall relate to that Day.

Bond may be given to ſave Warden, &c. harmleſs againſt paſt Eſcapes, but not againſt future. Vide 2 Salk. 438.

Inſt. Leg. 604.

Linch *verſus* Hooke.

S. C. 1 Salk. 7. Poſt 311.

Per Cur, If A. give Bond by Name of B. and he is ſued by Name of B. he may plead Miſnomer, and the other muſt plead that he made the Bond by the Name of B. and eſtop him by demanding Judgment; if againſt his Deed, he ought to be admitted to ſay his Name is A. and then the Defendant may rejoin, and ſay that he made no ſuch Deed, and this the Defendant muſt do without Oyer; for if he pray Oyer, he admits his Name to be B. Vide ante 28.

Where *A.* makes a Bond in the Name of *B.* how to ſue, &c.

Irregular to proceed on Bail-Bond till Essoin-day of next Term.

If a Writ be returnable in one Term, the Defendant ought to put in Bail in that Term, (that is) at any Time before the Essoin-day of the next Term, and till then it is irregular to proceed upon the Bail-Bond; but one in the mean Time may take an Assignment upon it, and take out a Warrant.

S. C. 1 Salk. 40. 2 Salk. 601, 679. Post 256. Ant. 134, 199. Upon a *Sci' fac'* against Tertenants, they all appear, &c. 1 Keb. 351, 388. 2 Keb. 55. 728. 3 Keb. 25, 50. 3 Lev. 205.

Adams *versus* Tertenants of Savage. Vid. ante 134, 199

THE Case being moved again this Term, it appear'd on the Record to be thus: A Sci' fac' by Administrator upon a Judgment by his Intestate, to warn in the Tenants of such Lands as were Savage's at the Time of the Judgment, &c. The Sheriff returns several Tertenants, among other J. and S. his Wife, Tenants of a capital Messuage called B. and also of the Manor of B. All the Tenants appear, and plead in Abatement jointly, viz. That one G. T. is Tenant of the Freehold of the Manor of B. and so pray Judgment of the Writ, & quod cassetur.

That such a joint Plea is bad.

And per Cur'. The Plea is clearly bad:

1. For them all to join in the Plea, when they are return'd several Tertenants; for if A. be return'd Tertenant of one Parcel, and B. of another, A. cannot plead that another is Tertenant of another Parcel, and not return'd, but as far as it affects himself, not quatenus it affects B.

This is pleading a Non-tenure by Implication.

2. This, as the Record is, is pleading a Non-tenure by Implication; for if G. T. be Tenant of the Freehold of the Manor of B. of which J. and S. his Wife are Tenants return'd, that is an Implication that J. and S. are not Tenants of it, and therefore bad; for a Non-tenure, though it were expressly pleaded, is not a good Plea to a Sci' Fac' upon a Judgment in a personal Action, because it is directly to falsify the Return of the Sheriff: It has been a Question, Whether a special Non-tenure could be pleaded in that Case? But that it may, is now settled. Vid. 3 Cro. 872. 8 Ed. 4, 19. 9 H. 5, 11. But in Sci' fac' to have Execution of a Judgment in a real Action, one may plead Non-tenure against the Return of the Sheriff, because there the Freehold so much favour'd in Law, is at Stake: Besides, as to the Pleading of this in Abatement, if the Sheriff has return'd all the Tertenants in his County, it is altogether improper to plead it in Abatement, that there are other Tenants in another County not return'd; because, in that Case, there are none to be summoned by that Sheriff: And the Sheriff having returned all in his County, has done his Duty; but if it be pleaded, that there are other Tenants in the same County, the regular and neat Way is to conclude, by demanding Judgment, if they ought to be put to answer quousque the other be summoned; for which see the Precedent in 2 Saund. Jefferson and Dawson's Case; but it is true, that Precedents are both Ways, but Judgment is never according to the Conclusion here, quod breve cassetur; but only to stay quousque; for Judgment shall not be to abate a Writ but where the Plaintiff may have a better.

When a special Non-tenure may be pleaded.

2 Saund. 23. 2 Keb. 587, 636, &c. 1 Sid. 436. 1 Mod. 28.

And Holt, Ch. Just. quoted Kemp *v.* Laurence, Owen 134. where it held, That a Tenant for Years is a good Tenant to plead in Bar to a Sci' fac' on a Judgment for Debt or Damages, because that is only in the Personalty; Secus to a Judgment in the Realty. If one Jointenant be returned, he may plead that another is Tenant of a Moiety.

Where a Tenant for Years may plead in Bar to a *Si' fac'* on a Judgment, &c.

Et per Cur', Respond' ouster.

Fitz-Hugh *versus* Dennington.

S. C. Post 259.

ERror of a Judgment in the Marshal's Court in Debt upon a Bond, where the Defendant upon Oyer of the Condition, which recited, That the Plaintiff was become an Apprentice to the Defendant for seven Years; and then the Condition was, That if the Defendant at the End of the said seven Years, should make, procure, or cause the Plaintiff to be made free of the Company of Joiners of London, if thereunto requested, then the Obligation to be void. To this the Defendant pleaded, That ad Finem of the said seven Years, or after, till Time of Action brought, he was not requested. To which the Plaintiff demurs, and Judgment for the Plaintiff below: Supposing the Request not material at all, or at least if it were, the Plea should have been, [that he never was requested] and not to tie it up to a Request at the End of the seven Years, or after; for he might have requested before the End of the seven Years, to make him free at the End of the seven Years.

Error of a Judgment in the Marshal's Court, upon Condition of a Bond to make the Plaintiff a Freeman of *London*, &c. on Request. Vid. ant. 223. Post 259, 260. 1 Lev. 85.

But Montague, for reversing the Judgment, insisted, That if in this Case the Request had not been expressly made Part of the Condition, yet the Plea had not been good; and took a Diversity, When there is a Duty made by the Bond, then there need no Averment of a Request; otherwise when the Bond is for doing a collateral Act as here; and for this, he quoted 1 Brownl. 13. But whenever the Condition is to do a Thing when thereunto required, or if thereunto required, there the Request is Part of the Condition, and to be averred.

Diversity upon a Condition, when it is a Duty, and where to do a collateral Act.

And per Cur', The Request is material here, and the Meaning is plain from the Recital, that the Defendant was to have made the Plaintiff free at the End of seven Years, that is, when his Time was out if the Plaintiff pleased, which was to be signified to the Defendant by Request; and the Request must be when the Condition could be perform'd, viz. at the End of seven Years, and not before; and if it were a good Request within the seven Years, that ought to be shewn of the Plaintiff's Side, otherwise it shall not be intended; for it cannot be intended one would request a Thing to be done, before it was to be, or could be done.

That the Request is material here, &c.

And Judgment reversed Nisi. Vide Post 260, 261.

Judgment reversed *Nisi*.

Robert *verſus* Harnage.

Debt upon a Bond made (dated, ſealed and delivered) at *Port S. David's*, &c.

PLaintiff declares, That the Defendant became bound to him at Port St. David's in the Eaſt-Indies, apud London, in a Bond of -----for the Payment of ---- to him, his Attorney or Aſſigns: Upon Oyer, the Bond appearing to bear Date at Port St. David's in the Eaſt-Indies; and the Solvendum was to the Plaintiff's Attorney or Aſſigns, without Mention of himſelf: And on Demurrer to the Declaration, two Exceptions were taken:

After *Oyer*, Defendant demur'd, and Exception of Variance taken, &c. Cr. Eliz. 256. Hob. 171.

1. That the Bond declared on, and that ſet out on the Oyer, were variant; the one being Solvendum to him, his Attorney or Aſſigns, the other to Attorney or Aſſign.

To which it was anſwer'd, That the Declaration muſt not be according to the Letter of the Obligation, but according to the Operation of the Law thereupon: As if A. bind himſelf in a Sum to B. Solvendum to C. who is a Stranger, a Payment to C. is a Payment to B. and in an Action upon it, the Count muſt be upon a Bond Solvend' to B. Vid. 4 Ed. 4. 19. 2 Keb. 81. 1 Sid. 295. And per Cur', If A. make Bond to B. Solvend' to ſuch Perſon as he ſhall appoint; if B. does appoint one, Payment to him is a Payment to B. and if B. appoint none, it ſhall be paid to B. himſelf.

2d Exception, That the Date, &c. made it local, &c. Ante 194.

2d Exception was, That the Bond ſet forth, appeared to have been ſealed and delivered at Port St. David's in the Eaſt-Indies, and therefore the Date made it local; and by conſequence, the Declaration ought to have been of a Bond made at Port St. David's in the Eaſt-Indies, apud Iſlington in Com' Middleſex, or on ſuch a Ward or Pariſh in London, &c. as upon a Bond, apud Bourdeaux in France, in Iſlington: And of that Opinion was the Court.

Peat's *Caſe*.

S. C. 2 Salk. 572. Poſt 310. A diſſenting Preacher qualified in one County, removes to another, &c.

HE was a Preacher to a Meeting of Diſſenters; and having qualified himſelf as ſuch, according to the Act of Toleration, in one County, removed from thence into another County, and ſet up a Conventicle there, without any farther Qualification; whereupon a Juſtice of Peace convicted him upon the Statute of Conventicles. And now the Attorney General, in his Behalf, moved for an Attachment againſt the Juſtices for a Contempt of the Act of Toleration; alledging, That a Qualification in one County, is a Qualification all over England.

Vide 2 Salk. 673. The Juſtices are Judges, and are only to acquit ſuch as comply with the Act of Toleration, &c.

But per Cur', The Act of Conventicles is ſtill in force, and the Juſtices of Peace have Power of executing it againſt ſuch as do not qualify themſelves according to the Act of Toleration, which Act only enjoins the Juſtices of Peace to acquit ſuch as do comply with the Act of Toleration: So they being Judges of the Matter, if they

wrong you, you have your Remedy by Certiorari, or Appeal to the Sessions, where the whole Fact may be heard and examined over again; which Examination of the Fact shall be final by the very Words of the Statute; and if they err in a Matter of which the Law makes them Judges, it would be most unreasonable to grant an Attachment for such Error. Then the Attorney moved for a Mandamus to the Justices, to suffer him to preach there, he qualifying himself according to the Act of Toleration. But the Court denied it, for a Mandamus is always to do some Act in Execution of Law; but this would be in the Nature of a Writ de non Molestando, and that contrary to a Conviction standing against you, which shall be looked upon as legal while it stands. Then they moved for a Mandamus for the Justices to take Security from him not to become chargeable to the Parish; which was also denied; for that Matter is only to be upon Complaint of Church-wardens, and Overseers of the Poor: And they held, That by the Act of Toleration, it sufficeth not that the Licence of such Preacher be inrolled at the Quarter-Sessions of one County, to enable him to preach in any other County; but it ought to be at such Quarter-Sessions as would otherwise have Conusance of the Matter upon the Statute of Conventicles, and that is the Sessions of the County where the Fact is committed: And at last they moved for a Mandamus to the Sessions to state the Fact specially; but it was denied, for that the Statute excludes all others from examining the Fact: And finally, they moved for a Procedendo to a Certiorari already brought by them, in order to appeal to the Sessions, which was granted.

Then Attor' Gen' moved for a *Mandamus* to suffer him to preach, &c.

Then a Motion for a *Mandamus* for the Justices to take Security, &c.

Per Cur', The ancient Rule was, That a Bail-Bond could not be put in Suit till a Rule obtained to amerce the Sheriff, for not having the Body forth-coming: And now Proceedings upon the Bail-Bond were set aside, because there was no Cepi Corpus return'd.

Proceedings on Bail-Bond set aside, because no *Cepi Corpus* return'd.

Brewster *versus* Weld.

Vide 2 Vent. 244. 3 Lev. 221. 2 Keb. 373.

SCI' fac' out of Chancery, returnable in the Queen's Bench, to repeal Letters Patents of the Rectory of Aldgate: And it was moved for, that the Sheriff might return his Writ: And here it was resolved, That if Letters Patents be to the Prejudice of another, he may have a Sci' fac' upon the Inrolment thereof in Chancery to have them repealed, as well as the Queen may; as if a Fair be granted to the Damage of mine, I may have a Sci' fac' to repeal such Grant: And they seemed likewise to hold, That a Sci' fac' upon a Record in Chancery, was not returnable here; but clearly after a Writ issues out of Chancery returnable in another Court, that Court into which it is returnable has Jurisdiction of it, and not the Chancery, nor can the Chancery supersede such Writ; but all the Irregularity both in issuing it out, and in the Return of it, is solely examinable in the Court in which the Writ is returnable; which if the Writ be legal, will hold Plea upon it, otherwise will quash it: But the Motion

Sci' fac' out of *Chancery* into *B. R.* to repeal Letters Patents moved, &c.

2 Vent. 344. 3 Lev. 220. Vid. Bro. *Sci' fac'* 104. acc.

tion being the quarto Die poſt, all which Day the Sheriff has to return the Writ, the Court would not make a Rule; and the ſame Motion being made the next Day, the Court was informed, that the Chancery had ſuperſeded the Writ; whereupon, in ſome Heat, they ruled the Sheriff to return it, or to return the Superſedeas, if he depended on't, that it would excuſe him: The Day after, the Sheriff having got the Writ back from the Chancery, returned it Sci' fac', and brought it into Court.

Upon *Non aſſumpſit*, &c. a Feme may give Coverture in Evidence. S.C. poſt 263.

Feme Covert may plead non Aſſumpſit, and give Coverture in Evidence, becauſe Coverture makes it no Promiſe; ſo ſhe may plead non eſt Factum to a Bond, and give Coverture in Evidence. Ray. 395. Vide poſt 218.

Cockroft *verſus* Smith.

In Treſpaſs, &c. with ſpecial *Acetiam*, the Defendant being poor, not held to Bail. Vide 1 Mod. 2 Acc.

THE Defendant in a Scuffle bit off the Fore-finger of an Attorney's Right-hand; and in Treſpaſs, with a ſpecial Acetiam by a Judge's Warrant, the Queſtion was, Whether the Bail ſhould not juſtify themſelves to a Sum ſuitable to the Acetiam? Vide poſt 266.

And per Cur', He was not held to that, he being very poor.

Gibbon *verſus* Dove.

Time to except againſt Bail put in upon a Writ of Error, &c.

UPON Writ Error, and Bail put in, the Defendant has twenty Days to except againſt the Bail, which Exception ought to be enter'd in the Clerk of the Error's Book: He ought further to take out a Rule to ſerve upon the Attorney, or Agent of the Plaintiff, to put in better Bail, but that Rule need not be ſerved within the twenty Days; but it muſt be before Execution ſued out for Want of Bail, per Cur', & omnes Clericos.

Notice of the Exception.

Note; It was ſaid, There ought to be Notice of the Exception within twenty Days.

Jacob *verſus* Dallo.

S.C. Fareſl. S. 2 Salk. 551. 5 Mod. 436. Prohibition to Spiritual Court, to ſtay Suit about diſpoſing Pews, &c. Vide 1 Keb. 457.

PRohibition was moved for to the Spiritual Court, to ſtay a Suit there about the Right of Diſpoſing of Pews in a Church: The Suggeſtion was, That ſuch a Corporation were Impropriators of it, and Time, &c. uſed to repair all the Pews, and ratione inde had the Diſpoſal of them; but becauſe it did not appear to the Court, whether it were Preſentative or Donative, or with Cure of Souls or not, they would do nothing in it. But they ſaid, a Donative might be with Cure of Souls, as the Tower of London's Chapel: And that there are alſo another Kind of Churches, which are neither Preſentative or Donative, but Stipendiary; and yet have Cure of Souls: As if there be an Impropriation, and it has no Vicaridge, but only a certain Stipend is given Yearly to him that ſerves the Cure; and that is meerly Dative, and that at Pleaſure of the Impropriator.

Note likewiſe it was ſaid, Anciently there were no Pews in Churches, but only Forms; and that it had been a good Preſcription to ſay, That Time out of Mind the Corporation did repair ſuch an Iſle of the Church, ratione cujus the Mayor and Aldermen ſate there; for tho' the Right be in the whole Body, the Enjoyment may be and enure to a ſelect Number.

Vide *Repertorium Canonicum*, Tit *Pews* and *Seats*.

Per Cur', The Bail have their Principal always upon a String, and may pull the String whenever they pleaſe, and render him in their own Diſcharge; they may take him up even upon a Sunday, and confine him till the next Day, and then render him; for the Entry in this Court is traditur in Ballium, &c. and the Doing it on a Sunday is no Service of Proceſs, but rather like the Caſe where a Sheriff arreſts by Vertue of a Proceſs of Court on Saturday, and Party eſcapes, he may take him upon a Sunday, for that is only a Continuance of the former Impriſonment.

Vide Fareſt. 77, 85, 98. Bail may render the Principal when they pleaſe, and take him up upon a *Sunday*, &c. So may a Sheriff take an Eſcaper.

Knight *verſus* Burton.

S. C. 1 Salk. 75.

DEBT upon Bond conditioned for Performance of an Award; which was ſet forth, and a Breach aſſign'd: And upon Demurrer, Parker took Exception:

Debt upon a Bond conditioned for Performance of an Award, &c. Poſt 244.

1. That the Award recited, That the Parties were Jointenants of ſuch Land, and ordered they ſhould make Partition by mutual Conveyances, which was ſaid to be incertain, and not making an End of the Matter by ſhewing what Moiety, or Part, the one ſhould have, and what the other: To which it was anſwer'd, and reſolved, That it was well enough; for whereas they were Jointenants before, they would now become Tenants in Common.

1. Upon a Partition awarded, and not ſhewed how; *ſed non allocatur.*

2. It was objected, That could not be; for it was further awarded, the one ſhould have unam dimidiam Partem five medietatem; which ſhews they intended ſomewhat more than a Tenancy in Common, but left it incertain; for Dimidia Pars is a Moiety in Certainty, and Medietas is a Moiety incertain; and in this very Award, they in other Matters uſed Medietas for a Moiety in Certainty, as Medietas of the Profits of ſuch a Ship to be delivered, which is to be underſtood of a Moiety divided; for otherwiſe it could not be delivered. But per Cur', Dimidia Pars, or Medietas, ſhall be reſpectively taken for Moiety divided or undivided, ſecundum Subjectam materiam; as Medietas of a Thing to be delivered, ſhall be underſtood a divided Moiety, becauſe it cannot be delivered except it be divided; ſo Dimidia Pars, if it be ſuch a Thing as cannot be reduced to a divided Moiety, ſhall be underſtood a Moiety undivided; as in Dower, a Woman demands tertiam Partem, if it be of ſuch a Thing as is capable of having a third Part divided made of it, it ſhall be ſo; but if it be of 3d Part of Lands of Tenant in Common, Mill, &c. it muſt be a third Part undivided.

2. How *dimidia Pars*, or *Medietas*, ſhall be reſpectively taken.

3d Objection

3. Whereas ſo much Money had been diſburſed (as is alledged) and well, &c. Ante 229. Skinner 156, 159, 188.

3d Objection, That they awarded Money to be paid, which of their own ſhewing upon the Face of the Award did not appear to be due; for it was, Whereas ſo much Money has been diſburſed by the one Party, as is alledged: So though if they had ſaid, Whereas ſo much Money has been diſburſed, it would be intended it appear'd to them to have been ſo; yet when they go farther, and ſay, as it is alledged, that takes away ſuch Intendment; for they ſhew their Certainty of it was only becauſe it was alledged, which might be without any Proof, or alledged by any Perſon whatever: But it was reſolved, that alledged ſhould be underſtood as alledged, and not controverted or diſproved by the other Side.

4. That a Suit in *Chancery* between the Parties ſhould be diſmiſſed, &c. Vide 1 Salk. 73.

4th Objection, That it was awarded, that a Suit between the Parties in Chancery ſhould be diſmiſſed; which, as was urged, was ill, for that an Award ought to be final, and that a Suit in Chancery might be diſmiſſed upon Payment of Coſts, ſo as the Party might begin again: Indeed, if the Diſmiſſing be abſolute, it is final; but if it be diſmiſſed, as is frequently done there, without Prejudice, the Party may begin again, and therefore an Award of diſmiſſing a Suit in Chancery is incertain, and not final, but is like the awarding that one of the Parties in a Suit at Law be nonſuited, which is void.

1 Salk 74, 75.

But per Cur', 'Tis true, awarding that one of the Parties be nonſuit, is void, for that is not final; but when an Award is, that a Suit commenced be diſmiſſed, that muſt be underſtood that it ſhall be diſmiſs'd, and ceaſe for ever, that is a ſubſtantial Diſmiſſion and Ceſſer, and not the Shadow of one; as if the Condition of a Bond be to deliver up another Bond by ſuch a Day to be cancelled, and the Obligee before the Day puts the firſt Bond in Suit, and obtains Judgment thereupon, and at the Day tenders it to be cancelled according to the Letter of the Condition of the ſecond Obligation, yet his Obligation is forfeited; and diſmiſſing here is put in Latin dimittere, with an Anglice to diſcharge, and to diſcharge a Suit is to releaſe it, and ideo final: And if an Action be depending upon a Bond, and puis darrein Continuance the Plaintiff does releaſe the Action, that releaſes the Duty. Beſides this Award is, that what is awarded of the other Side, ſhould be in full of all Debts and Demands then due and owing; and the Word Demands extends to all Things that the one Party has Right to demand or exact of the other, at the Time of Submiſſion; and the Words, due and Owing, does not qualify or reſtrain it to a Debt, or other ſpecial Demand, that is more ſtrictly ſpeaking a Duty; for whatever a Man has a Right to demand of another, may well be ſaid to be done and owing from the other to him; ſo it may extend to Right of Entry into Land, to a Suit for Partition, &c.

The Extent of the Word [*Demands*] in an Award, &c.

Aſtated Rule in Awards, that are ſaid to be *de & ſuper Præmiſſis*. Poſt 244. 1 Salk. 70.

Note; This was agreed to be a ſtated Rule in Awards, that are ſaid to be de & ſup' Præmiſſ'; that if the Words uſed in them be in their own Nature more comprehenſive, and ſo extenſive to Things not within the Submiſſion, yet they ſhall be intended that there was no other Matter between the Parties for them to lay hold on, but what was ſubmitted if the contrary be not ſhewn: So e converſo, if the Words are more narrow, and leſs comprehenſive than to take in all the Mat-

ter of Submiſſion; yet it ſhall be intended that no more was in Controverſy than what the Words naturally comprehend, if the contrary be not likewiſe ſhewn.

Et Jud' pro Quer' Niſi, per tot' Cur'.

Judic' pro Quer' Niſi.

Selby *verſus* Greene.

THE Obligee made a material Razure in the Condition of a Bond, and after brought an Action upon the Bond, and the Defendant having had Oyer, and the Bond being now in Court, and the Razure diſcovered, the Defendant pleads Non eſt Factum, and Notice of Trial given; but when the Plaintiff underſtood that the Defendant had found out the Cheat, and could prove it, he countermands the Notice.

Obligee had made a material Razure in Condition of a Bond, &c. Vide 2 Bulſt. 247, 248. 11 Co. 28. 5 Co. 23. Dyer 261, 262.

And now Serjeant Darnell moved upon Affidavits of this Matter, That the Bond ſhould remain in the Cuſtody of the Officer of the Court till the Cauſe were tried; for otherwiſe the Plaintiff would ſtay until the Defendant's Witneſſes were dead, and put this forged Bond in Suit againſt them, when he could by no Poſſibility relieve himſelf againſt it; and now if he would try it by Proviſo, the Plaintiff would be nonſuited, and might begin again.

2 Rol. 30. Cro. El. 546. Motion, that the Bond ſhould remain in Officer's Cuſtody, &c.

Per Cur', If you had denied the Deed according to Weymark's Caſe, it is to remain in Court till the Cauſe be tried; ſecus it ſhall only remain for the Term in which it is brought in; but the moſt it goes to is, that upon Imparlance granted, it ſhould remain in Court till the Defendant pleads: As here, if it be by Bill, the Defendant after Imparlance may crave Oyer; and therefore there it muſt remain in Court till the Party is put to plead, that he may in that Caſe have Oyer of it.

Allowed, if they had denied it according to *Weymark's* Caſe, &c. 2 Salk. 497. Vide poſt 303.

And the Ch. Juſt. remember'd Sir Solomon Swale's Caſe in his time, where a Deed upon Evidence was found not to be the Defendant's Deed, and by Conſequence forged; and it was inſiſted on, that the Court ought to cancel it: Yet the Court denied it, becauſe there might be error in the Proceedings for which the Verdict might be ſet aſide, and then the Bond would ſtand unimpeach'd, and ſo the Matter be brought in queſtion again: And ſo it was reſolved it ſhould not be cancelled, but remain in Court uncancelled: And they ſaid, here the Defendant's beſt Way would be to carry the Cauſe down by Proviſo; and if the Plaintiff would ſuffer himſelf to be nonſuited, whereby the Suit will be at an End, and the Plaintiff entitled to take his Bond out of Court, yet that Nonſuit would be great Evidence againſt him in another Action to be brought thereupon; or elſe he might get his Witneſſes Teſtimony perpetuated in Chancery.

Court ſaid Defendant might carry it down by *Proviſo*, &c.

Defendant's Counſel ſaid, he might bring Action upon his Caſe, &c.

But Darnel ſaid, he might bring an Action upon his Caſe againſt the Plaintiff for ſuing him upon a forged Bond, and that a Verdict therein would be Evidence for him, it being between the ſame Parties.

And ſo he took nothing by his Motion.

S. C. Ante 38. 2 Salk. 466, 468.

Godolphin *verſus* Tudor.

Paſch. 3 Annæ, in B. R.

Debt upon Bond conditioned for Performance of Articles, &c. Vi. poſt 237.

DEBT upon a Bond conditioned for Performance of Articles; the Condition recited, That whereas Sir Wm. G. was Auditor of Wales for his Life, and had deputed the Defendant's Teſtator to exerciſe his ſaid Office during his good Behaviour, and that the Defendant pro Deputatione præd' did agree to pay him yearly during the ſaid Deputation 200l. in Conſideration whereof the Defendant's Teſtator ſhould have all the Rents and Profits of the ſaid Office to his the Defendant's Uſe, and likewiſe ſave the Plaintiff harmleſs, &c. and the Bond was for Performance thereof. The Defendant pleads the Statute of 5 & 6 Ed. 6. c. 16. &c. making Bonds and Securities, &c. for certain Offices void, without the neceſſary Averments, &c. Replication, that the ſaid Office had a fix'd Salary of 20 l. per Ann. belonging to it, and that during the whole Time of the ſaid Deputation, the annual, juſt and legal Profits of the ſaid Office did amount to 329 l. 10 s. and that during all the aforeſaid Time the Defendant did receive yearly the ſaid Sum of 329 l. 10 s. out of the Exchequer, for the Fees and Profits of the ſaid Office to his own Uſe, and aſſigns Breach in not paying the ſaid 200 l. for ſo many. Rejoinder of the ſame Matter in the Replication, and Demurrer. And the Caſe being three Times argued in this and the two precedent Terms, the Court were clear of Opinion againſt the Plaintiff, and took this Diverſity: If an Office deſcribed by the Statute has a certain Salary annex'd to it, Deputation of ſuch Office, reſerving a Sum leſs than the ſtanding Salary, will not be within the Statute. So if Fees be incertain, and no certain Salary annex'd to the Office, reſerving a certain Sum out of Fees, will not be within the Statute; becauſe in that Caſe, if the Fees anſwer not the Sum certain, the Deputy is not to pay the Sum certain, it being payable out of the Profits. But here the Event will not help it, it being void at firſt; for the Fees being Things ariſing from the Buſineſs of the Office, which may be more or leſs, they muſt be incertain, and yet the Defendant's Teſtator at all Events was to pay a Sum certain, let the Fees be more or leſs. Vide 3 Keb. 717, 659. Ellis *verſus* Nelſon. So they adviſed the Plaintiff to diſcontinue, which he denied. Jud. pro Def. laſt Day of the Term, and the ſaid Diverſity allowed and confirmed for good Law; for

Stat. 5 & 6 Ed. 6. c. 16. Vide 3 Inſt. 148. Hob. 75. Co. Lit. 234. 3 Keb. 552, 659, 678. Cro. Car. 361. Cro. Jac. 269, 386.

Court againſt the Plaintiff.

Diverſity. 2 Salk. 466.

Vide 3 Keb. 711, 717. Welch and Baden, and 3 Keb. 552, 659, 678. Ellis *verſus* Norton.

for if one reserve a Sum certain upon a Deputation out of the Profits or Fees, he only reserves Part of that which was wholly his before; for tho' by making a Deputy, the whole Power of Principal is in the Deputy; yet the Fees or Profits don't pass, and the Deputy has no Right to them: Then if he make a Deputy, reserving a Sum certain, Part of the Profits, and the rest to Deputy, he may well do it, for it is but reserving Part of what was wholly his.

Vide 3 Keb. 711, 717. Hawk. P. C. 169.

If one put in a Deputy without any Allowance of Salary, he has no Remedy but by Quantum meruit, and that against his Principal.

Quantum meruit for a Deputy having no Allowance.

Davenant *versus* Rafter.

Vi. Carlton's Case.

ERror of a Judgment in C. B. upon nil dicit in Debt upon a Bond for Want of an Original, the Defendant pleads a Release of Errors. The Plaintiff replies, That there was another Judgment between the Parties for the same Sum, and of the same Term, and that the Release was of that Judgment of which the Writ of Error was not brought, absque hoc that it was of this now in Question.

Ante 113, 114, 206. Error of Judgment in B.C. (in Debt upon Bond) for Want of an Original. 1 Sid. 84.

To which the Defendant demurs, and Eyre maintains the Demurrer, for by this Traverse, the Defendant is excluded from saying that there is but one Judgment, for it is only made an Inducement to the Traverse.

See the Cases cited ante, 113, 174, 206, &c. Carthew 7. 200 & 339.

Per Cur. The Question is, Whether there ought to be a Traverse in this Replication? For then you would cut out the Plaintiff from pleading Nul tiel Record. But your Way seems to have been, to have shewed one Judgment specially, and then to have averred the Release to have been of that Judgment, and so have rested. As suppose a Man has two Manors of Dale, and levies a Fine of his Manor of Dale, he shall by Averment ascertain of which of them it was. If Debt be brought upon a Sheriff's Bond conditioned for an Appearance in this Court die Veneris prox' post Mens. Mich. the Defendant pleads a Writ of Latitat taken out against the Party at the Suit of the same Plaintiff, returnable die Mercurii, and that the Party was upon that Writ arrested, and the Bond was given for his Appearance at another Day than the Return-Day of the Writ, and so the Bond is void by the Statute of 23 H. 6. The Plaintiff may come and say, that he took out a Writ returnable die Veneris, and that an Arrest was upon that, and the Bond for Appearance to it, without traversing the other Writ; and if a Thing which may in Process of Pleading become material and traversable be traversed before such Time, it is naught, as my Lord Hobart says. Now you have not shewed how this Matter was material.

Travers. See Carthew 99, 100, 117, 196, &c.

Another Objection was, That the Releaſe pleaded did recite a Judgment in which the Plaintiff did recover 600 l. pro debito & dampnis ultra miſ. & cuſtag. the Errors in which the Plaintiff releaſed; and the Judgment of which this Writ is now brought, is pro debito & damnis only, without any thing of Coſts, and ſo a plain Variance between the Judgment releaſed and that now in Queſtion; for at Common Law, before any Coſts were given, the Form of entring of Judgments in Debt was pro debito & damnis, as this is, and therefore the Judgment recited in the Releaſe, and that of which this Error is now brought, are not the ſame.

But per Cur. In the Common Pleas, they always, in Caſe of Judgment by nihil dicit, enter Judgment pro debito & damnis, without more, tho' in this Court the Manner be, tam pro debito & damnis quam pro miſ. & cuſtag. and Damages include Coſts: And beſides, in the Judgment recited in the Releaſe, it does not ſay that any Coſts were recovered, but ultra miſ. & cuſtag. he recovered 600 l. for his Debt and Damages.

3. It was objected, That Judgment ought not to be affirmed without a Certiorari, to aſcertain the Court how the Matter ſtood below.

But the Court took this Difference: If the Defendant upon Error aſſigned will not come in and plead, there the Plaintiff muſt have a Sci' fa. againſt him ad audiend. Errores, and a Certiorari to certify the Want of Original, that being the Error aſſigned; but where the Defendant comes in gratis, and pleads In nullo eſt erratum, or other Plea which is ill, it is a Confeſſion of the Error; and the Judgment was, Quer. nil capiat per Breve, becauſe here is Error upon Record, but is releaſed.

Vid. ante 206, 207. Yet for Precedents of Judgment affirm'd in this Caſe, vide Raſt. 300. 21 Ed. 4. 43. 1 Co. 14. Releaſe relied on as an Eſtoppel.

Note; At another Day it was objected, That the Concluſion of the Defendant's Plea was naught, for it was, Quod Quer. &c. excludatur, & quod Judicium affirmetur, when by Law the Judgment is to be affirmed; but it was over-ruled, for Quod Quer. præcludatur is enough, and the reſt Surpluſage.

Concluſion of Pleas, &c. See Inſtit. Leg. 272, 512, 523, &c. Skinner 387, 517.

And here Holt, Ch. J. took this Diverſity as to Concluſions, That if a Dilatory be pleaded, and Plaintiff take Iſſue upon it, he may conclude with a petit Judicium & Damna, becauſe there final Judgment ſhall be; but if Dilatory be pleaded, which Plaintiff does not deny, but confeſſes and avoids, he muſt conclude in Maintenance of his Writ: As if Defendant plead Attainder in Diſability of the Plaintiff, and he replies a Pardon, he muſt not conclude with a Petit Jud. & Damna, but in Maintenance of his Writ.

Lady

Lady Cook *versus* Remington.

S. C. 2 Salk. 498. Vide ante 234. Debt upon Bond to perform the Covenants in an Indenture, &c. 1 Sid. 50, 97, 425. 1 Keb. 104, 127. 1 Saund. 9, 22. 1 Mod. 266. 1 Vent. 37. Keilwey 71. 1 Sid. 425. Cro. Jac. 360, 460. Vi. 1 Saund. 22.

DEBT upon a Bond, with Condition to perform Covenants in a certain Indenture mentioned: The Defendant craves Oyer of the Indenture, which the Plaintiff gives him; and one of the Covenants therein was, That the Defendant would safely give up unto the Plaintiff the Goods, a Particular whereof was writ on the Back of the Indenture: The Defendant pleads Performance generally, to which the Plaintiff demurr'd.

And it was held per Cur'. 1. That when one is bound to perform Covenants in an Indenture, that in an Action upon such Bond, the Defendant, in order to discharge himself, ought to shew the said Deed to the Court, that they might see what the Covenants were; for he cannot shew that he has performed all, without shewing what he was to perform; and therefore he ought to recite the Indenture, whereof he is supposed to have a Counterpart, in his Plea; but if he never had a Counterpart, or had lost it, upon Oath thereof the Court will compel the Plaintiff to give him a Counterpart, in order to set it out for his Defence.

Counterpart.

2. That though the Plaintiff in this Case was not compellable to give him Oyer of the Deed, yet if he will do it, it will suffice for the Defendant to plead upon.

3. That the Indorsement here, at the Time of the Ensealing and Delivery of the Deed, was Part of it, and therefore Oyer of the Body of the Deed without Oyer of the Indorsement, was not a compleat Oyer of the Deed, the Deed relating to the Indorsement, and therefore not perfect without it; and it in this differs from an Obligation, with a Condition indorsed, for there may be Oyer of the Obligation without any of the Condition; and if one crave Oyer of the Obligation, he shall not upon that have Oyer of the Condition, because the Obligation is compleat and perfect without the Condition, and does not refer to it.

That the *Oyer* was not compleat, there being an Indorsement of Goods, &c.

4. If the Indorsement were after the Ensealing and Delivery of the Deed, and at another Time, it is a new Deed; and in that Case, if a Bond were to perform Articles in one Deed, and that Deed refers him to another, there to discharge himself, he must shew the Matter in the second Deed that is referr'd to from the first.

And if the Indorsement was after Sealing and Delivery, 'tis a new Deed, &c.

5. Here where the Plaintiff gave the Defendant an incompleat Oyer, viz. of the Deed without the Indorsement, he ought not to have rested satisfied therewith, but to set forth further the whole Purport of the Indorsement, or averr'd that there was none.

And Jud' pro Quer' Nisi.

Jud' pro Quer' Nisi.

Wells

Wells *verſus* Oſmond.

Vide 1 Salk. 31, 33. 2 Salk. 424. Vide ante 25. Libel in the Admiralty for *Seamens Wages, &c.* 3 Mod. 244.

LIbel in the Admiralty for Seamens Wages: It appeared, that the Builder did make a Contract for a Ship with an Owner; who thereupon had the Ship put into his Poſſeſſion, and did contract with Seamen to go with him on a Voyage; and in order to rig the Ship for that Voyage, the Owner brought the Seamen to work for a conſiderable Time on Board the Ship; after which, through Diſagreement between the Builder and Owner, the Voyage is put off, and the Seamen diſmiſſed without their Wages, who now libel for their Wages againſt the Ship: And Prohibition was moved for, upon Suggeſtion that the Work was done in corpore Com', and no Voyage ever made.

Per Cur', If the Contract be, to go on a Voyage, &c. they ſhall ſue for their Wages, &c.

Sed per Cur', If a Contract be with Seamen to go on a Voyage, and they in order thereunto work in a Harbour, and after the Voyage is intercepted through the Owner's Fault, as if the Ship be arreſted for his Debt, &c. the Seamen ſhall ſue for their Wages, for their Work done ſo in Harbour in Purſuance of the Contract to go on a Voyage, in the Admiralty, as much as if they had gone the Voyage; ſecus, if the Retainer of them had been only to do the Work in the Harbour: And in this Caſe the Ship ought to be liable for their Suit, becauſe the Builder, by truſting it into the Owner's Poſſeſſion, gave him an Opportunity of engaging of Seamen, who are the eaſier induced becauſe they ſee him in Poſſeſſion of it; and they being Strangers to the Builder's Bargain with the Owner, ought not to ſuffer by its not being performed, and the Builder might have taken Care to ſecure himſelf from any ſuch Charge, when he entruſted the Owner with the Poſſeſſion of his Ship, whereby he render'd it obnoxious to the Wages of ſuch Seamen as he ſhould bring on Board her in order to go a Voyage in her: And the Motion for a Prohibition was denied.

And here the Ship is liable.

The Reaſon why Seamen may ſue in the Admiralty.

And per Cur', The true Reaſon why Seamen may ſue for their Wages in the Admiralty, though the Contract be at Land, is, That there the Ship it ſelf is made liable to them; and beſides, there they may all join in the Suit, neither of which may be at Common Law, and yet both are much for the Eaſe of poor Seamen.

At what time Bail may ſurrender the Principal, tho' Notice be not to the Plaintiff.

Per Cur', If Bail ſurrender the Principal at or before the Return of the ſecond Sci' fac', it is good, though there be not immediate Notice of it to the Plaintiff; for the End of Notice in that Caſe is twofold: One that the Plaintiff may, if he pleaſes, charge him in Execution; the other, that he be at no further Trouble or Charge in proceeding againſt the Bail; but if, through Want of Notice, he is at further Charge againſt the Bail, that ſhall not vitiate the Surrender; but yet the Bail ſhall not be delivered till they pay ſuch Charges. If at

any Time after the Return of the Capias the Bail ſurrender the Principal at a Judge's Chamber, and he thereupon is committed to the Tipſtaff, from whom he eſcapes, or is reſcued, that will not be a good Surrender, becauſe it is Indulgence to the Bail to ſurrender after a Capias return'd; ſecus if it be before a Capias return'd, for to ſurrender before, or at Return of Capias, is Matter of Right: And now by the Rule of Court, upon the firſt Sort of Surrender the Principal ought to be two Days in the Marſhal's Cuſtody, to make it a good Surrender.

Ride *verſus* Ride.

Vid. 2 Salk. 447, 552.

A Popiſh Recuſant convict made his Wife, another Popiſh Recuſant, his Executrix, and they would ſuffer her to prove the Will in the Spiritual Court; and a Prohibition being moved for, upon the Statute of ---- El. c. 4. Sect. 22. Per Cur', It was granted, for ſhe is diſabled by the general Clauſe, and not enabled by the Proviſo.

Prohibition to the Spiritual Court, &c.

Domina Regina *verſus* Foxby. Antea 11, 178, 213.

2 Keb. 687. 1 Mod. 71. 1 Salk. 382.

JUdgment upon an Indictment at the Quarter-Seſſions of Maidſton, was reverſed; the Indictment being, for that ſhe was communis Rixa, a common Scold, inſtead of Rixatrix.

Rixa for *Rixatrix.*

Anonymus.

COvenant againſt Huſband and Wife upon a Deed of Demiſe to the Wife dum ſola; whereby ſhe covenanted, That ſhe would every Year, during the Term, plant ſo many Oaken Plants on the Premiſſes: Breach aſſign'd, that aliquos querculos aliquo Anno durante Termino annuatim, they or either of them, non ſeruit ſeu plantavit.

Covenant againſt Huſband and Wife upon a Demiſe to her *dum ſola*, &c.

Montague objected, That the Wife ought not to be joined in the Action for Breach ſince the Coverture; ſed non allocatur; if the Wife had aſſigned dum ſola, the Action for Breach would lie againſt the Huſband and her jointly: And as to the Annuatim aliquo Anno, at moſt it is but Surpluſage, and ſhall be rejected.

So if ſhe had aſſigned *dum ſola.*

Jud' pro Quer'.

Domina

Domina Regina *verſus* Branworth,

A Petit Chapman indicted as an idle Perſon, &c.

INdictment by Jury of the Town of Portſmouth, For that he, being an idle Perſon, did wander in the ſaid Town ſelling of Small Ware as a Petit Chapman: And to maintain this Indictment, it was urged, That a Petit Chapman is a Vagabond by the Statute of 39 El. cap. 4. And tho' ſome Petit Chapmen, that is, ſuch as are legally qualified by the Statute of 8 & 9 W. 3. c. 25. may now lawfully uſe that Occupation, yet that Act excepts Boroughs and Corporations, ſo as to them they remain in ſtatu quo.

That a Vagabond, *quatenus* ſuch, is not Indictable. Q. if without Certificate. Vide Bract. Li. 3. cap. 10. con. 3 Inſt. 103.

Holt, Ch. Juſt. Is a Vagabond, quatenus ſuch, indictable? And it ſeems not, for at Common Law a Man might go where he would; but if he be an idle and looſe Perſon, you may take him up as a Vagrant, and bind him to his Good Behaviour by the Common Law; and by the Stat. of Labourers, he may be compelled to ſerve: There is indeed a Way by Law for puniſhing incorrigible Rogues, by burning them in the Shoulder, and ſending them to the Gallies; from whence it may be urged, that there muſt be a Way before of Convicting them of being Rogues, for they cannot be puniſhed otherwiſe as incorrigible Rogues; and that firſt Conviction muſt be by Indictment.

But per Holt, Ch. Juſt. No; but by being judged by a Juſtice of Peace to be a Vagrant, and uſed by him as ſuch, and if he offend again, he may be indicted as a common Vagrant: Rule for quaſhing it was enlarged.

Blackmore *verſus* Tidderly.

S. C. 2 Salk. 423.

To Treſpaſs, Aſſault and Battery, &c. Limitations Vide ante 25 poſt 309. Carthew 3, 136, 144, 335, 471.

TReſpaſs, Aſſault and Battery: The Defendant pleaded Not guilty infra ſex Annos, and Demurrer to plea, as being argumentative, for the Statute limits this Action to four Years, and not to ſix: It is indeed an Argument, That if it was not within ſix, it could not a fortiori be within four; but Pleadings ought to be direct, and not illative.

It ſeem'd at firſt to Court, that Plaintiff might have join'd Iſſue for his own Advantage.

But per Cur', You might well have joined Iſſue with them upon this Plea; for if they have taken a larger Compaſs than they need, it is for your Advantage: Upon this Iſſue you might have given Battery after four Years, and within the ſix, in Evidence; and it would have maintained your Iſſue, and you could have Judgment thereupon, it being found for the Plaintiff, without the Help of the Statute of Jeofails: So if the Plea had been Not guilty within a Week or a Year, and Verdict for the Plaintiff, he ſhould have Judgment, for Guilty or Not guilty is the Subſtance: Sed Hill' prox' tot' Cur' contra.

Per Holt, Ch. Juſt. If Deviſe be to the Heir at Law, paying ſuch and ſuch Legacies, &c. and for Default thereof, Remainder over, the Heir till Default is in by Diſcent, and the other's Intereſt is by way of Executory Deviſe: And ſo it was in Pell and Brown's Caſe in Effect, in 1 Cro. where the Fee was deviſed to one that was not Heir, the Remainder to him that was Heir, there the Heir was in by Deſcent; and it's hard to maintain, either by Uſe or Deviſe, a Remainder to a Stranger, after a preſent Fee to one who is not Heir at Law: Vid. 3 Cro. Sole *v.* Gerard, And. 833, 919. Carthew 224. Skinner 206, 207, 269, 340.

A Deviſe to Heir at Law, paying, &c. and for Default thereof, Remainder over, &c.

Vid. 3 Cro. Gilpin's Caſe, 161.

Reignots *verſus* Tipping.

Vid. 1 Salk. 399.

PEr Cur' & omnes Clericos: After a Rule to ſign Judgment, there ought to be four Days excluſive of the Day on which the Rule, and of the which the Judgment is ſign'd; and the Meaning of the Rule is, That the Party might have reaſonable Time to bring a Writ of Error, if he ſee Occaſion; but in the Common Pleas they never give Rules for ſignning of Judgment, but they ſtay till the quarto die poſt, which makes but four Days incluſive.

Time of ſigning Judgment, &c. Ante 191. 2 Salk 518.

Denham *verſus* Stevenſon.

S. C. 1 Salk. 355.

DEbt by Adminiſtrator againſt the Heir upon Bond of Anceſtor; and declares cui Adminiſtratio omn' Bonor', &c. by ſuch a Peculiar debito modo commiſſa fuit; without ſaying that he had ordinary Juriſdiction, or that it did of Right belong to him to commit Adminiſtration, and Demurrer to Declaration.

Debt by Adminiſtrator upon Bond againſt an Heir.

And, Firſt, It was excepted, That he had not ſhewn how the Defendant was Heir; and for the Neceſſity, was quoted. Hob. 333.

But per Cur', The Diverſity is where he ſues as Heir; there, becauſe he is preſumed conuſant of his Pedigree, he ought to ſhew it; ſecus where he is ſued, becauſe Strangers ſhall not be compelled to ſhew what lies not in their Knowledge.

Demurrer to the Narr', &c.

2d Exception; He makes Title by Vertue of Adminiſtration committed by a Peculiar, without alledging any Right in the Peculiar to commit Adminiſtration, and that is Subſtance and traverſable; for de communi Jure here in England, it belongs to the Ordinary: Vid. 1 Sid. 228. 2 Ventr. 84. Cro. Jac. 556. & 12 W. 3. in B. R. Gidley *v.* Williams.

He does not alledge any Right in the Peculiar, &c. 1 Lev. 71. 5 Mod. 425. Vid. 1 Lutw. 8, 297, 298. 2 Mod. 65. 1 Sid. 90. 3 Lev. 211.

Contra. It was urged, That at moſt it was but Matter of Form; the Omiſſion whereof is not to be objected upon general Demurrer; and upon Iſſue the Plaintiff would not be put to prove, that the Peculiars had Right to grant Adminiſtration.

R. 'Tis only Matter of Form.

C. J. He ought to ſhew the Peculiar's Right to grant, &c. 5 Mod. 425. 1 Sid 228. 1 Lutw. 8. 297. 2 Mod. 65. Cro. Eliz. 431, 791, 838, 879, 907. 1 Sal. 40, 41. Carth. 148. Ante 134.

Holt, Ch. Juſt. It cannot be ſaid to be only Form; for it is the committing Adminiſtration by one having legal Authority, that veſts Cauſe of Action in the Plaintiff, and the Ordinary by Law is to commit Adminiſtration; and in all Caſes of Peculiars, you muſt ſhew Title and Right to grant Adminiſtration, and the leaſt Averment that can do it, is to ſay, That de Jure it did belong to him to grant Adminiſtration; for the Court cannot take Notice of Peculiars, but may of Biſhops; and Profert in Cur' literas Adminiſtrat', is not enough, for they only certifie what is on the Face of them, viz. that Adminiſtration was committed to the Plaintiff by ſuch a one, but that does not import he had any Right to grant any.

That 'tis doubted if the Right of Archdeacon ought not to be ſhewn.

Powell. Might not the Defendant come and traverſe his having Right to commit, if you had alledged it; And in the Caſe of Chiverton *v.* Trudgeon, in 2 Cro. 556. it was doubted, whether the Right of Archdeacon, who is taken Notice of by us as oculus Epiſcopi, ought not to be ſhewn; but all the Matter is, that here it's ſaid, debito modo commiſs' fuit, whether that ſhall be taken only in reſpect to the legal Form of the Inſtrument, or to the Peculiar's Right of committing? And I rather believe the firſt, and debito modo ſeems to me not to be enough to traverſe; they might indeed have traverſed the Adminiſtration committed, and given in Evidence, that he had not Right to commit Adminiſtration: And no Rule was given.

No Rule given.

Bignall *verſus* Devniſh.

When Bail above upon removing a Cauſe, &c. 1 Salk. 104, 105, 106.

PEr Cur', If the Defendant upon Habeas Corpus remove a Cauſe from an inferior Court, in which there ought to have been ſpecial Bail below, he ſhall not thereby put the Plaintiff in a worſe Condition, but be compelled to give in Bail above; but as to the Sum which the Bail are to juſtifie themſelves worth, that may be moderated as the Court ſees Occaſion.

Judge's denying legal Evidence, &c. Ante 22, 222. Fareſl. 53, 64. 3 Salk. 649.

Per Cur', Good Cauſe of new Trial, where the Judge who tried the Cauſe has denied to admit that for Evidence which was legal Evidence, or where he misdirects the Jury.

Middleton *verſus* Haw. Hill. 3 Annæ.

Variance. Execution by *Fi. Fa* in Debt, &c.

SCi' fac' upon a Judgment in the Caſe, and pleaded Execution by Fi' Fac' by Judgment pro debito & damnis, which is different.

Jud' pro Quer'.

Domina Regina *verſus* Rawlins. Hill. 3 Annæ.

S. C. 1 Salk. 367.

HE being bound by a Recognizance, to appear the firſt Day of Term, at which Time the Attorney filed an Information againſt him, he would imparl, and the Attorney General would have the Imparlance to Craſtin' Animar'; for heretofore, when one came in upon a Recognizance, or Habeas Corpus, they were put to plead inſtanter. Indeed, in the Biſhop's Caſe, by great Advice, they pleaded, They ought to have Time to imparl, but ruled they ſhould plead inſtanter: But that was thought hard, and is now redreſs'd; but it was never intended to grant greater Indulgence of the Crown-ſide, than is of the Plea-ſide: Where the Courſe is, That if a Declaration be delivered before Craſtin' Animar', or Menſ. Paſch. the Defendant ſhall not give a Plea ſo as to try it that Term, but he muſt plead ſo as to enter.

One bound by Recognizance to appear firſt Day of the Term, &c.

1 Lilly 389, 390.

Holt, Ch. Juſt. If in a Michaelmas Term a Writ of Summons had iſſued upon an Information, and the Defendant comes in voluntarily thereupon, there is Reaſon he ſhould have an Imparlance; but yet not to another Term, becauſe in that Caſe, by due Proceſs continued, he might be brought in upon an Attachment the ſame Term, ſo as to be compellable to plead inſtanter; and where upon ſtanding the Length of Proceſs, they muſt have pleaded the ſame Term, there is Reaſon that upon a voluntary Appearance they ſhould have ſo much Time allowed to plead, as they might have gained by running out the Length of Proceſs, and no more; but the Information is now of this Term, and till Information exhibited there cannot be a Summons; the Offence being in Middleſex, the Summons indeed may be made returnable at any Day certain: And on the Crown-ſide the Courſe was, Whenever an Imparlance has been that it was granted to another Term, an Imparlance in theſe Caſes cannot be without Leave of the Court; and the Reaſon of an Imparlance is, that the Defendant may have a reaſonable Time to adviſe what to plead, and the Court are Judges of that Time. Heretofore there have been Imparlances from one Return of Michaelmas Term to another of that Term; but in Plea-ſide, now we have Imparlances to a Day certain in the ſame Term: Yet, though the Court declared this very reaſonable, no Rule was made. Of Imparlance in Appeals, &c. See 2 Hawk. chap. 23. Sect. 102. And Note; where a Cauſe is by Original, 'tis ſaid an Imparlance is ex Gratia Curiæ. See Skinner 2.

What Imparlance in a *Michaelmas* Term, &c.

No Summons till Information exhibited, &c.

Courſe on the Crown-ſide.

S. C. 1 Salk. 76. 2 Salk. 498.

Arnote *verſus* Breame. Paſch. 3 Annæ.

Debt upon a Bond for Performance of Award, &c. Ante 231. Vid. 2 Salk. 425. 1 Lutw. 382, 386. Poſt 311.

DEbt upon Bond for Performance of an Award, reciting ſeveral Differences between the Plaintiff and Defendant, concerning a Piece of Ground South of the Plaintiff's Houſe adjoining to the River Thames, and uſed as a Wharf, and the erecting ſeveral Piles of Boards and Scaffolds thereupon to the Nuſance of the Plaintiff's Houſe; all within the Liberties of St. Bride's Hoſpital, London: Null' Award pleaded, and an Award ſet forth, adjudging, That the Defendant ſhould enjoy the ſaid Piece of Ground as a Wharf, and that the ſaid Scaffolds ſhould be pulled down and removed. And on Demurrer, ſeveral Exceptions were taken to this Award:

Exception, That the Date of it does not appear. R. It is ſaid to have been made on ſuch a Day, &c.

1. It does not appear what the Date of it was; ſo it may be, it was made without Authority, as before the Submiſſion; ſed non allocatur, for it's alledged to have been made on ſuch a Day, which appears to be within the Time; and if no Date be ſet out, it ſhall be intended it had none, and then it's good from the Delivery, according to 5 Co. Clayton's Caſe; and every Writing or Deed has a Date in Law, viz. the Time of the Delivery thereof, and a Deed may bear Date one Day, and be delivered on another, and the Day of Delivery is the Date, and the other the bearing Date; and the Making an Award or Deed, is that which gives it the Eſſence and Being of a Deed or Award, and that is the Date of it.

Where the making of an Award is the Date of it.

That the Award is *de & ſuper Præmiſs', &c.* 1 Salk. 70. Ante 232.

2. It was objected, That Submiſſion was of Ground, &c. within the Liberty of the Hoſpital of Bridewell, and of Scaffolds, &c. newly erected; and the Piece of Ground mentioned in the Award is not aver'd to be within that Liberty, nor newly erected: Sed per Cur', The Award is ſaid to be de & ſuper Præmiſs', and therefore it ſhall be intended within the Submiſſion, if contrary be not ſhewn of the other Side, which the Defendant cannot now do after Null' Award generally pleaded, for that would be a Departure.

That the Award is not final or certain, it not being awarded, &c. Vid. tamen 2 Vent. 242.

3. It is not awarded who ſhall pull down the Scaffold, therefore Award not final or certain, ideo ſo far void, and this not to be helped by any Averment or Intendment of the Court: Vid Style 365. 1 Roll. Abr. 164. 5 Co. 78. a. Cro. El. 432. Mo. 39. and the Diverſity is, when a Thing incertain may in the Nature of the Thing be made good by Averment or Intendment, and when not; as if one covenant to give Bond or Obligation for Enjoyment of Land, there it muſt be to the Value of the Land, or for Payment of ſuch a Sum, it ſhall be in double the Sum, Cro. Jac. 116. but in Award it is not ſo, for to admit of Averment, is to admit the Matter not determined, ſince the Averment would be traverſable, and to intend would be to make, not to expound an Award: And it's not an Anſwer to ſay, That it appears on the Face of the Award, that the Land was the Defendant's, and therefore the Nuſance being thereupon, it ought to be removed by him, who may come there without being a Treſpaſſer. For,

1. It does not neceſſarily appear, that the Ground was his; for the Award is only, that he ſhould uſe it as a Wharf; which rather ſhews, that it was diſputed whether it was his Right before. It does not neceſſarily appear the Ground was the Defendant's, &c.

2. It does not ſhew it to be his now; for the Words only are, That he ſhould uſe it as a Wharf; that is, that he ſhould have Liberty of Wharfage there; and if it be admitted to be his Ground before; (for if it were the Ground of the Plaintiff, the Erection of the Boards could not be a Nuſance to his Houſe,) yet a Nuſance is by Law abateable by him to whom it's a Nuſance; and if it were not, the Arbitrators might, by awarding the Plaintiff to pull it down, enable him to do it without Danger of becoming a Treſpaſſer thereby: So it being left indefinite, whether the Plaintiff or Defendant ſhall pull it down, it's therefore void for Incertainty; and then this being aſſigned only for Breach, tho' the Award for other Particulars were good, the Plaintiff cannot recover, there appearing no Cauſe of Action on the whole Record for him, according to Turner's Caſe, 8 Co. Vid. poſt 514. A Nuſance is abateable, &c. See Co. 9. 54, 59. So being indefinite, Award is void for Incertainty. 8 Co. 132, &c.

And of this Opinion, Holt, Ch. Juſt. ſeemed to be; but Powell, Powys and Gould clearly contra: For when they declare it to be a Nuſance, and that it ſhould be removed, who ſhould remove but he on whoſe Ground it was? And though in Point of Law any may remove what is to his Nuſance; yet in Caſe of Award, which is by Judges of Equity as well as Law, it muſt be intended that it was to be done by the Party on whoſe Ground it was. But 3 Judges *contra*.

Jud' pro Quer': Holt dubitante ut ſupra. *Judic' Quer.*

Per Cur', Upon a Writ of Error, if the Clerk below will certify the Record wrong, Caſe will lie againſt him for it; and if he make no Return, the Plaintiff may have a Writ of Executione Judicii out of Chancery. Action, &c. where a Record is wrong certified in Error.

Domina Regina *verſus* Jacob Banks *Mil'.*

S. C. 2 Salk. 652. Vid. 1 Salk. 380.

AN Indictment was found againſt him at the Quarter-Seſſions of Berkſhire, for an Aſſault upon Mr. Culpeper in Windſor-Caſtle, and the Indictment removed up by Certiorari at the Suit of the Proſecutor: Both he and the Defendant took out Proceſſes, made up Records, and took Warrants of Niſi prius, to try it at the next Aſſizes after Removal; and the Proſecutor not thinking fit to carry it on, the Defendant put in his Record, and was tried and acquitted. And now a new Trial was moved for by the Proſecutor; for that when an Indictment is originally preferred here above, or found below, and removed up here by the Proſecutor, the Defendant cannot carry it down to Trial till after a Default in the Proſecutor, nor even then without Application to the Court, and Leave had; Vid. 2 Leon. 110. It's ſo in caſe of an Information qui tam, becauſe, as the Book ſays, it quodammodo concerns the Queen; a fortiori then will it be in caſe of Indictment, which altogether concerns her. An Indictment found againſt the Defendant at the Quarter-Seſſions, &c. for an Aſſault. Trial.

To

If Difference in such Case between an Indictment and Information.

To which it was answered, That there was a great Difference between an Indictment and an Information; for an Indictment being a Charge by Oaths of twelve Men, is much heavier; and for that, one ought to be allowed all imaginable Speed to clear himself of it, and not to be continued under such Imputation till the Prosecutor thinks fit to bring it to a Trial; but an Information is a bare Suggestion, and therefore is more easily rested under.

And as to another Objection that was made, That such a Course, if tolerated, would be of great Mischief, for then most profligate Offenders would get themselves acquitted by Surprize, or over-hastening the Trial, without allowing the Queen convenient Time to manage her Prosecution:

No *Nisi prius*, &c. without Warrant from Attorney General. Vid. Sav. 2.

It was answered, That there could be none, because in Crown Causes there cannot be Nisi prius or Tales, without a Warrant from the Attorney General, who will be sure to grant none if he find any such Danger; and that such a Thing may be at least by Consent, appears 1 Keb. 195. the King *v.* Jones; and the Granting a Nisi prius amounts to a Consent.

Former Practice concerning Removals of Indictments by *Certiorari*.

Per Cur', Before the late Statute of 5 & 6 W. & M. c. 2. concerning Removals by Certiorari's, if the Defendant had removed an Indictment from any County besides London and Middlesex, he was sine die out of Court, and only to be brought in upon Process, whereupon he might have been outlawed; but in that Case the Defendant might have come in voluntarily if he pleased: But if the Indictment had been removed from London or Middlesex by the Defendant, there he must have enter'd into a Recognizance to carry it down to Trial the same Term, or the Sitting after; and in Imitation of this Practice in these two Counties was the late Act made, whereby the Defendant upon Certiorari brought by him to remove an Indictment out of any County in England, must enter into a Recognizance to carry it down and try it the next Assizes, because of the great Delay of Justice occasioned by the other Course; but if the Prosecutor does remove it up, the Defendant upon pleading does not enter into a Recognizance to try it, and that begets the Question, Whether notwithstanding he may immediately carry it down to Trial? And it was allowed here, that this being removed up by the Prosecutor before Plea, the Defendant was out of Court, and sine die, and might be brought in by Process, or sued to an Outlawry, or if he pleased might come in voluntarily; and if Indictment be found here, the Defendant upon pleading shall give Security to try it.

How by the late Act of 5&6 W. & M. 1 Salk 380.

Et per totam Cur', After great Consideration, it was resolved:

Per Cur', In Civil Actions Defendant can't try by *Proviso*, &c. V. 2 Lev. 5,6.

1. That in Civil Actions the Defendant cannot carry down a Cause to Trial by Proviso till after Default in the Plaintiff, except in special Cases where the Defendant is in some respect in Nature of a Plaintiff, as in Quare Impedit, Replevin and Prohibition, to have a Writ to the Bishop, Return or Consultation.

2. There cannot be a Trial by Proviſo in the King's Caſe, becauſe there can be no Laches in the King. None in the King's Caſe.

3. A Defendant may at the firſt Inſtant by Conſent of the Proſecutor, carry his Cauſe to Trial where the Queen is Party. Yet he may by Conſent of Proſecutor.

4. That all Cauſes of the Queen in this Court muſt be tried at Bar, if Mr. Attorney will not grant a Warrant of Niſi prius. Where Trial muſt be at Bar, &c.

5. That that Warrant in its Nature is no more than a Conſent, that the Cauſe may be tried in the Country; but not that the Defendant ſhould carry it down irregularly, or contrary to the uſual Courſe.

6. That if Mr. Attorney will grant a Niſi prius by Surpriſe, and after ſhew that to the Court, they will ſuperſede it. If Att' Gen' be ſurprized.

7. Which was the main Point in this Caſe, that in all Indictments and Informations here, or Indictments removed hither by the Proſecutor for Treaſon, Felony, or any inferiour Offence, the Defendant has no other Way to haſten on his Trial, but by Application to the Court; who upon hearing the Reaſons of Mr. Attorney, will, as they ſee Occaſion, either give him further Time, or fix him a Day peremptory for the Trial, or give the Defendant Leave to bring it on himſelf. Defendant here to haſten Trial, muſt apply to the Court for Leave.

And per tot' Cur', A new Trial was granted; and directed it for a Rule hereafter, that the Defendant ſhould never carry an Indictment removed hither by the Proſecutor to Trial, without Leave of the Court. New Trial granted, and a Rule ſettled. See Carth. 499, 507.

French's Caſe.

HE had been arreſted at the Suit of ſeveral Perſons, and had given in Bail; who having charged him with an Action of 4000 l. had him taken up in the City, and committed to the Poultry Counter, in order to remove him by Habeas Corpus, and rendered in Diſcharge of themſelves to the Priſon of the King's Bench, where the original Actions were brought; and it being Circuit-time, and all the Judges out of Town, before the Bail could render him, he was charged with the Queen's Debt; and the Bail having now brought an Habeas Corpus to remove him up, and render him, the Attorney General oppoſed it, becauſe the Queen, as he alledged, might chooſe her Priſon, and the Counter was ſafer than the Marſhal's Priſon; and quoted the Caſe of Village and Clayton, as a Precedent for him. Bail in Circuit-time, charge the Principal with 4000 l. &c. He was ſoon after charged with the Q.'s Debt, &c.

But per Cur', If he had been taken up by the Queen firſt, there might be ſome Reaſon that they ſhould not for their own Eaſe leſſen the Queen's Security of her Priſoner; and that the Queen's Intereſt concurring with that of the Subject, ſhould be preferr'd; but of the other Hand, the Bail having taken him up here, and the Queen taking Advantage thereof in charging him with her Debt, ought not to prejudice them: And he was turned over. *Per Cur'*, It might be if he had been firſt taken at Queen's Suit. V. 1 Cro. 389.

Stillingfleet

Stillingfleet *verſus* Sir Harry Parker.

In Ejectment to prove a Leaſe to the Queen, an ancient Book of Entries was offered. Vid. ante 225. 1 Salk. 285, 286, 287. 2 Salk. 690. Fareſl. 129.

AT a Trial at Bar in Ejectment, the Queſtion was upon the Time of the Commencent of a Leaſe, which was to commence upon the Determination of a Leaſe then in Being to Queen Eliz. And to prove ſuch a Leaſe to the Queen, an ancient Book, in which were Entries of Leaſes of the Premiſſes ever ſince Henry the Seventh's Time, and found among the Evidences of the Biſhops (this being Biſhop's Land) was offered and oppoſed, becauſe not ſuch good Evidence as they might have had, becauſe this being to the Queen muſt have been inrolled, and then they might have brought a Copy of the Inrollment. And tho' it was anſwered, that to prove the Leaſe a good Leaſe, it would be neceſſary to produce a Copy of the Inrollment, becauſe without Inrollment the Queen could not take, yet to prove a Leaſe in Fact this would be good Evidence, and that was what it was offered for. Yet,

Per Cur. Inrollment is better Evidence of a Leaſe in Fact than the Book; ideo it muſt be produced.

Queen can't be Tenant at Will.

Per Cur. Queen cannot be Tenant at Will.

S. C. 1 Salk. 27.

Burkmire *verſus* Darnell.

Intr. Paſch. 3 Ann. Rot. 64.

In Caſe the Defendant undertook that *J. S.* would redeliver a Horſe, &c.

IN Caſe the Plaintiff declared, That in Conſideration that at the Requeſt of the Defendant he would let a certain Gelding of his out to hire to J. S. he the Defendant did undertake the ſaid J. S. would redeliver him to the Plaintiff; that accordingly he did let him out his Gelding, but that J. S. did never redeliver him. At the Trial it appeared upon Evidence, that the ſaid J. S. came to the Plaintiff to hire a Horſe from him, who miſtruſting, was unwilling to let him have his Horſe; whereupon the Defendant came and deſired him to let him have it, and that he ſhould undertake J. S. would redeliver him ſafe. And the Chief Juſtice doubting whether this Promiſe was not void by the Statute of Frauds and Perjury, it being not reduc'd into Writing, directed a Verdict for the Plaintiff, but ſaved them the Matter to be taken Advantage of above.

Obj. That this Promiſe is void by Stat. of Frauds, as being to anſwer for Default of another, and not reduced into Writing.

And now Serjeant Darnell argued, That it was void by the Statute. If the Words had been, Let him have the Horſe, and if he don't redeliver him, I will; that had been plainly within the Statute, for it is anſwering againſt the Default of another, and the Undertaking here is the ſame in Subſtance, for it is, that he ſhall do that which by Law he was bound to do, and that is anſwering for the Default of another. Indeed if the whole Credit and Reliance had been upon the Defendant's Account, ſo as the Plaintiff could have no Remedy againſt J. S. for the Non-delivery, it had been otherwiſe. And

he quoted a Case in the Second Year of the late King and Queen, resolved upon this Difference, viz. That where the Plaintiff has an Action against the Party for whom the undertaking is, there no Action will lie against the Undertaker, without the Promise be in Writing. Secus where no Action does lie against the Party, for then the whole Credit is entirely upon Account of the Undertaker, and the other looked upon as his Servant; and the Sale and Contract is, in Judgment of Law, to the Undertaker, tho' the Delivery be to the other Party as his Servant: As if A. comes to B. and tells him, Hire your House to J. S. and I will see you paid the Hire; there the Hiring is to A. and not J. S. who is considered as Servant to A.

Raymond contra. I agree the Difference taken by Mr. Serjeant, but will make a quite contrary Inference from it; so the Point between us must depend upon the Fact of the Agreement, and yet I would distinguish upon the said Diversity. It is said, where an Action lies against the Party, it will not lie upon a Parol Promise against the Undertaker; that is, where an Action lies against him upon the original Contract or Agreement, 'tis true; but where an Action lies against him upon a Matter collateral to the Contract, I deny the Rule. And the Words of the Statute shew, That the Undertaking made void, is an Undertaking for the Party's performing the original Contract: And here, upon the original Contract, no Action would lie against J. S. for not delivering back the House, though indeed if he refuse to do it upon Request, Detinue or Trover will lie against him, not upon the Contract, but upon the subsequent Tort, of keeping that from us which of Right we ought to have, and belongs to us.

Cur. Clearly the Words [Default of another] in the Statute, is the Default of another in performing his Contract, and if the whole Credit be not entirely given to the Undertaker, so as no Remedy lies against the Party upon the Contract, but that the Undertaker comes in Aid of the Credit given by the Contract to the Party, the Undertaking will be within the Statute. And they also agreed the Case put by Darnell, and further said, If two come to a Draper, and one of them says, Let this Person have so much Cloth, and I'll see you paid; there the Sale is to the Undertaker only, tho' Delivery be to another by his Appointment; but if Contract be made with A. and the Vendor scruples to let the Goods go without Money, and B. comes to him, and desires him to let A. have the Goods, and undertakes that A. shall pay him, that will be a Promise within the Statute: So the whole Question will be, Whether the Plaintiff had any Remedy upon the Contract against J. S? As to the Words in Stat. [Default of another.]

And Darnell insisted on it, That there is a Remedy upon the Bailment against J. S. by Contract in Law.

That there is no ſuch Thing as a Contract in Law.

But per Holt and Powell. There is no ſuch Thing as a Contract or Promiſe in Law, tho' there be ſuch Expreſſion in ſome Books.

But at another Day they declared, That upon Conference with the other Judges, they had great Debate, and great Variety of Opinions in this Caſe, and that many thought it out of the Statute; for this Reaſon, That the Horſe was let out wholly upon the Credit of the Defendant, that it ſhould be redelivered; but we (ſays he) of this Court are unanimouſly agreed, that it is within the Statute; for it is an Undertaking for the Act, and to make good the Default of another. And where it has been objected, That if ſo be the Party did not redeliver him, the Plaintiff had no Remedy againſt him upon the Contract, but only in Trover and Converſion upon the ſubſequent Tort in caſe of Demand and Refuſal, and therefore they did not bring him within the Meaning of the Statute, for it is a Remedy accrewing from a Wrong after the Contract; but there is a Way to charge him upon the original Delivery or Bailment, for the Bailment is ſuch as in its Nature required a Redelivery, and if Bailee will not redeliver the Thing bailed, the proper and only adequate Remedy is an Action of Detinue againſt the Bailee: Therefore this Promiſe of the Defendant's, that J. S. ſhould redeliver the Horſe bailed, for which there lies a Remedy againſt the ſaid J. S. upon the Bailment, is a collateral Promiſe, and therefore a Promiſe to anſwer for the Act and Default of another, and by Conſequence within the Statute. So if two come to a Shop, and one of them contracts for Goods, and the Seller does not care for truſting him, whereupon the other ſays, Let him have them, and I'll undertake he ſhall pay you; that is an Undertaking for the Act and Default of another, and within the Act: But if the Promiſe be, I will ſee you paid, or I will be your Paymaſter, it is otherwiſe.

Verdict ſet aſide.

Et per tot. Cur. Verdict ſet aſide.

S. C. 2 Salk. 626.

Davy *verſus* Salter.

Error of Judgment in C. B. Vide ante, 148, 159, 196.

ERror from the Common Pleas of a Judgment by Default there; and the Error inſiſted on was, That the Writ of Inquiry was executed after it was returnable. It was returnable in Tres Sept. Trin. which is a Sunday of Neceſſity, and was in that Year the 13th of June, and the Writ of Inquiry is returned to have been executed the 14th of June, which is the Day after, when the Sheriff's Authority by the Writ was determined. And the Court muſt take judicial Notice of the Commencements and Return-Days of all Terms, as well fix'd as moveable, and this they cannot do without likewiſe taking Notice of the Days of the Month on which theſe Days fall. You muſt take Notice of the Commencement of Eaſter Term, which muſt be by taking Notice of Eaſter-Day, on which that depends;

and Easter-day is the first Sunday after the Full Moon next after the 21st of March, and if that Full Moon happens on a Sunday, Easter shall not be till the Sunday after; by the same Reason you will take Notice of Trinity Term, its Beginning and Returns, and that Tres Sept' Trin' must be on Sunday, and what Day of the Month that Sunday is, and you will find it on the 13th of June this Year, of which this Judgment is: And Gage's Case, as in Co. Ent. 252. Mod. 402. 1 Roll 595. were quoted, and strongly relied on.

Eyre contra. That the Court cannot take Notice of the Day of the Month: 1 Cro. 275. Jo. 300. 1 Roll. Abr. 595. Yelv. 140. where held, That the Court shall not take Notice even of Fix'd Feasts.

1 Danv. 683. 2 Danv. 254. Farsl. 17. *R.* That the Court cannot take Notice of the Day of the Month.

2. He urged, That Tres Trin' in Law was not a Day of Return, or at least that the Sunday being not a Dies Juridicus, should not be reckon'd, and it then would be well, for a Writ may be executed on the Day of its Return; and for this Reason the Essoins are kept on the Monday: And the Reason seems to be, that when that Sunday is no legal Day, the Monday shall succeed in its Place; and in the Common Pleas they always take the Monday to be in Mensem Pasch'. If the Mise be join'd on the meer Right where the Appearance must be on the first Day, it must be, that the Monday is the first Day, or else the Party could not save himself: And this seems consonant to Reason, and the first Institution of the Thing; for it would be absurd to appoint a Day for Appearance which the Party could not possibly appear at, and that Sunday never was a Juridical Day; Vide Britton, c. 5. and this is the more reasonable, for that the first Return is Craft' Trin'; and in 2 Cro. 16. the Monday is said to be the Day of Tres Trin'; in 1 Cro. 11. the same, viz. the Dies Lunæ is the Day of Tres Trin', and all Returns of Writs adjourn'd to that Day.

That *Sunday* shall not be reckon'd, &c. *In Mens' Pas.* is *Monday* in *C. B.*

That *Sunday* never was a Juridical Day. See Carthew 504. Spiritual Process may be served on a *Sunday*; and so it seems may any Temporal Process besides arresting the Person, &c. Q.

Obj. The Sunday is always reckon'd in the Computation of the Quarto Die post; and the 1st and 4th Day are taken in inclusive.

Answ. All the Octaves and Quind' are not inclusive of the 1st and 8th, or 15th; as in Easter Term, Quinden' Pasch' does not take in Easter-day, but is exclusive of it; and so is Octab' Trin' of Trinity Sunday, as is apparent from the Entries, which are, a Die Pasch. in quind' Dies, a Die Trin' in 8 Dies; and [a] is always exclusive of the Terminus a quo, and it is very odd to include the Day of Return one of the four Days of the quarto Die post; for post is likewise exclusive.

Obj. That *Sunday* is in the *Quarto Die post.* *R.* That all *Octaves* and *Quindena's* are not inclusive.

Then all Judgments must refer to the first Day of Term; and if so, this Judgment must relate to a Sunday, except it be agreed that Monday shall succeed in its Place. If Sci' fa' be returnable in Common Pleas, Tres Trin', the Entry is, Et modo ad hunc Diem scilt' Diem Lunæ; for if it be understood Sunday, it will be void.

Holt, Ch. Just. If the Sunday happen to be the Quarto Die post, it must of Necessity go to Monday, because it cannot be kept on the Sunday, and so of Essoins; but all Quindena's and Octaves are inclusive of the 1st and 8th, or 15th Day: So Octab' Hill' is the 20th

C. J. That all *Quindena's* & *Octaves* are inclusive.

of January, and Hill' Day is the 13th; and here, where we proceed de Die in Diem, we never enter a Die S. Trin' in 8° or Quind' Dies, but Die Lunæ, &c. poſt Feſtum: And as to the Relation of Judgments, that is for Neceſſity to the firſt Juridical Day, which is Monday, Sunday being none, and the Calendar is ſettled by Law, and Part of it, and the Moveable Feaſts by the Calendar, though not altogether according to the Rule in it; and if a Writ be returnable Quind' Paſch', we muſt ſure take Notice of it, and ſo muſt all thoſe whom it concerns: Suppoſe upon Forfeiture of Iſſues, or ſaving, or keeping of Days in a real Action; and Gage's Caſe, and that of Fiſh and Brockett, in Pl. 266. are unanſwerable: And the Monday is not the Tres Trin', but the Sunday is it, though in Caſes of Neceſſity it be kept on the Monday: And ſome Years ago the Midſummer-day happen'd to be on a Wedneſday, which ſhould have been the laſt Day of the Term; but being a Dies non, upon great Conſideration the Day following was kept: By the Statute of 22 H. 8. c. 21. Trin' Term is to begin the Morrow after Corpus Chriſti Day, and therefore we don't come here the 4th Day. And he quoted the Trial at Niſi prius, which was ſet aſide, becauſe it was Die Lunæ in Menſem Paſch'. And though [a] be generally excluſive, and that the Entry in the Common Pleas in all Caſes of Original be a Die Lunæ, &c. in all Proceedings on Original, yet it is taken incluſive.

The Calendar ſettled by Law, and Part of it. Vid. ante 41, 81, 160, 196.

1 Inſt. 135. a. That *Sunday* is the *Tres Trin'*. Ante 148, 159 & 196.

When *Trinity Term* is to begin.

That it is fit to ſettle this Matter fully.

Powell. Gage's Caſe is very ſtrong againſt you; but I believe there be many other Caſes contrary, therefore it is fit to ſettle it fully; and the Practice of Common Pleas will be a good Guide in a Writ of Error from thence: And in Caſes of Neceſſity, Things are done on the Monday, as in Appearance in a Writ of Right, where Law allows not of a Quarto Die poſt: And Sunday never was nor is a Dies Juridicus; but there is no Neceſſity in this Caſe.

Cur' adv. vult.

Parker *verſus* Clerk.

Pariſh-Clerk ſues Church-wardens in Spiritual Court for Money, &c. Vide of Pariſh-Clerks, Godol. Abr. 167, 165, 192. 2 Rol. Abr. 227, 234, 286, 287. 2 Brownl. 38. Cro. Jac. 670. Mar. 101. Vi. Ben. 142, 304. S. C. Fareſt. 137.

SUIT was in the Spiritual Court by a Pariſh-Clerk againſt the Church-wardens for ſo much Money, by Cuſtom due to him Yearly, and leviable by them upon the Pariſhioners: And now a Prohibition was moved for upon Suggeſtion of no ſuch Cuſtom.

To which it was objected, That if there was no ſuch Cuſtom, they ſhould have pleaded it below; and if without receiving that Plea they would proceed, then would be the proper Time for a Prohibition; but they came for a Prohibition too late, viz. after Sentence.

Holt, Ch. Juſt. I know no Caſe where one comes too late for a Prohibition after Sentence, but that of ſuing one out of his Dioceſe: Indeed, if a Suit be there for a Modus, and the Defendant pleads Payment, he comes after too late to plead, or ſuggeſt that there is no Modus, becauſe he has admitted one by pleading a Payment. But here

Where after Sentence, Prohibition lies, &c. Vide Show. 158, 172. Fareſt. 148. Hob. 79. Poſt 253. Ante 11. 1 Sid. 332, 65. Win. 8. 1 Ro. R. 80. 2 Ro. 318.

here the Matter lies; Here is a Duty not Spiritual but Temporal, and to a Temporal Person, for such is a Parish-Clerk; and therefore we grant Mandamus's to restore him to his Place: And this Duty is founded upon a Custom; and if there be such a Custom, he is not without Remedy at Law; for he may have Case for not making a Rate and levying; or if they do levy it, and not pay him, he may have an Indebit' for Money received to his Use. But alii dubit', looking upon the Clerk to be an Ecclesiastical Person, and in inferiour Orders, and that as such, he might sue in the Spiritual Court for a Stipend or Pension: And a Diversity was urged from the Bar in the Point of a Spiritual Person's suing in the Ecclesiastical Court for a Pension, viz. that he might well do it only in Case of Pensions originally granted, or confirmed by the Ordinary; but that where a Pension does not originally commence by the Act of the Ordinary, there it cannot be sued for in the Spiritual Court: As if one should grant an Annuity to a Parson, he cannot, as was said, sue for it in the Spiritual Court; and for this was quoted Cro. El. 675. Colier's Case.

C. J. That this is a Duty temporal.

Q. If the Clerk be an Ecclesiastical Person.

Vide 2 Inst. 487. Cro. Jac. 217, 269, 666. Cro. El. 675, 810.

But per Holt, Ch. Just. There is no Diversity; but what sticks with me is, whether they have original Jurisdiction here; which without Doubt they have not, if they don't make the Clerk a Spiritual Person, which will be hard to do: And if they have not Original Jurisdiction, one is never too late for a Prohibition. Vide ante 152. in pede.

It will be hard to make the Clerk a Spiritual Person, &c.

And per Cur', The Case will certainly lie against the Church-wardens upon such a Custom: As if Bailiff, or Reeve of a Mano, be bound by Custom to collect Money, Case will lie against him for not doing it, and Indebit' after it is received. Quære quid inde venit.

Per Cur', Case and *Indebitat'* will lie.

Tilsden *versus* Parfriman.

S. C. 1 Salk. 213, 345.

TIlsden being now in Newgate upon a Warrant of a Judge, upon the Act against Prisoners escaping; and the Regularity of that Matter being now referr'd to Mr. Clerke to examine, it was reported to him, That Tilsden had been indebted to Parfriman, and in Prison of Marshal at his Suit, and had escaped; and being taken up by a Warrant, lay in Newgate. That after the said Parfriman and he came to an Agreement: Whereupon, upon Payment of a Sum certain in Hand, and a Promise to make other Payments hereafter, he consented to have him discharged out of Newgate, That after the said Tilsden not performing his Agreement, the said Parfriman endeavour'd to get him arrested, but could not; but that he was arrested at Suit of another, and committed to the Marshal, who let him escape voluntarily; and after he paid that Plaintiff, but had no legal Discharge from him. Parfriman hearing of the new Arrest, goes to the Marshal, and asks him, If he had such an one in his Custody? Who answers, Yes: Whereupon he enters an Action against him in the Book that is kept in the King's Bench Office, and after gets him arrested by Process of

T. in *Newgate* upon an Escape-warrant *ad Sectam P.* Vide ante 21, 22, 63, 95, 154.

T. was after arrested, and *in Cust' Mar'*, &c.

the Court of King's Bench, keeps him in Cuſtody thereupon till he got a Judge's Warrant, whereby he was carried to Newgate; the Commitment by this Warrant is what is complained of: And tho' it was urged by Serjeant Darnell, That the Diſcharge out of Newgate was no Diſcharge of the firſt Action for Eſcape from which he was committed to Newgate; for the Plaintiff upon the Eſcape out of the Marſhal'ſea of Marſhal, had his Election to take the Party upon a new Action, or upon a Warrant now by the late Act, or to have an Action of Eſcape againſt the Marſhal, and the taking up upon a Warrant will be no Diſcharge to the Marſhal; therefore the firſt Action remains ſtill undiſcharged, and the Marſhal may take him up thereupon; and if ſo, he is now wrongfully at large, and may be taken up by a Judge's Warrant, as has been done.

Obj. That the 1ſt Diſcharge was no Diſcharge of the firſt Action, &c.

But per Cur', If one in Cuſtody of the Marſhal eſcape, and is taken upon a Judge's Warrant, that is no new Impriſonment, but a Continuance of the old; and a Diſcharge of that Commitment will be a Diſcharge of the firſt; but if he had eſcaped out of the County Jayl without Conſent of the Jayler, there the Marſhal might retake him: As if one be in Cuſtody of the Marſhal for Debt, and eſcapes, and after the ſame Plaintiff takes him up upon another Debt, and lets him go again, yet the Marſhal may retake him for the Eſcape.

Per Cur', Taking up an Eſcaper by Warrant, is no new Impriſonment &c.

Vid. ante 95, 154. 5 Mod. 232, 413.

2. The Court agreed, That if a Man be in Cuſtody two Terms without a Declaration, he ſhall be diſcharged upon Filing common Bail; and the Way to charge one in Cuſtody in Term-time, is by filing a Bill againſt him, and delivering a Declaration to the Turnkey: After which he muſt lie two Terms, as to that Party, before he can be diſcharged on common Bail; but in Vacation, there is no Way but to make an Entry in the Book that is kept in the Office of a Ramanet in cuſtod' Mar' ad Sect. de, &c. and that is ſufficient to charge him; but to make that ſuffice, the Party muſt be actually in Jayl, and not eſcaped; for the Reaſon why ſuch Entry is allowed good, is, becauſe of the Neceſſity of the Thing, the Party having no other Way to charge him when he is in actual Cuſtody: But upon an Eſcape there is not that Neceſſity, for he being at large, may be arreſted: Indeed, if the Marſhal will own him to be in his Cuſtody who is not ſo, that ſhall conclude him, and ſubject him to an Eſcape; but ſuch Confeſſion of the Marſhal ought not to be concluſive to any but himſelf, and it is againſt a Principle of the Law to charge a Man in Cuſtody, who is not in Cuſtody, and the Miſchief of it would be very great: And this cannot be called taking Advantage of the Party's own Wrong; for his eſcaping out of Priſon, where he is in Cuſtody at the Suit of A. cannot be any Wrong to B. though he be thereby deprived of the Advantage of charging him in Cuſtody. Indeed, if Marſhal ſuffer one to be in and out at Times, and during ſuch Time he is charged by a Remanet, &c. though he were actually out of Priſon at that Time, yet if he returned in again, that will be quaſi a Continuance of the firſt Impriſonment: And by ſuch Return he may have Notice of the Charge, and the Meaning of the Statute, whereby

Priſoner, how to be diſcharged if no Declaration in two Terms. 1 Salk. 213. 214.

But upon an Eſcape, he may be arreſted.

If Marſhal ſuffer one to be in and out, and he is diſcharged, and then returns again, &c.

the Marſhal is to acknowledge what Priſoners he has, is only in order to charge himſelf.

And per Cur' The ſecond Impriſonment in Newgate is irregular; but we cannot take Notice of any Thing till the Warrant be return'd: And the Queſtion will be, Whether we will relieve on Motion, or put you to your Audita querela?

That this ſecond Impriſonment is irregular, but the Warrant muſt be return'd before Remedy had. S. C. 1 Salk. 359. Vide Ib. 12, & 358. Vide 2 Inſt. Ante 150, 191. Poſt 263, 307. Error of Judgment on an Indictment for not repairing, &c.

Domina Regina *verſus* Saintiff.

AN Indictment againſt him for not repairing quendam Communem pontem ſitum in quadam communi ſemita pedeſtri, leading from ſuch a Place to ſuch a Place; which he was bound to repair ratione Tenuræ, and which he ſuffered to be valde ruinoſ' & in magno decaſu, &c. ad commune nocumentum omn' ligeor' Dnæ' Rnæ' illac tranſeun'; and Judgment given thereupon at the Quarter-Seſſions, of which Error was now brought.

And now Eyre objected to the Indictment, That it did not lie; for it did not appear that the Bridge was in altâ regiâ viâ, as it ought to have been per luy: For it was a Term of Art not to be ſupplied by any other Words, no more than the Words, Murdravit, Burglariter, &c. in Indictments of Murder or Burglary; Staundf. 96. Dyer 304. 2 Inſt. 701. Then if it does not appear to be a Highway, it muſt be taken to be only a private one, for the not Repairing whereof an Andictment does not lie: Of the other Side, in Maintenance of the Judgment, was quoted Weſt's Precedents, 147, 156, 346.

Obj. It did not appear the Bridge was *in alta regia via*. Vide Pal. 389. 2 Keb. 178. 1 Vent. 208.

And Eyre further urged, That the Power given to Juſtices of Peace in this Caſe, is by the Statute of 22 H. 8. c. 5. which mentions, that they ſhall judge of Decay in Bridges in Highways; ideo they ought to ſhew that this is ſuch a Bridge, and ſo purſue their Authority.

Holt, Ch. Juſt. An Indictment lies not for not repairing a Bridge, except it be in a Highway, as Mr. Eyre will have it; but the Word, Highway, is the Genus of all publick Ways, as well Cart, Horſe, and Foot Way, and yet Indictment lies for any one of theſe Ways, if they be common to all the Queen's Subjects, having Occaſion to paſs there; that is, if it be a Foot-way only common to them all, or Horſe and prime Way; and theſe are not altæ regiæ viæ, for that is the great Highway common to Cart, Horſe and Foot, that pleaſe to uſe it: So that the Term of Alta regia via, is not ſo neceſſary; and if there be a common Foot-way for all the Queen's Subjects, if it be in Decay, an Indictment muſt of Neceſſity lie for it, becauſe Caſe will not lie without a ſpecial Damage: Then as to the Authority of the Juſtices, they have a Power by the Statute of 1 Ed. 3. c. 16. by which they are created, to inquire of all publick Nuſances; and if this be a publick Bridge, the

C. J. It lies not, except the Bridge be in a Highway; *i. e.* in a publick Way.

That the Term, *Alta regia via*, is not ſo neceſſary. Vid. 1 Hawk. 201.

the ſuffering of it to be in Decay is a publick Nuſance, and ſo within their Juriſdiction: So all that ſticks with me is the Manner of laying it; for the Word, Commune, does not ex vi Termini import that it is common to all the Queen's Subjects, as it ought to do to maintain an Indictment. And one of the Precedents produced has the Word Publicus, which is of wider Extent than Communis, for there is Common for two, three, or more; and it will be hard to underſtand the Word, Common, to be univerſal, to charge a Man's Freehold. And without Doubt the Concluſion will not help it, if ſo much be not expreſly charged in the Premiſſes. And here it is not ſaid to whom it is common, ideo very fit to ſee Precedents before we determine it.

Publicus is of a wider Extent than *Communis*. Vide Fleta 174. Auſow. Pop. 66. *Ideo* fit to ſee Precedents, *&c.*

S. C. 1 Salk. 276. Vide ante 134. 2 Keb. 47, 55, 181, 415. 3 Keb. 212. 768. Poſt 304.

Trevivan *verſus* Lawrence *& al. Paſch. & Mich.* 3 *Annæ.*

In Ejectment by Adminiſtrator of Lands in Cornwall, this Special Verdict was found, That one S. R. was ſeized of the Premiſſes in Fee, and he being ſo ſeized, the Plaintiff's Inteſtate did ſue him in Debt upon a Bond in ſuch a Court in Weſtminſter, and that in that Suit Judgment was given againſt the ſaid S. R. in Mich. 1656. That in the 13th Year of the late King a Sci. fa. was brought by the now Plaintiff againſt the now Defendant, as Tertenant of ſome of the Lands whereof the ſaid S. R. was ſeized at that Time or ſince, and that the Defendant being ſummoned, did appear, and plead Nul tiel Record, and Day given to produce the Record, at which Day a Judgment of Michaelmas Term was produced, and Judgment and Award of Execution for Plaintiff thereupon; but that the Sci. fa. brought by the Plaintiff did recite a Judgment of Trinity Term 1656. And upon this Award of Execution an Elegit was taken out by the Plaintiff, and Lands extended, and in Ejectment to get the Poſſeſſion, the Judgment given in Evidence was that of Michaelmas 1656. And for the Variance between the recited Judgment in the Sci. fa. and that given in Evidence, the Jury doubted.

In Ejectment Special Verdict that a *Sci. fa.* was by an Admr. in *Trin.* Term, but no Judgment till *Mich.* Term. See 2 Lutw. 1267. 3 Lev. 300.

See 1 Saund. 37.

Eyre for Plaintiff. I agree the general Rule, That who makes Title under Execution, muſt ſhew a Judgment on which it is grounded; but here we need only to ſhew the Judgment on the Sci. fa. for tho' it be upon a judicial Writ, yet it is conſidered as an Action, and may be releaſed by that Name. Litt. §. 503, 504. If Judgment be againſt one, the Attorney for Plaintiff may ſue Execution by Vertue of his firſt Warrant, yet a Warrant in the original Cauſe does not impower an Attorney to appear to a Sci. fa. upon a Judgment in that Cauſe, or the Attorney for Plaintiff to ſue out a Sci. fa. Cro. El. 154. Releaſe of Action is a Releaſe of Sci. fa. but a Releaſe of Action is no Releaſe of Execution; therefore the Sci. fa. is no Execution, nor the Judgment upon it more than a bare Award of Execution.

Brotherick contra. A Judgment on a Sci. fa. is no new Judgment to affect the Land in this Caſe, but is only an Application of an ancient Lien on the Land, 2 Keb. 499. And this Judgment does not alter the Nature of the Duty, nor create a new one. Vide 3 Lev. Micoe *verſus* Morrice. Indeed an Officer that juſtifies by Vertue of a Writ need not ſhew a Judgment, but the Party muſt always do it. And per luy, a Sci. fa. lies not upon a Judgment on Sci. fa.

Obj. Judgment on *Sci' fa'* is no new Judgment, *&c.* Owen 134. Bridgm. 72 Hetl. 150.

Holt, Ch. J. If Sci. fa. recite a Judgment of Trinity Term in Debt, whereby all the Defendant's Lands whereof he was then, or at any Time ſince, ſeized, are bound, and the Tenants returned plead Nul tiel Record, and a Judgment of Michaelmas Term be produced, no Doubt that is a Failer of Record. But the Queſtion is, when the Record is produced, and Judgment thereupon, Whether the Defendants be not thereby concluded for ever? For to admit them to controvert it now, would be to falſify the Point tried, and that cannot be even by Iſſue in Tail: As if in a Writ of Entry a Recovery be againſt the Anceſtor of Iſſue in Tail, the Iſſue cannot falſify it in the Point tried, but he may ſay that his Anceſtor omitted the giving ſuch Things in Evidence which he can now give. And one may have a Sci. fa. upon a Judgment on a Sci. fa. and for this he remembered the Caſe of Obrien *verſus* Ram about 15 Years ago in this Court: A Judgment againſt a Feme Sole, who after took Husband before Execution, and then a Sci. fa. was ſued againſt both, and Judgment thereupon, and an Award of Execution againſt both, and then the Wife died, and then a new Sci. fa. is brought againſt the Husband Survivor, and adjudged it lay. And another Caſe ſince likewiſe in this Court: Feme Sole obtained a Judgment, and before Execution took Husband, and then they brought a Sci. fa. to have Execution, and had Judgment thereupon, and Award of Execution: The Wife dies, and the Husband ſurviving had another Sci. fa. and held well. And he quoted the Caſe of Gilbert and Bragg, Anno 1655. Judgment in Debt againſt Tenant in Tail, who died, and after Sci. fa. againſt his Iſſue, who return'd warn'd, made Default; though the Lands in Tail were not liable, yet he is concluded for ever, and this is grounded on the Book of 27 Aſſ. And a Jury cannot find againſt an Eſtoppel in a Point tried, and ſo where-ever there is an Eſtoppel that affects the Intereſt of the Land, the Jury cannot find againſt it. It is true, if you come to ſpecial Pleading, and it be reduced to a Point in Pleading, and the Party then will not take Advantage of it by relying thereupon, but will leave it at large, the Jury is not eſtopp'd, but may find the Truth. As ſuppoſe in this Caſe, Plaintiff had declared on a Judgment in Trin. 1656. and the Defendant had pleaded Nul tiel Record; if he will join Iſſue that there is ſuch a Record, he is gone, becauſe the Truth will be againſt him; but if he will ſay that there was a Sci. fa. taken out againſt the Defendant at ſuch a Time, reciting ſuch a Judgment as is now ſhewed in his Declaration, and that the Defendant pleaded Nul tiel Record, and that was found againſt him the Defendant, and conclude by relying on the Eſtoppel, he is ſafe, and the Defendant cannot offer any Thing againſt it.

Reſp. per C. J. That there was a Failer of Record, but that cannot be controverted now to falſify the Point tried.

S. C. 3 Mod. 186. Carthew 30. and Comberba. 103. See Cro. Car. 150, 164.

3 Keb. 170, 324. 1 Keb. 95, 113.

So if a Demiſe be pleaded by Indenture, and the other will ſay, Nil habuit in Tenementis, and the Plaintiff will ſay, Habuit in Tenementis, he thereby waives the Matter of the Eſtoppel, and leaves it at large, and the Jury may find the Truth; but if he had ſaid, that it being by Deed under his Hand and Seal, he ought not to be admitted againſt his Deed, to aver that he had nothing, the Truth could not be inquired into; but if the Iſſue were upon Nil debet, where the Point don't come in Pleading, as in Debt for Rent where the Demiſe is by Deed, the Party cannot give Evidence of Nihil habet in Tenementis, nor the Jury inquire of it: And when an Eſtoppel runs upon the Land, it alters the Intereſt of it; for if a Man by Deed indented make a Leaſe of Dale, reſerving Rent, in which at that Time he has nothing, and after he purchaſes Dale, and bargains and ſells it to a Stranger, the Bargainee ſhall hold it liable to the Firſt Leaſe, and coming under him that made the Leaſe, ſhall be eſtopp'd to ſay, that Bargainor had nothing to let in the Premiſſes at the Time of the Leaſe made; for this Eſtoppel runs upon the Land, and alters the Intereſt of it. And this Caſe having been thus ſpoke to in Eaſter-Term, pended in Conſideration till this Term: When per tot' Cur', Judgment was given for the Plaintiff, the Ch. Juſt. putting the Caſe ſhortly thus: Sci' fa' by Adminiſtrator upon a Judgment in Trinity-Term, the Record being in Truth of that Term, but no Judgment till Michaelmas-Term; and the Defendants being all except one return'd, plead Nul tiel Record; and the Record of Michaelmas Term produced, and Judgment on the Sci' fa', and an Award of Execution, Elegit taken out, and an Extent thereon, and an Ejectment brought to get Poſſeſſion; and now it is found out, that there was no ſuch Judgment as the Sci' fa' recited: What then? All theſe Perſons are eſtopp'd; for now they are not bound of the Plaintiff's Side to give the Record of the original Judgment in Evidence, but only the Award of Execution on the Sci' fa' for being all except one return'd Tertenants, they are all all except him eſtopp'd thereby from ſaying, that there was no ſuch Judgment; and as to him too, he is eſtopp'd if he does not ſhew a Title paramount the Judgment on the Sci' fa', for this is an Eſtoppel that works upon the Intereſt of the Land; and it is like a Judgment againſt one who is afterwards diſſeiſed, or a Sci' fa', againſt an Iſſue in Tail, who makes a Default, or pleads other Plea which is found againſt him, whereby Execution is awarded, he ſhall not after be admitted to ſay, that his Anceſtor was Tenant in Tail, and he Heir to the Intail; and even upon the Eſtoppel the Plaintiff in the Judgment ſhall maintain an Ejectment: As if a Man make a Leaſe by Indenture of Land which is not his, and after purchaſes it, that Leaſe ſhall bind him, his Heirs and Aſſigns; and an Eſtoppel that affects the Intereſt of the Land, ſhall run with it to whoever takes it; and none that are Parties to, or Claimants under, this Recovery, ſhall falſify it.

Vi. Hob. 207.

When an Eſtoppel runs upon the Land, it alters the Intereſt of it.

1 Salk. 276. 2 Mod. 115. 2 Keb. 364. Raym. 21. 1 Lev. 43.

Judgment *pro Quer'* upon the Caſe as here put.

All the Tenants here but one are eſtopp'd, &c.

And he too, if he does not ſhew a Title paramount.

Jud' pro Quer'. Jud' pro Quer'.

Fitz-Hugh *verſus* Dennington. Antea 227. See 2 *Salk.* 585.

THIS Caſe being moved again, Broderick urged, That the Plea was naught, and therefore Judgment ought to be affirmed: We were to be made free at the End of ſeven or eight Years from the Date of the Bond, of the Company of Joyners, if we deſired it; then the Election is ours, to be made free at the End of ſeven Years, or elſe at the End of eight; and this ought to be determined in ſome convenient Time before the End of Seven Years, that the Obligor might have all Things ready to perform his Condition, which was to be at the End, that is, the laſt Day of the ſeventh Year: And how has the Obligor diſcharged himſelf by ſaying, That we have not requeſted him at the End of ſeven Years, or ever after before the Action brought? For a Requeſt before the End of ſeven Years, in ſuch convenient Time as the Obligor might have reaſonable Time to get us made free at the End of ſeven Years, would be a good Requeſt to entitle us to our Action; and that would not come within their Plea: Ideo Vid. Mod. 241. One bound to pay 20 l. or 20 Kine in a Month, at Election of the Obligee, there Obligee is to make his Election in convenient Time, that Obligor may provide what he chooſes, and need not provide both: So if one be bound to make Obligee a Conveyance by Fine or Feoffment by ſuch a Day at Election of Obligee, the Obligee is to determine his Election in convenient Time before the End of the Term; ſo here we were to make a Requeſt in convenient Time before the End of ſeven Years, and they have not denied but we have ſo done; but only ſay, that we have not done it at the End of ſeven Years: 1 Lev. 68. 1 Ro. Ab. 374. Bridgm. 41. Aleyn 25. Style 49, 74.

That Judgment in this Caſe ought to be affirmed, &c.

Becauſe the Election or Requeſt ought to be determin'd within the 7 Years, &c. Ante 227. Vide 1 Cro. 179, 280. 2 Cro. 183, 652. 2 Bulſt. 229. Yel. 66. 3 Bulſt. 297.

Holt, Ch. Juſt. The Obligor was to make him free at the End of ſeven Years, or eight Years, if thereunto requeſted; let us then go by Steps; Suppoſe it were to make him free at the End of ſeven Years if thereunto requeſted; and the Defendant pleads, That at the End of ſeven Years he was not requeſted; Why is not that a good Plea, for it is directly the Words of the Condition? But what ſhall be underſtood to have been meant by the End of ſeven Years? Whether after they are expired, or juſt at the End of them, ſo as he ought to be made free on the laſt Day of the ſeven Years? When a Man is to do a Thing by ſuch a Time if requeſted, there if the Thing in its Nature may be done at the Time of Requeſt, then the Requeſt is to be made on the laſt convenient Part of that Time: As if a Man be bound to pay Money on Lady-day if requeſted, there the Requeſt is to be on the laſt convenient Time before Sun-ſet of that Day, on which ſuch a Sum may be paid; and if it were a Thing, the doing whereof required more Time, ought not that to come of the Plaintiff's Side in his Replication? And he took it clearly, that the Requeſt here ought to have been on the laſt moſt convenient Time of the laſt Day of the ſeventh Year, and that it would come too late the next Day:

C. J. This Plea is good, for it is directly to the Words of the Condition.

How the Requeſt ought to be made.

The Condition being at the End of 7 or 8 Years, &c.

Day: As if Leſſee covenant to leave all Things in good Order, and to vacate the Premiſſes at the End of his Term, he muſt do it on the laſt Day, and cannot ſave his Covenant by doing it the Day after; for the End of a Thing is Part of that of which it is an End: But here the Condition being, at the End of ſeven or eight Years, if the Plea had been, that he did not requeſt at the End of ſeven Years without going further, it had been bad.

Vide Fareſt. 143, 144. Pal. 321, If the Requeſt had been 2 or 3 Days after the 7 Years.

Powell ſeemed to incline, that a Requeſt in a Day or two after the ſeven Years, would be well; though he agreed, that in Demand for Rent it muſt be on the laſt convenient Time of the Day, becauſe there the Law appoints a Place where the Requeſt is to be made; but this muſt be a perſonal Requeſt, and no Place appointed for it.

Simile of a Bond where there is no Demand at ſuch a Day and Place.

Holt, Ch. Juſt. In a Bond where there is no Demand for the Payment of Money at ſuch a Day and Place, the Obligor muſt bring the Money the laſt Part of the Day to the Place; and if there be no Place appointed, he muſt ſeek him out if he be in England. If there be a Place appointed, and he has an Election to do the Thing on or before the Day, there he may give Obligee Notice to be there at the Day; and if he don't come, and Obligor is there and tenders, he ſaves his Bond: As if a Man be bound to enfeoff one of Lands in York the laſt Day of November, and Covenantee ſtays here in Town; yet if the Covenantor does not go down and tender, he breaks his Covenant; and there is a Difference when a Time is appointed, and when not; for if Feoffment be to be made at ſuch a Time if requeſted, there the Requeſt is to be made at that Time; but if there be no Time fix'd, then the Requeſt is to be made ſome reaſonable Time before, and the Feoffment need not be made immediately thereupon: And the Caſe in 1 Roll. Abr. 443. for Payment of Money in Holland on Requeſt, and a Requeſt in England held good, is upon this Diverſity.

A Difference when a Time is appointed, and when not.

2 Salk. 585. The End of 7 Years muſt be the laſt convenient Time of that Day.

And now Holt, Ch. Juſt. and Powell: The End of ſeven Years muſt be the laſt convenient Time of that Day; and it is juſt like a Demand, which muſt be on ſuch Time as the Thing may be done on. Indeed, if you had come and ſaid, That the Defendant was a great Way off on the laſt Day, it had been ſomething; and tho' the End of the Day be the laſt Inſtant of it to many Purpoſes, yet as to Acts to be done thereon, it is not ſo; for Day then is between Sun-riſe and Sun-ſet, which is the Time for Men to work on; and therefore if a Demand be to be on Midſummer-day, it may be good at Eight of the Clock in the Afternoon; whereas in December it muſt not be much after Four. Vide 2 Danv. 264.

The End of the Day is the laſt Inſtant to many Purpoſes, &c.

S. C. 1 Salk. 40, 44.

And Holt, Ch. Juſt. ſaid, That it has been adjudged, that if one be born the Firſt of February at Eleven a Clock at Night, and the Laſt of January in the one and twentieth Year, at one of the Clock in the Morning, he makes his Will and dies; yet ſuch Will is good, for

for he then was of Age: And they all agreed, the Plea was good, tho' they differed about the Time on which the Request was to have been made, viz. whether on the last Day of seven Years, or after.

Per Cur', The Plea is good, and the Judgment was reversed.

Jud' reversf' una Voce. 2 Sal. 585.

Leicester *versus* Foy.

S. C. 2 Salk. 656. Hill. 7. Vaux.

PRohibition was moved for to stay a Suit by a Vicar in the Spiritual Court for Tithe-Milk, upon a Suggestion of a Modus, That the Inhabitants of that Place did, from such a Day in April till All-Saints, pay every Tenth Day's Milk skimm'd, and made into Cheese, and ratione inde were discharged of all Tithe-Milk.

Prohibition to stay a Suit in Spiritual Court for Tithe-Milk, &c.

And Eyre against the Prohibition: It is true, making the Tithes of one Crop into Hay, will be a good Cause of Discharge of Tithe of Aftermoth; but he denied that it would be a good Modus to say, that for making the Atermoth into Hay, they should be discharged of Tithe of the first Crop: And this Modus amounts to a Non decimando of the Cream.

Q. If this *Modus* does not amount to a *Non Decimando* of the Cream.

Contra was urged, Cro. El. 609. Moore 909. Modus to pay the 10th Cheese made from such a Time to such a Time in Lieu of all Tithe-Milk, and though it be but for Part of a Year, yet being what they are not bound to do, it is a good Discharge of Tithe-Milk all the Year: Vid. Latch 222. Raym. 277. And suppose it were to pay a Groat a Year for all Tithe-Milk, it would be well, and why not this? And though the Court did not like the Modus, as seeming very severe on the Vicar; yet to settle the Point which they thought of great Consequence, they granted a Prohibition directing them to declare forthwith.

Goddard *versus* Smith.

S. C. 1 Salk. 21. 2 Salk. 456.

CASE for maliciously indicting him of Barretry without probable Cause, setting forth that he was debito modo inde Exoneratʼ; and at the Trial to prove the Declaration, he produced a Nolle ulterius Prosequi by Attorney General: And the Chief Justice doubting whether this Evidence maintained the Declaration, and strongly inclining that it did not, reserved it for the Opinion of the Court; and he said, That the Entring a Non Prosʼ was only putting the Defendant sine Die; and so far from discharging him from the Offence, that it did not discharge any further Prosecution upon that very Indictment, but that notwithstanding new Process might be made out upon it; and sure it is hard to allow a Man that gets off by a Non Prosʼ to maintain an Action for a malicious Prosecution. Indeed, if he had pleaded Not guilty, and the Attorney General had confessed it, that would have done; but he that gets off upon a Non Prosʼ, does not at

Case for indicting the Plaintiff of Barretry, &c. Vide ante 215, 216.

Per Ch. J. 'Tis hard to allow a Man that gets off by a *Non Pros'*, to maintain an Action, &c.

8 Co. 58. at all get off on the Merits of the Cauſe; and to maintain a Conſpiracy, it is neceſſary to lay and prove an Acquittal: So in an Action for ſuing for a great Sum in order to hold to extravagant Bail, the Plaintiff muſt ſhew what became of that Cauſe, in order to maintain his Action; and ſo is my Lord Hob. ----But this here is not ſo much as a Nonſuit, for the Indictment ſtands ſtill in force, and the Attorney General muſt make new Proceſs upon it when he pleaſes: But he remember'd a Cauſe about twenty Years ago, in which Juſtice Wyndham directed for the Plaintiff on the ſame Point, and ſaid, he thought it hard even at that Time.

That this is not ſo much as a Nonſuit.

That the Word [*inde*] *non vult, &c.* goes not to the Fact charg'd.

Mountague urged, That it is Attornat' Dominæ Reginæ ipſum, &c. inde non vult ulterius Proſequi; ſo he would have the inde to go to the Fact charged: Sed tota Cur' contra; for at moſt it can go but to that Indictment, and cannot be pleaded to a new Indictment for the ſame Offence, for a Nolle Proſequi at that Rate would amount to a Pardon.

That *inde acquietat'* goes to the Fact charged. 1 Sid. 420. 2 Salk. 456. 1 Vent. 33. 2 Keb. 521. 5 Mod. 394.

And per Powell, In all Caſes of Conſpiracy the Inde acquietat' goes to the Fact charged, and not to the Indictment; for if it went to the Indictment, if the Indictment were vicious, Conſpiracy would lie; but that is not ſo, and colourable Proof would deſtroy this Action; and the Plaintiff by procuring this Nolle Proſ', bars the Defendant from giving ſuch Proof, and this Action cannot be maintained but upon Acquittal of the Fact charged by Verdict, Confeſſion, &c. but he doubted of the Effect of a Nolle Proſ' upon an Indictment, if it diſcharged the Indictment, or only put the Defendant without Day, and that notwithſtanding the Attorney might iſſue new Proceſs upon it.

When *Nolle Proſ'* upon Indictments began, &c.

And Holt, Ch. Juſt. ſaid, He had known it thought very hard that the Attorney General ſhould enter Nolle Proſ' upon Indictments, and that it began firſt to be practis'd in the latter End of King Charles the 2d's Reign, but that on Informations it had been frequently done; and he ordered Precedents to be ſearched if any were in Mr. Attorney Palmer or Nottingham's Time.

Harcourt, Maſter of the Office; There never has been any Proceedings after a Nolle Proſequi: And per omnes, In caſe of Barretry, Defendant upon Motion may have a Rule to have Articles delivered to him of the Inſtances, and the Proſecutor ſhall not give Evidence of any Particular but what he has given Articles of; and if the Proſecutor gives no Articles, he ſhall give no Evidence.

Nolle Proſ' a Diſcharge of an Information. Hard. 126, 153. No Rule made.

And at another Day, Holt, Ch. Juſt. declared, That in all K. Ch. the 1ſt's Time there was no Precedents of a Nolle Proſ' on an Indictment: And Gould quoted a Caſe in Hardreſs, where it was enter'd on Record on an Information, and held it to be a Diſcharge of it. And the Court ſeemed all clear, that the Action did not lie, but gave no Rule.

Anonymus.

BAron and Feme came to acknowledge a Deed by them both in Court, and the Court ordered an Acknowledgment only of one of them to be enter'd viz. of the Husband.

Baron and Feme acknowledge a Deed in Court.

Cockroft *versus* Smith.

S. C. ante 230.

PLaintiff declared as Clerk of the Court, The Defendant pleaded, that he was an Attorney of the Court, absque hoc that he is a Clerk of the Court. Plaintiff replies, That he is a Clerk of the Court, prout patet per Record' inde resident' in Cur'; and prays the Record may be inspected: The Defendant would demur, and not join in the Issue; whereupon the Plaintiff signed his Judgment.

Plaintiff declared as Clerk of the Court, &c.

And per Cur', The Plaintiff is regular and made the Replication the true Way without desiring the Record to be brought in, and the Defendant forced to pay Costs to have the Judgment set aside.

Buxom *versus* Hoskins.

S. C. 1 Salk. 52. Vide post 310.

ERror was of a Judgment in Ejectment; and the Plaintiff not assigning Error, the Defendant in Error brought a Sci' fa' against him to have Execution, reciting a Judgment of two Messuages, &c. whereas the Judgment in Truth was de uno Messuagio: And to this the Plaintiff pleads, Nul tiel Record; and now it was moved to amend it, and for Amendments of Sci' fa', were quoted 1 Roll. Abr. 197, 797. 22 Ed. 4. 6. 2 Keb. 175. 2 Cro. 372. Br. Abr. 20. Sect. 20. 3 Cro. 760. 2 Sid. 7, 12.

Plea, That he was an Attorney, *absq;* &c. Error of Judgment in Ejectment. and a *Sci' fa'* to have Execution, &c.

Holt, Ch. Just. This Sort of Sci' fa' is always to have Execution and the Writ thus mentions it; and the Plaintiff in Error may if he please plead to it a Writ of Error brought, and still depending, and assign Error.

And Holt, Ch. Just. cum reliqua Cur'. There is a Difference when the Writ is bad and vicious on the Face of it, and when it is good in the Frame of it, but not fitted to that particular Purpose; and all the Cases put of Amendment are of the first Kind; and some Colour there would be to amend in this Case if the Defendant had appeared and pleaded some other Plea, or had taken no Advantage of this Slip, so as the Proceedings would have been vitious without Amendment; but here he having taken Advantage of this Slip by pleading Nul tiel Record, shall we vitiate his Plea by an Amendment? And they agreed, That where-ever an Original was amendable, there a Sci' fa' would be so too; but said, That this would not be amended in an original Writ of

Post 286. That the Writ might have been amended, &c.

of Error: Why? because it is a good Writ, and would well remove the Record it describes if any were; and quoted the Cases of Hamond v. Jersey, Pasch. 9 W. 3. and Thomson v. Crocker, 12 W. 3. And he said, If Formedon were made for 10 Acres, when the Instructions given are for 20, he doubted it could not be amended; for the Statute is to cure only Mistakes of Clerks, which would endanger the Reversing of Judgments, and not to alter Matters of Fact, by extending it further than it was before; and if this Writ be good in its self; but not ad idem, the Party may take out another Writ pending this; for if this Writ be not ad idem, it cannot be pleaded in Bar of the other; and against the Case in 2 Cro. 372. which Holt, Ch. J. said was a great Strain, was quoted, 1 Cro. 162, 163. and to amend this Writ, were quite to alter the Nature of the Writ after it is return'd and executed; which ought not to be.

That the Statute is to cure only Mistakes of Clerks, &c. Vide post 269, 270, &c. 2 Show. 304, 305.

Et per Cur', No Amendment here.

Et per Cur', No Amendment. Vide postea.

Ward *versus* Apprice.

Indebit' ass' by one Part-owner of a Ship against another, &c.

AN Indebit' assumpsit for Money received to the Plaintiff's Use: Broderick open'd this Matter at the Bar, That the Plaintiff, Defendant, and several others, were Part-owners of a Ship, and several Sums of Money were given by the rest of the Part-owners to the Defendant, for the Use of the Ship, for the Receipt whereof he had given a Note; that the Defendant had actually laid out the said Sums on the Ship and Voyage, and enter'd an Account of the Manner, &c. in a certain Book kept for the Affairs of the Ship; and then an Allowance thereof was enter'd likewise in that Book, which Book did belong to the Plaintiff, Defendant, and other Part-owners in Common, and now was in the Plaintiff's Possession; and upon this Matter made out by Affidavit, he moved, That the Plaintiff should either produce that Book at the Trial, or let the Defendant take Copies of such Entries and Allowances of Payment therein, as would be proper for him to make his Defence by; and said, this ought to be as well as if a Man bring an Action of Covenant upon an Indenture, and the Defendant swears he never had a Copy, you will not compel him to plead till the Plaintiff furnish him with a Copy, quod Cur' concess': But here the Defendant should have taken up his Note upon the Account allowed, and you have entrusted him with the Custody of this Book; and if he has broke his Trust, you must seek for Remedy in Equity; and if an Action be brought by a Shopkeeper for Money due on Sale of Goods, we never enforce him to produce his Books; but if very slender Evidence be against him, then if he will not produce his Books, it brings a great Slur upon his Cause.

Motion, That the Plaintiff may produce the Book at the Trial, &c. Vide 1 Salk. 285. 2 Salk. 690.

C. J. Plaintiff ought to consider if this Action will lie, &c.

But Holt, Ch. Just. said, The Plaintiff would do well to consider, whether an Indebit' assumpsit would lie in this Case; and they would do nothing in it: They notwithstanding owned it to be a mischievous Case, where many are Tenants in Common, or Copartners in a Trade, and have one common Book of their Transactions, and one has the Possession of it, and then brings Actions against the others.

Gree *verſus* Sharp.

EJectment upon Demiſe at ſuch a Place in Devonſhire, of Lands in another Vill in the ſame County, and the Ven' fa' was from the Place of the Demiſe; and at Cauſe's being carried down, and a View granted, there being a Jury, and a decem Tales: Now at the Trial a Panel was return'd promiſcuouſly of the Jury, and decem Tales; and now for this Irregularity, a new Trial was granted.

In Ejectment upon a Demiſe of Lands in another Vill, &c. 1 Keb. 179, 418. 3 Keb. 103, 254, 485.

And, 1. per Cur', In Ejectment the Venue ought to come always from the Place where the Lands lie, and not from the Place where the Demiſe is laid to be made; but that Fault is cured after Verdict by the Statute of Oxford.

Vide 2 Salk. 665, 545.

And per Holt, Ch. Juſt. There is a Difference between the Practice of Common Pleas and this Court, in caſe of Views granted: If upon a full Jury in the Common Pleas the View be granted, and a Juror withdrawn, an Entry is made of this, and Proceſs continued againſt the Jury, and a decem Tales awarded on the Roll, and there may be a Command of a Tales de Circumſtantibus beſides; but in the King's Bench, if a full Jury appear, and a View is granted, and a Juror be withdrawn, they take no Notice of it by Entry, but only grant a new Diſtringas againſt the ſame Jury, except the Juror withdrawn; but if there be a decem Tales awarded here, and a Jury appears, and a View is granted, there they muſt take Notice of it by Entry, and continue Proceſs againſt the Jury, and decem Tales; otherwiſe the decem Tales would be diſcharged: And the Diſtringas of the decem Tales muſt be the ſame decem Tales return'd upon the firſt Writ, and to mix the Perſons return'd on the principal Panel, and the decem Tales in the Panel that tries the Cauſe after the View, is irregular; therefore the Verdict was ſet aſide.

Difference of Practice in *C.B.* and *B.R.* in caſe of Views.

That to mix the Perſons return'd on the Panels, is irregular, &c.

Strong *verſus* Courtney.

SPecial Aſſumpſit, ſetting out, That whereas James T. had a Rent-Charge iſſuing out of the Defendant's Land, the Defendant, in Conſideration the Plaintiff would indempnify, and ſave him harmleſs againſt all Diſtreſſes to be taken by James T. out of or upon the Premiſſes, promiſed to pay him ſuch a Sum. Upon Non aſſumpſit, and Verdict for the Plaintiff, it was urged, That no Right of diſtraining appeared for the ſaid James, ideo no Conſideration for the Promiſe: And of this Opinion was all the Court, though it were after Verdict; which they ſaid, would not cure the Want of Conſideration: Secus, if it had appear'd that the Rent had been aſſigned to James. See Carthew 446.

Special *aſſumpſit*, For that *James T.* having a Rent-charge out of Defendant's Land, would ſave harmleſs againſt Diſtreſſes, &c.

That this was no Conſideration, &c.

Garibaldo *verſus* Cagnoni.

S. C. 1 Salk. 102. Vide ante 90. In an Action of Aſſault and Battery, an *Ac etiam* for 40 *l.* was by Conſent put into a Writ, &c. 1 Sid. 276, 307. 2 Keb. 101.

A Conviction upon an Indictment of Battery being againſt G. he in Conſideration that C. the Proſecutor would not preſs for a great Fine, undertook to put in ſpecial Bail to an Action of Treſpaſs to be brought by the Plaintiff for the ſaid Battery: And at this Time a Writ which the Plaintiff C. had taken out, and returnable in Michaelmas Term paſt, was run out; and in Hillary Term Bail was put in, and after a Trial 100 l. Damages were given to the Plaintiff: And now a Sci' fa' being againſt the Bail, they applied to the Court for Relief; for that the Ac etiam, which was by Leave put in the ſaid Writ in Michaelmas Term, was only 40 l. and the Bail meant to undertake for no more; and ſince the Plaintiff had declared to more Damages, and recovered more, the Bail were thereby altogether diſcharged: And a Rule of Court ſaid to have been made in the 22d Year of King Charles, and found by Mr. Clarke in the then Secondary's Book; that in Caſe of Bail, if the Recovery were for more than was mentioned in the Ac etiam, the Bail ſhould not be charged at all in iſta Actione, was very much inſiſted on.

1 Mod. 8. 2 Keb. 552. 1 Sid. 425. 1 Ven. 44. Declaration and Recovery for more than the *Ac etiam*, and a *Remit'*, denied.

And the Ch. Juſt. remember'd a Caſe of Thomſon and Collins, in which he had been of Counſel, in my Lord Pemberton's Time; where in an Indebit' aſſumpſit the Declaration and Recovery was for more than the Ac etiam; and there tho' it was offered to level it with the Ac etiam by entring a Remit' on the Record for the reſt, it was denied them on Debate.

Reaſonable Rule, That the Plaintiff ſhould recover no more than mentioned in the Writ.

And note; In this Caſe upon Search, this Rule could not be found in the Clerk of the Rules Book: But the Ch. Juſt. ſaid, There was Reaſon for ſuch a Rule to purſue the Act 13 Car. 2. c. 2. that Bail ſhould know what they came bound for, and not to be ſaddled with more; and that muſt be by recovering no more than was mentioned in the Writ, to which the Bail of Neceſſity muſt relate: Whereas if the Plaintiff recovers more, the Bail, if at all liable, muſt be liable for what is recovered; for their Condition is to anſwer the Condemnation, or render the Principal; and it would be extream hard to enſnare the Bail to a greater Sum than is mentioned in the Writ: And ſince the Proceſs againſt them muſt be founded upon the Judgment, it ſeems from thence they muſt anſwer for all or none; but if leſs than is mentioned in the Writ be recovered, then there is no Inconvenience to the Bail; and if there be no Bail inſiſted on but common Bail, it is but juſt the Wrong-doer ſhould anſwer whatever is recovered. And he further ſaid, That in Caſes of outragious Batteries, when People came to him for Leave to charge with Ac etiams, he would give Leave to charge with a good Sum; but when they came for Bail, they muſt be content with Bail of reaſonable Value, and not inſiſt upon their Worth in Proportion to the Sum charged.

If leſs be recoverd, 'tis no Inconveniency.

Reaſonable Bail upon *Ac etiam* grounded.

And Powell and the reſt agreed, The Bail by no Means ought to anſwer for more than was mentioned in the Ac etiam.

And Powell added, That if ſuch a Rule as was mentioned had been, the reaſonable Conſtruction of it would be, not to ſuffer the Bail to be charged with more than was mentioned in the Writ, but likewiſe not to diſcharge them for good and all; for tho' it be true the Proceſs againſt them muſt be for the Sum recovered, yet he ſaid the Court might hold the Plaintiff from levying more than was mentioned in his Writ; and the Bail, upon bringing ſo much into Court, might obtain a Rule to ſtay any further Proceedings againſt them, as is done every Day in caſe of Render of the Principal before the Return of the ſecond Sci. fa. tho' in Strictneſs of Law they ought not to do it after a Capias returned againſt the Principal.

If when Recovery is for more, it be reaſonable to diſcharge the Bail, &c. 1 Sid. 183, 258.

To which Holt, Ch. J. ſaid, The Caſes differed very much, for this Rule was made in Imitation and Purſuance of the Law, and they ought not to make any Conſtruction contrary to it, and the Words of it were, That the Bail ſhould be looked upon as none in iſta Actione; and to render before Return of the ſecond Sci. fa. that was ſo by the ancient Courſe and Practice of the Court.

The Words of the Rule were, That the Bail ſhould be looked upon as none *in iſta Actione.*

But then it was further moved, that this Bail being of Hillary Term, could not be looked upon as Bail to the Writ returnable in Michaelmas Term, and then the Caſe would be no more than if one had by Conſent, upon a good Conſideration, put in ſpecial Bail in a general Action of Aſſault and Battery, in which Caſe there would be no Pretence of a Surpriſe on the Bail, and therefore they ought to anſwer the whole Condemnation, which the Court inclined to; but being informed there was never any other Writ taken out, Clerk the Secondary informed the Court, That the filing of Bail without a Writ taken out before or after, was void: Which Holt, Ch. J. and Gould, affirmed to be true, But the other Clerks all ſaid, that Rule was underſtood thus, viz. That if Bail were filed by Conſent, and no Writ already taken out, nor taken out within 8 Days after, the Bail was void, that is to ſay, the Defendant was not thereby obliged to accept of a Declaration; but if he did accept one, it would be well, and this ſeemed a reaſonable Explication; but at laſt the whole was referred to Mr. Clerk to examine. Quære quid inde venit.

That this Bail of Hill. Term could not be Bail to the Writ.

But note, Holt, Ch. J. wiſhed the Attorneys to beware of charging extravagant Ac etiams, for otherwiſe an Action of the Caſe would lie for holding to exceſſive Bail.

Caution againſt extravagant *Ac etiams*, and exceſſive Bail. 1 Sid. 183.

Note likewiſe, The ſame Point, in regard to a Recovery above the Ac etiam, came in Queſtion afterwards this Term in the Caſe of Bovey *verſus* Wheeler.

And then Holt, Ch. J. ſaid, The above-mentioned Rule was made to rectify an extraordinary Practice in this Court; which was, If a

Man became bound for another in an Action of 10 l. he was thereby Bail in all Actions of the same Term, by the same Plaintiff, against that Defendant, let the Sum be ever so great, which was mighty inconvenient.

And this Rule was made in Pursuance of the said Statute of 13 Car. 2. that the Bail might know what they undertook for.

Domina Regina *versus* Tutchin.

S. C. 1 Salk. 51. Ante 164. State Trials, p. 659 to 706. 1 Lev. 143. Upon an Information against *Tutchin*, Author of the *Observator*, the *Distringas* was tested the Day after the Return of the *Ve. fa.* Mov'd in Arrest. 1. For that both the Writs ought to have been returnable at a common Day.

An Information was exhibited against him by the Attorney General in Easter Term last, for contriving, composing and publishing a certain seditious Libel, intituled, The Observator. And pleading Not guilty in Trinity Term, a Ve. fa. was issued out to the Sheriffs of London, (the Fact being laid there) returnable die Lunæ post Tres Sept. Mich. and the Distringas was then awarded on the Roll in the common Form, with the Nisi prius, die Sabb. post Craft. Animar'; but the Distringas thro' Mistake was tested the 24th of October, viz. the Day after the Return of the Ve. fa. and after Verdict for the Queen, Mountague moved in Arrest of Judgment,

1. That the Ven' and Distring' were made returnable at a Day certain, whereas the Fact arising in another County, it ought to have been at a common Day.

Vid. Cro. El. 820. 1 Danv. Abr. 335, &c. ib. 1 Lev. 2. See Skinner 46, 253, &c. Carthew 70, 76, 157, 172, &c.

Holt, Ch. J. In case of Information, or other Proceeding originally commenc'd in this Court, the Process may be at a Day certain, tho' into another County; and so has been lately settled here, in a Case wherein we took it into Consideration, and ruled it so upon Certificate of all the Clerks: But if an Indictment be removed up hither by Certiorari, and after is carried down to Trial, there the Process must not be returned at a Day certain, but at a Common Day. Besides, there is great Reason it should be so here, for the Information is exhibited on a Day certain, and the Defendant's Appearance to it is so too, and he pleads to it at a Day certain, and then why should not the Process be so too? The Plea is, die Lunæ Craft. Trin', and that is certain; for Craft' Trin', without more, is a common Day. Indeed in Common Pleas, except it be where they proceed to Bill or in Assize, they must go by common Days. And even in this Court, in Assize, we may go by a Day certain; and where one is sued here as present in Court, all must be by a Day certain: And so of Proceedings by Bill in any County of England. And since the Attorney General, by reason of the universal Jurisdiction of this Court, may file a Bill here for a Crime committed in any County of England, he may make the Process returnable at a Day certain, and he has his Election of the one or the other. Reliqua Cur. acc'. And the Difference is between Things originally begun here, and brought hither by Certiorari.

Difference between Things originally begun in *B. R.* and brought up by *Certiorari*.

2. That tho' the Diſtringas was well awarded on the Roll, on the Day of the Return of the Ven', which was the Day for both Parties in Court, yet the iſſuing a Diſtringas the Day after, and teſted the Day after, was without Warrant, as not being according to the Award of the Court; for by the Statute of Niſi prius, the Proceſs of Niſi prius is to be awarded in Præſentia Partium, and it ought to bear Teſte of the ſame Day, or elſe it is a Diſcontinuance.

2. That tho' the *Diſtringas* was well awarded, yet the Iſſuing and *Teſte* was without Warrant.

To this it was anſwered by Serjeant Powys, That this was amendable even at Common Law, being a bare Miſpriſion of the Clerk, he having a good Warrant before him to guide himſelf by, viz. the Award of the Diſtringas on the Roll, by which a Day was given duly to the Parties, a Day of Niſi prius. And for Amendments at Common Law, before 14 Ed. 3. c. 6. which is the firſt Statute of Amendment, the Authority of 8 Co. 156. b. was urged by him. Want of Entry of a Continuance amended, and ſo of Miſentry of Eſſoin by a Clerk. 22 Ed. 3. c. 10. a. A Diſcontinuance amended, and that muſt have been by Common Law, for the ſaid Statute of 14 Ed. 3. is only for Amendments of Letter or Syllable, and the Judges were ſo ſcrupulous, that they doubted whether they could amend a Word by it. 29 Ed. 3. 32. Habeas Corpus amended. Bro. Amendment, 32. 4 H. 6. 16. b. And the Book ſays, that ſuch Amendments may be, eſpecially in Caſe of the King. F. Amendment, 9, 12.

R. That 'tis amendable at Common Law, being a Miſpriſon of a Clerk. Vide ante 264.

It is true, People of late have conceited, that nothing is amendable in criminal Proceedings, becauſe, ſay they, they are excepted out of the Statute, as if nothing were amendable at Common Law; but in many Caſes at Common Law, the King could amend where the Subject could not; as if Quare impedit, at the King's Suit, be præſentere inſtead of præſentare, it was amendable, tho' in an Original. But beſides, this is a Matter within the expreſs Words of the Statute of 8 H. 6. c. 12. 1. This is all in the ſame Term, while the Record is wholly in the Breaſt of the Court, and is relative to Matter of the ſame Term. And I know nothing but is amendable in the ſame Term, for 8 Co. 156. b. ſaid, That at Common Law the Judges may amend their Judgment, as well as any other Part of the Record, in the ſame Term. And we are upon a Miſpriſion of an Officer of the Court, who is to make up his Record, or iſſue Proceſs according to the Act of the Court, which is right, and which he had before him, and that in the very Term in which it is committed; and we are not endeavouring to amend the Teſte of an Original which comes out of another Court, but the Teſte of a Judicial Writ, according to the Award of the Court, and no Statute of Amendment is againſt us in this.

Poſt 287. 'Tis within the expreſs Words of 8 *H.* 6. *c.* 12.

And the Words of 8 H. 6. are very comprehenſive, and would take in all criminal Matters whatſoever, as well as civil, if there had been no Exception in it; otherwiſe the Exception had been vain; therefore what is not foreprized by the Exception, is within the general Words of the Statute; and the Exception expreſſes only Indictments

Exception of criminal Matters in 8 *H.* 6. as to Indictments, Appeals, &c.

ments and Appeals of Treaſon or Felony, and Outlawries of the ſame: And the Statute of 14 Ed. 3. makes no Diſtinction between criminal and civil Cauſes. It may be the Statute of 32 H. 8. c. 1. does not extend to any Pleas of the Crown, becauſe it mentions Party and Party, which in Decency cannot be applied to the King.

2 Cro. 502. And he relied very much on 2 Cro. Harris's Caſe. Indictment for a Nuſance at the Seſſions, and Not guilty pleaded, and the Clerk of Aſſize, who ought to have joined Iſſue for the King, omitted it, and the Matter being tried and found againſt the Defendant, this was moved in Arreſt of Judgment; and yet, after ſeveral Years, the Court ordered it to be amended. 2 Cro. 529. Information for Recuſancy againſt Baron and Feme for Recuſancy of the Feme, and the Entry was, Et præd. the Baron and Feme veniunt, & præd. the Feme dicit quod ipſa non eſt inde culpabilis, & de hoc ponit ſe ſuper Patriam. And this was likewiſe amended after Verdict by the Docket of the Officer, it being a manifeſt Miſpriſion of the Clerk; and yet this was a clear Diſcontinuance, for there was no Plea, and this Amendment was in another Term. Cro. Car. 144. Sir John Aſhley's Caſe:

Quo Warranto. In a Quo Warranto, the Defendant diſclaimed ſpecially, that is, the Diſclaimer in the Paper-Book was ſo, and the Entry on the Roll was of a Diſclaimer general; and a Year after this was amended, as the Court ſaid, at Common Law, being only Miſpriſion of the Clerk in copying the Paper-Book before him, which was right. 1 Sid. 244. Upon an Indictment, the Ve. fa. was directed Vicecomitibus

Poſt 272,306. Cantuar', and the Return was only by one, there being in Truth but one Sheriff of Canterbury; and this was ſet right, by making an Entry on the Back that there was but one Sheriff, and this was ſaid to be an Amendment at Common Law, without the Help of any Statute; and likewiſe that it might well be by the Statute of 8 H. 6. which does not extend to Informations at all, or if to any, not to Informations at Common Law, as this is: So he concluded that this was amendable at Common Law, being in the King's Caſe; or

If this Miſpriſion be forepriſed by the Statute. if not for that, yet that it might be by reaſon of Miſpriſion of the Clerk in the ſame Term; or if neither, that it was within the Purview of 8 H. 6. c. 12. and not forepriſed by the Exception.

It imports to know what is amendable in Crown-Caſes by Common Law. The Attorney General, ad idem. This is a Caſe of great Concern, for if none of the Statutes of Amendments or Jeofails extend to Caſes of the Crown, certainly it importeth much to know what is amendable in Crown-Caſes by Common Law. The Preamble of 32 H. 8. c. 3. takes Notice of the Inconvenience of having Judgment ſtayed upon ſuch nice Exceptions; and he agreed, that Statute could not be thought to extend to Crown-Cauſes, becauſe of the Words Demandant and Tenant in the Statute; but from that he inferred, that the Crown-Cauſes did not ſtand in Need of it; for it would ſound very harſh for the Subjects Cauſes to be taken Care of, and that the King's Caſe, in Matters of equal Miſchief, ſhould paſs unregarded. The Law gives great Privileges and Prerogatives to Suits of the King, which the Subject has not: Demurrer to Evi-

dence shall not be in the Case of the Queen, without Consent of her Counsel; otherwise in Case of a Subject. Queen after Demurrer join'd may wave it, and come to Issue. Vide 5 Co. Before Judgment in the Queen's Case, no Discontinuance can vitiate. Hard. 504. Discontinuance not to be alledg'd before Judgment, for till then, even in Case of a Subject, it may be amended at the Pleasure of the Court; Secus after Judgment in another Term. 2 Cro. 211. Want of Form in the King's Writ shall be amended, otherwise in the Case of a Subject. 4 H. 6. 18. F. Am. pl. 22. Original at Common Law amendable in the King's Case, but not in Case of Subject. 8 Co. 156.

1 Cro. 347. 1 Vent. 17. 28.

Original amendable in Queen's Case.

And this is further manifest by every Day's Experience; for the Queen shall amend her Information before Issue join'd, and this she may do even in Informations for Perjury, which is a most infamous Crime; and this by common Right of the Crown at Common Law, and more than a Subject can do in his Action. And such Amendments as we press for were always allowed, where it could not turn to the Prejudice of the Party; but be agreed, Amendment which would alter the Defence of the Party, or any Way turn to his Prejudice, ought not to be; and this is no such, for the Party had a right Day on the Roll, and he did appear and took his Trial at that Day. 20 H. 6. 18. Capias amendable in the King's Case, because no Prejudice to the Party, but Exigent is not, because he would be thereby prejudic'd, viz. outlawed; and this stands clear of all Exceptions of Prejudice.

Amendment not to prejudice Party.

Then as to the Exception it self: Though it may seem by the Award on the Roll that the Writ ought to bear Teste the same Day, yet there appears no Reason to make it absolutely necessary it should be so, and there are no Authorities that the Law does require it. And by the Reason of the Thing it seems it may be otherwise; for the Ve. fa. is returnable all the 23d, and may be return'd any Time that Day, and the Court may sit all that Day, and peradventure the Clerk has not Time enough after the Award to make out a Writ till the next Day, and if so, they ought to Teste it according to the Truth the next Day. It is true, there is Reason it should be made out and tested in a reasonable Time after, that the Jury might have Time to appear, and the Party timely Notice to prepare for his Trial; but not that it should be absolutely necessary it should be tested on the Return of the Ve. fa. F. N. B. 20. b. Br. Discontinuance 59. Upon Writ of Error brought, if the Plaintiff does not assign Error, and sue out a Sci. fa. against the Defendant, ad audiend. Errores, of the same Term of which the Record is, all is discontinued, not said that he must do it at the Return of the Writ. 22 Ed. 4. 20. And all that is necessary at Return of the Writ is, that the same Day be given to the Jury and Parties, but not that the Process against the Jury be tested of that Day. Vide Br. Discont. of Process 53. Hab. Corpora Juratorum shall have the same Day that the Parties have, that is, it shall be continued to that Day; but not that the Teste must be of that Day. Now the Jury and Party are continued over to a Day certain by the Award on the Roll.

If absolutely necessary to *Teste* the *Distringas* the Day of Return of *Ve fa.*

And

'Tis neceſſary in an Appeal, &c. Vide Cro. El. 433. 572.

And I don't know any Caſe that makes it neceſſary that the Teſte ſhould be of the ſame Day with the Return of the firſt Writ, but that of Yelv. 204. and in Cro. Jac. 203. It is in an Appeal which is upon another Reaſon; for in an Appeal, if there be any mean Time between the Return of one Proceſs, and the Teſte of another, as in that Caſe there were ſeven Days, all the Proceſs is diſcontinued; but that is upon a ſpecial Reaſon, that of being in Appeal, where the Proceedings have always been very ſtrict, and by the Common Law all Appeals were to be carried by freſh Purſuit; and ſo it was till the Statute of Glouceſter, which gives them a Year and a Day, within which it muſt be brought, and in an Appeal he cannot impart; and if he does, it is a Diſcontinuance; and this is the only Authority I can find: But in Cro. El. 572. where it is taken Notice of that the Proceſs bore Teſte the Day after the Return of the Ve' fa', and the Exception is taken to other Matter on the Record; yet this was not mentioned as a Fault, or amended. Beſides, the Courſe of the Crown-Office has gone ſometimes this Way, and ſometimes another Way, and due Weight will be laid upon the Courſe of a Court.

No Imparlance in Appeal.

If this ought to be ſet right by Courſe of Common Law.

However, if it be amiſs, it ought to be ſet right, and that by the Courſe of the Common Law, without the Help of any Statute; for it is the Miſpriſion of the Clerk of the Court, which in Strictneſs is the Act of the Court in the ſame Term, and by Conſequence within the Power of the Court; and beſides, the Crown without Doubt has the Benefit of the Statute of Amendments in many Caſes, and great Authorities are ſo; 14 Ed. 3. has no excluſive Words in it, and I ſee no Reaſon why it ſhould not extend to Crown-Cauſes, for there is nothing in the Statute that may lead to ſuch a Conſtruction: Statute of 32 H. 8. I agree does not extend to it for the Reaſon before mention'd; but that of 16 & 17 Car. 2. is very general and extenſive, without any Thing in it to exclude Crown-Cauſes; and the general Words of the Statute of 36 Ed. 3. c. 15. for Entry of Pleas in Latin, and Pleading in Engliſh, extends to Pleas of the Crown, ideo a pari: And my Lord Hale, for whoſe Opinion all Profeſſors of the Law have a great Veneration, was of Opinion in my Lord Fitz-Walter's Caſe of a Quo Warranto, where the Writ iſſued to Sheriffs, there being but one, That that Miſtake was amendable by the Statute of 16 & 17 Car. 2. 2. It is true, it went off after upon another Point, viz. That it appear'd the Jury had thrown Dice for their Verdict; but upon ſeveral Motions, Hale abided by his Opinion, That it was amendable, 1 Sid. King *v.* Read, and 8 Co. Blackmore's Caſe throughout is, That all Caſes where the Words of the Statute are not between Party and Party, that general Words will reach to Crown-Cauſes if they be not excepted: And this is not excepted by the Statute of 8 H. 6. the Words whereof are as comprehenſive and expreſs as can be for us; that Statute indeed does not extend to all Pleas of the Crown, as to Appeals, Indictments of Treaſon or Felony, and Proceſs thereupon, becauſe they are excepted by expreſs Words; but to all other it does.

1 Cro. 526. that general Words of Act ſhall not bind or bar the King. Amendment in a *Quo Warranto*.

2

In

In Dyer 346, 347. an Information is amended in a stronger Case than this: It was in an Information Qui tam for Usury, and the Party brought in by Subpœna, and appear'd by Attorney, and pleaded Not guilty; and this taken for an Exception: And yet after Debate, Jud' pro Quer' propter Stat' de Jeof. as the Book says: And much of the common Course of this Court seems to be upon this Ground and Reason, That Pleas of the Crown are amendable either by Common Law, or by the Statute, as the Practice of amending Records removed by Certiorari by the Roll below. Informations amended. 10 E. 3. 29. 1 Sid. 148, 259.

But in this Case, taking it for granted that the Distringas ought to bear Teste on the Return of the Ve' fa', What do we desire to amend? Only a Letter or Syllable, or rather a Tittle; for the Date is in Latin Figures XXIIII. and to strike out the last Stroke is what we desire; a Thing within the express Words of 14 Ed. 3. in the Case of a Subject; and the Statute makes no Difference between that, and Cases of the Crown: And greater Amendments than this have been at the Common Law; and that of late Days, 8 Co. 156. says, Without Doubt there were Amendments at Common Law: And we put it upon the other Side to shew, that there was any Diversity between Crown-Causes and those of Subjects, except it were that Crown-Causes were amended where Subject's Cause could not be: And if they don't shew any such Authority, then all the Authorities for Amendments in Civil Causes are a fortiori in criminal Causes: And Co. (ubi supra) says, That at Common Law any Variance in any Part of the Record from the Original, was amendable; so the Judges may amend their own Judgment, as also any Part of the Record in the same Term, but Misprision of the Clerk in Process was not amendable in another Term: So it was his Opinion, that it could be done any Time the same Term; but he might go a little further, and say it might be any Time before Judgment; for all the old Books are so. Now the Reason of that Rule extends to all criminal Causes as well as civil: If a Fine be set in Court the first Day of Term, by Common Law it may be mitigated or discharged any Time during the Term; Trin. 7 W. 3. the King *v.* Walcott: Writ of Error to reverse an Attainder of Treason, a necessary Part of the Judgment being omitted, the Reversal was actually pronounced and entered on the Roll; but after the Court finding that there were Precedents and Forms of Entries to the contrary, they ordered the Judgment to be struck out again the same Term, and to be put in the Paper to be argued; and the Process of the Court, as well as their Judgment, is in the Breast of the Court all the same Term. That 'tis now desired only to amend a Tittle, &c. and ought rather to be in Crown-Causes. Vid. 1 Vent. 132. in another Term. 1 Cro. 251. 1 Vent. 69. Raym. 186. 4 Mod. 395. Parliament Cases 125.

A second Instance of this Practice is, That all Misprisions of the Clerk of Assize, or Justices of Peace, in certifying the Indictment in the Caption, may be amended the same Term it comes in. 1 Saund. 200. If Indictment be vitious in the Caption, the Court by Common Law may amend it the same Term it comes in. 1 Sid. 259. the King *v.* Glover. The Coroner was ordered to attend, and to amend an Inquisition return'd hither. Cro. Car. 276. Indictment upon the Statute of H. 6. of Forcible Entries; it laid the Inquisition to have been taken Amendment of an Indictment vitious in the Caption, &c.

apud S. coram A. & B. Juſticiar' Pacis in Partibus præd'; and there being three Diviſions in the County, and three ſeveral Commiſſions for them, Exception was taken that it did not appear for which of them A, and B. were Juſtices: And this was held a fatal Exception; but ruled, that if the Certificate of the Clerk of Aſſize were faulty by his Miſpriſion, they would amend it by the Roll below: Juſt. Jones; Samſon's Caſe, 1 Roll. Abr. 196. Error to reverſe an Indictment of Murder; the Certificate of the Clerk of Aſſize was wrong, for want of a Continuance; and one of the Judges would have it amended at Common Law, for the great Miſchief that would otherwiſe enſue; but Juſt. Jones was againſt it, except the King did ſpecially deſire it.

Certificate of Clerk of Aſſize. Vide 1 Jo. Stafford's Caſe.

And per Holt, Ch. Juſt. That muſt be by ſpecial Mandate: But there two Judges were againſt Juſt. Jones for its being amended. Pal. 480. Amendment of an Indictment, according to a Precedent in Edward the 4th's Time; and that before the Statute of Amendments, civil and criminal Matters were amended, he quoted 4 Ed. 3. 9. b. Entry of Eſſoin amended. 5 Ed. 3. 25. Entry of Voucher to Warranty amended. 3 Lev. 420. That the Record of a Judgment is in the Breaſt of the Court all the ſame Term, and all Proceſs till Judgment. 9 E. 4, 3. Bro. Amend. 46. Default of Proceſs amendable any Time before Judgment. 7 H. 6. 27. After Iſſue joined, a Diſtringas, and no Award of Tales on the Roll, and there being a Tales on the Back of the Writ, it was amended. Fitz. Amend. 32. Bro. Diſcontinuance 15. 13. Fitz. Am. 13, 65. g. 16, 17. 22 Ed. 3. 19. Bro. Amend. 105. The Record was, that ſuch a one, Gentleman; and in the Niſi prius Roll, Gentleman was omitted, and it was amended, and all by the Common Law. Cro. Car. 563. On the Ve' fa', S.S. was return'd, and the Diſtringas was ſo, but the Panel return'd was D. S. and that Variance was moved in Arreſt of Judgment; but upon Examination, it was found to be only a Miſpriſion of the Sheriff's Clerk, and therefore amendable by Common Law, without the Aid of the Statute of H. 6. Fitz. Amendment 16, 17. Bro. Amend. 27. Treſpaſs to the Damage of 100l. the Record of Niſi prius was 100s. and Verdict 100l. and this Miſtake amended as a Miſpriſion of the Clerk; and there the Judge of Niſi prius had no more Warrant to try that Iſſue than is in our Caſe. Bro. Amend. 26, 29. Fitz. Am. 16, 54, 55. all at Common Law. 2 Ri. 3. 11. Br. Amend. 87. Things of the ſame Nature with this were amended at Common Law, and the Statute makes no Alteration againſt us, but where it is expreſly ſo. Bro. Amend. 22, 59.

Eſſoins amended, &c. 7 E. 4. 15.

Diſtring' &c. amended all at Common Law. See Skinner 46, &c.

There are not in the Year-Books many Inſtances of criminal Proceedings, and that is a great Argument that theſe Niceties have not crept into the Law in criminal Matters; for if they had, ſomething of them would be found: Then if there were Amendments at Common Law, why ſhall there not be ſome in Informations? There are Multitudes of Amendments of this Nature in civil Caſes. 1 Cro. 144. is an Amendment which could be at Common Law even in another Term, as is there held; and ſure it is in the Power of the Court to do Right to the Queen, as well as to the Subject; and he quoted my

Why ſhould not Amendments be in Informations by Common Law?

Lord Macclesfield's Case: Rule was to reverse an Attainder of High Treason about sixteen Years before upon Writ of Error, and no Entry thereof, or any Record made up, no Continuance or Assignment of Error; and yet, to reverse this Attainder, Leave was given to make up the Record now: And if this Help was given to a Subject, Why should not the like be in the Queen's Case? And there it was said to be a Default in the Officer of the Court, and that was in some respect the Default of the Court; therefore he was ordered to do that now, which then he ought to have done; so here it is to make your Officer do what he ought to have done before: And the Case of the Queen against the Warden of the Fleet, was much stronger than this; for there a Ve' fa' upon Issue join'd in Chancery, was return'd hither the 4th of February, and the Record it self did not come in till the 7th; and the Officer mark'd it to have come in on the very Day, on which it came in Truth: And the Court ordered the Matter of Fact to be examined, in order, that if it should appear that the Record had come in on the 4th, it should be set right; but if appearing not to have come in till the 7th, they could not amend it, being a Discontinuance: But upon Writ of Error before the Lords, that Judgment was reversed for this Reason; For that the Clerk might have enter'd it as of the 4th, though in Truth it came in after.

Amendment upon a Rule to reverse an Attainder.

Q. If this be only a Misprision of the Clerk.

But Holt, Ch. Just. said, That Matter was not set right in the King's Bench to this Day; for they look'd upon it to be against their Duty as Judges, to enter a Record against Truth.

Lastly, The Attorney General said, That the making a Writ different from the Roll, was only the Misprision of the Clerk: Vide Cro. El. 467. 1 Roll. Abr. 200, that Teste out of Term, or on Sunday, is the Fault of the Clerk.

Broderick contra. And first, he took a Difference between Suit of the King in civil Prosecution of his Right, and a Prosecution against a Subject for a Crime; in the first Case he has greater Favour than a Subject, in the other the strictest Nicety is to be kept to: And upon this Difference he would distinguish the Cases of Quo Warranto's from the present Case, as likewise that of Warden of the Fleet; for they are to be look'd on as Prosecutions for the King's Civil Right. He agreed, there were some Amendments at Common Law; but said, If there were Amendments in all the Instances put by them, there would be little Use of the Statute of Jeofails, or of Amendments: He denied that any criminal Proceedings were amendable by the Statute of H. 6. or 16 & 17 Car. 2. and no Authority of any such Amendment is quoted except the Case of Dyer 346, 347. And 1 Ro. Rep. 447. takes Notice of the Case in Dyer, and says, It was held not amendable in 22 El. And 8 Co. in the middle of Blackmore's Case, says, That the Statute did not extend to criminal Proceedings. 1 Cro. 312. that the Statute of Jeofails does not extend to Pleas of the Crown; and a wrong Venue is fatal in a Quo Warranto, Style 307. In Suit upon

Difference, where the King sues in civil Prosecution of his Right, &c.

If criminal Proceedings are amendable by Statute, &c.

A wrong *Venue* is fatal.

upon the Statute of Inmates, a Diſtringas hoze Teſte out of Term, and it was not amended; and a Ve' fa' de novo was awarded, Vid. 3 Keb. 485. the Opinion of Hale ſo much relied on of the other Side; but in 1 Vent. 17, 35. Infozmation foz Fozgery at Common Law, denied to be amended. Hard. 217. Infozmation upon the Statute of Navigation, foz Impozting certain Spices of the Gzowth of Aſia, Africa oz America, from Holland beyond the Seas. Exception taken, That it was not ſaid that Holland was not in Aſia, Africa oz America, and held fatal though after Verdict: He agreed, that Recozds, come hither by Certiorari, if variant from the Roll below, ſhall be amended by it: The Caſe of the Writ directed to two Sheriffs when there was but one, was amended by having an Indozſement made on the Back of the Writ, that there was but one Sheriff in Fact; and it was an Amendment by the Common Law, accozding to a Pzecedent in 5 H. 7. where a Writ was directed Coronatoribus. 1 Keb. 900, 901. But it is ſaid, That there is no Neceſſity it ſhould be teſted on the Day of the Return of Ve' fa', but that is expzeſly againſt the Caſe in Yelverton befoze put: This is not like the Caſe of Walcot, that was an Alteration of the Judgment of the Court, which is not compleat till the laſt Day of Term; noz is it like my Lozd Macclesfield's Caſe, foz doubtleſs the Court may ſupply loſt Recozds, oz put Things in the State they have been in befoze, oz make their Officer do that which he ought to have done; but this is to alter what he has done: Vid. 3 Cro. 572. Ve' fa' returnable at a Day different from Award of Court, and Trial thereupon, not amendable: Per Popham, 1 Roll. Abr. 201. Yelv. 60. Infozmation on a penal Statute, and the Ve' fa' on the Roll awarded, was coram Nobis ubicunq; and that Ve' fa' made out, was coram Nobis without mozе; and Judgment ſtay'd thereupon.

Ve' fa' de novo.

Informations not amended.

Records by *Certiorari* may be amended.

If a Neceſſity that *Diſtringas* ſhould be teſted on the Day of Return of *Ve' fa'*.

If Officer may alter what he had done.

Holt, Ch. Juſt. The Caſe of the Warden of the Fleet was a civil Action, and no criminal Pzoſecution; but meerly a civil Courſe to entitle the King to an Office fozfeited to him.

Mountague having had Time given him to anſwer, argued it ſolemnly:

Arg. That the *Teſte* of this Writ is not amendable at Common Law. See Carth. 70, 76, 157, 172, &c. Skinner 46, 253, &c.

1ſt. This Point as it is of Concern to the Crown, ſo it is of high Impoztance to the Subject, foz it is to make a Pzecedent that will be leading in the like Caſes. Again, Actions Qui tam, which in ſome Reſpects are between Subject and Subject, have been always excepted out of the Statute of Jeofails; ideo a fortiori, Actions of higher Nature were ſo.

That the Teſte of this Writ is not amendable at Common Law; though I agree many Amendments were at Common Law, no Authority has been quoted that Erroz in the Teſte of a Writ was amendable at Common Law: Coke in his 8th Rep. 156. b. 157. a. ſays, That Judges may amend their own Judgment in the ſame Term, oz any other Part of the Recozd; but it does not from thence follow, neither does he ſay it, that they may amend Faults in Writs iſſued

If Error in the *Teſte* of a Writ be ſo amendable.

out of their Record to an Officer in Païs, or Returns made by him: And the Reason why they may amend their own Judgments and Continuances, which are the only Instances given there, is, because they are their own proper Acts, which, as it is there said by my Lord Coke, remain in their Breasts in the same Term; but the Act of another in Pursuance of their Award cannot be said to be their Act, and a Writ made out to an Officer cannot be said to be in the Breast of the Court: If Entry of the Clerk of the Award of the Court had been different, there might be some Colour to amend the Roll; but this is not so, you will take Notice that the Writ ought to be according to your Award, and that it is not so, is the Fault of the Officer, not of Court: And all their Authorities out of the Year-Books are between Party and Party, and not like this: Not within the Statute, the Words of 44 Ed. 3. are very large, and yet there is not one Authority of Amendment of Crown-Causes by that Statute: And Coke holds, in his 8th Rep. 57. b. that Statute did not extend to Pleas of the Crown; and this he says generally, without saying that it is because they are excepted, as he says, upon the Statute of H. 6. in that Case; and this Statute of 14 Ed. 3. has no Exception; and yet by the Opinion of that Book, the Words of it do not comprehend Pleas of the Crown: And what can be the Reason that the general Words of this Statute do not extend to Pleas of the Crown, as it has been acquiesced unto ever since, but the great Indulgence that is given to the Subject in criminal Matters?

Or the Act of another in Pursuance of the Award of the Court.

Not within Stat. 14 Ed. 3.

Object. The Crown's not being relieved by the Statute, is a Sign it did not want it; Hard. 504. 2 Cro. 211. that there can be no Discontinuance in Crown-Causes till Judgment, those Cases extend only to what we agree, that Acts of the Court are in their Breast before Judgment; and so is 3 Lev. 430. and Coke's Note, That the Statute did not extend to Pleas of the Crown, would be impertinent if that were so that they did not need it.

If Pleas of the Crown wanted any Relief as by that Statute.

As to the Statute of 8 H. 6. which has an Exception of Appeals, of Indictments of Treason and Felony, and Outlawry on the same; from whence it is strongly urged, that it extends to our Case, because it is not excepted.

I answer, 1st, That the Words of it are not more comprehensive than those of 14 Ed. 3. that of H. 6. is all Misprision of Clerk in Writ, the other is all Misprision in Process, so they are co-extensive: And the Exception, we say, is only ex abundanti cautelâ of some scrulous Law-maker, or but mention'd for Instances to shew they meant not it should extend to Pleas of the Crown. Many Estates-Tail are not mentioned in the Particulars instanced by the Statute De Donis; and so are many Offices not within the Enumeration of Particulars in the Statute of Ed. 6. against selling of Offices: So since the Proceedings of all the Time, ever since the making of these, have gone against the Notion of amending of Crown-Causes, it will be hard to begin now.

As to Stat. 8 H. 6. 'tis all Misprision of Clerk in Writ, &c.

And

That this was not a Miſpriſion, but the Neſcience of the Clerk, and not amendable. Vi. poſt 286. *in pede.*

And this Variance of the Roll from the Teſte cannot be thought the Slip of the Clerk. Indeed if the Day certain of which the Writ ought to bear Teſte were entered on the Roll, then it might be a Miſpriſion of the Clerk not to imitate what was ſet before him; but that being not ſo, it was the Neſcience of the Clerk, that he did not know, but it would do well to have it teſted at any ſubſequent Time; and Faults through Neſcience of the Clerk are not amendable. And Amendments here would quite alter the Writ, and make it quite another Writ, as much as the 24th differs from the 23d, and that ſuch Amendment would be like the Alteration made by Juſtice Ingram, whereof Mention is made in 2 Ro. 3, 10. a. for which he was fined 800 Marks. But per Cur. That Alteration was made extrajudicially and clandeſtinely, and that made the Crime of it. And he relied on Gage's Caſe in Co. Ent. and in More and Child *verſus* Harvey. Mich. 11. W. 3. where, on a Sci. fa. upon a Record out of Chancery, Iſſue was join'd, and a Niſi prius was on the very Day of the Return of the Writ. But per Cur. That could not be ſet right, becauſe the Trial was actually had before the Return of the Writ. And he quoted the Opinion of Noy, in Cro. Car. 144. that none of the Statutes extended to the King's Caſe.

250.

Allocatur in Caſes of Removal by *Certiorari*, where the Term is but as one Day.

Parker, of the ſame Side. As to Records removed hither by Certiorari the ſame Term they come in, to have them amended, the Truth is ſo; for when a Record is removed hither by Certiorari, by Intendment of Law the very Record is brought hither; but if it appear to the Court not to be rightly entered, they will do it, becauſe all the Term it is in their Breaſt: But it is not like Writs iſſuing out and coming in the ſame Term, for there it is otherwiſe; for as to Records coming by Certiorari, the Term is but one Day, and the Court are not abſolutely poſſeſs'd of it till that Day be out; but as to Writs, the Term has ſeveral Returns and Days in it.

And here the Fact was, That the Writ was really made out at a Day after the 23d, and teſted according to the Truth on that Day; and to make it teſted againſt this, would be to go againſt the Truth.

That the Writ ought to be made out *in Præſentia Partium.*

And we ſay, That the Writ ought in Law to appear to have been made out in Præſentia Partium; and the Command of the Court is not by the Entry on the Roll, but by the Writ. If indeed it had been made out at a Day after, and teſted of the Return of Ven. it would have been intended to have been well, and made out of the Time it bears Teſte.

And he ſaid, The Difference in Crown-Cauſes was between Suit for the King's Civil Right, which is favoured, and Criminal Proſecutions, which are ſtricti Juris.

Difference in Point of Amendment of Writs.

And he took another Diverſity, in Point of Amendment of Writs on which nothing is done, and Writs executed: As if on a Capias nothing be done, but Non eſt inventus returned, that may be amended, when if the Party were taken upon it, it would be otherwiſe.

Ve. fa. when amendable.

And for this Diverſity, he relied on the Opinion of Popham, in 3 Cro. 572. A Ve. fa. was rightly awarded, and made out (through Miſtake) wrong: Per Popham, If a Trial had been upon it, it ſhould

not be amended. Vide 34 H. 6. 2 Br. Am. pl. 10. 3. Juror returned upon a Habeas Corpora different from Ve. fa. and not amended.

And there is another Diversity where the thing is really done well; as if the Ve. fa. be of one Person, and he is really sworn, but by another Name, this was amended. Vide 28 H. 6. 3. 2 Sid. 12. Palm. 490. 1 Ro. Ab. 196.

Serjeant Powys, by Way of Replication. As to Diversity between the King's civil Right and criminal Prosecution, they quote no Place where it is taken; and if the King has that great Favour in the Prosecution of his civil Right, for that it concerns the Revenues of the Crown, in which the Publick have an Interest, a fortiori it ought to be in Prosecutions for Crimes which is for the Administration of Justice, and in which the Subject, viz. the Publick, have the highest Concern that they should not go unpunish'd, especially where the Offender loses no legal Advantage, or receives any real Prejudice by it. If this Slip of the Clerk be prejudicial to the Offender.

2. It is admitted, that all Acts of the Court, even the highest and most transcendent, are amendable in the same Term; a fortiori then should the Slip of a Clerk in pursuing the Warrant of the Court be so too, that likewise being a Matter no Way prejudicial to the Offender.

3. If a Writ original, when a Fault is discovered therein, shall be sent into Chancery, to have this Mistake of a Clerk there amended by that Court; Why shall not this Court in like Manner amend the Mistake of their Clerk in a Writ issuing out here?

Then great Endeavours have been used to exclude this Case out of the Benefit of the two Acts of Parliament, for that the general Notion has been, that those Statutes did not extend to criminal Causes or Proceedings: But sure the Opinion of my Lord Vaughan in his Case of collateral Warranty is very reasonable, That ancient Interpretations ought to be followed; but that, on the other Hand, a Thousand Resolutions against the express Words of an Act of Parliament ought not to prevail. And the Words of the Statute of H. 6. are very expressive and general. All, &c. And the Exception very particular. If the Acts of Parliament exclude this Case. Quære and Vide ib. 179, and 327. Vid 1 Jo. 423, 424.

Attorney General. Sure the Diversity between civil and criminal Prosecution of the Crown, as to the Point of legal Favour, is very groundless; for we all know, that by the Common Law a Criminal was not to have a Copy of his Indictment, or Counsel to plead for him, which is now remedied in Case of Treason; and before, and even now in all Cases of Felony, the Defendant has no other Opportunity of defending himself but merely upon the Fact, Guilty or Not guilty. Arg. *Per Att. Gen.*

It is odd to say, that if the Roll on the Award had been wrong, it might be amended as the Act of the Court; and that the Slip of the Clerk in Pursuance of the Award of the Court which is right, shall not be amended; that is, that when there is nothing to amend by,

by, it shall be amended, and not when there is a Good Foundation to amend by.

It is not true to say, that there is no more Reason to bring Pleas of the Crown within the Statute of 8 H. 6. than within that of 14 Ed. 3. for that 14 Ed. 3. has the Word Party in it, which may have been the Reason why it has not been construed to extend to Crown-Causes; but there is no such Word in the Statute of H. 6. and Co. seems strongly of this Opinion in Blackmore's Case, for he says generally, That 14 Ed. 4. does not extend to Crown-Causes; but when he talks of that of H. 6. he says, That Statute extends not to Crown-Causes: Why? Because they are excepted.

If this Amendment be against the current Opinion in all Ages.

But it is objected, That we contend against the current Opinion in all Ages, and we agree it was generally taken so, tho' no direct Authority be in the Case; and there are not many Authorities express, even upon the Statute of Jeofails.

And such general received Opinion upon a Matter never solemnly adjudged, is of no great Weight; for it was a Common Opinion ever since the making of the Statute 32. concerning Actions by Assignees of a Reversion, that it did not extend to an Assignee of a Copyholder. And though there be a Case in Yelv. agreeable to that Opinion, yet about 12 Years ago, when it came thoroughly to be considered, it was held, That that Statute did extend to Copyholds. Some Opinions sudden, and passing sub Silentio, ought not to be of any great Consideration.

Q. Stat. 29. Car. 2. c. 3. Sect. 2. *i. e.* of Frauds. Post 281.

I do agree this is a Case of great Consequence; But what is the Consequence? Whether an Offender should go unpunish'd? And sure Criminals are not the Favourites of the Law. There is indeed Favour where Life is in Question, but none in case of inferior Offences? and it is more for the Honour of Justice and Law that Criminals should be punished, than escape upon such Niceties: But however, all this must stand upon the Law, and every Body is to have Justice.

Against a known Rule of Law.

As to 2 Cro. 211. where it is obiter said, That the Statute of Jeofails shall not extend to Crown except it be expressly named, that is, directly against a known and true Rule of Law, upon Construction that general Words of an Act of Parliament for Furtherance of Justice, or Suppressing of Wrong, shall bind the King. And in the Case in Style 304. Suit upon the Statute of Inmates, and a Distringas tested on Sunday, and the Question, Whether it was amendable by 18 El. or 21 Jac. 1? And held not; but no Mention was made of 8 H. 6. And Yel. 60. was an Information upon a penal Statute, and the Rule was of a sudden, Let Judgment stay; but that is not to be understood as a final Determination; and besides that is excepted by the subsequent Statutes.

If this be Misprision or Nescience.

And to say that this is no Misprision, but Forgetfulness, which is Nescience, Quia omnis Scientia est Reminiscentia, ideo omnis Ignorantia est Oblivio: We say, That all Defect through Want of due Care or Diligence is a Misprision, and so is 8 Co. 160. b. If a Clerk imbezils the Record voluntarily, or suffers to be defaced by Accidents, through Want of Care, it is a Misprision. And the Amendment in Sid. by Suggestion on the Roll of a Fact otherwise out of their No-

tice, is much more than we desire here: And a Quo Warranto is not a civil Prosecution for Ouster of the Franchise; for suppose the Defendant disclaim in the Franchise, yet he must further answer the Usurpation; and if it be found against him, he shall be fined. *Quo Warranto*

Holt, Ch. Just. The Case of Sherrot and Talbot does not come up to this Case; That was an Amendment for the Subject and in a civil Case. And sure if in a Quo Warranto a Subject makes a limited Disclaimer, and the Clerk enters it a general One, this ought to be amended: And on the other Side, if an Original Indictment be right, and the Clerk enters it wrong on the Plea-Roll, it shall be amended; And Harris's Case is a very shrewd Case; in capital Matters there never is a compleat Issue join'd, but de hoc Ponit se super Patriam, but in other criminal Cases it is otherwise; and the Case of Sir John Curson, is a strong Case too: Indeed, this is a Case of great Consequence; and it has been the general receiv'd Opinion, that the Statutes of Jeofails, or Amendments, did not extend to Pleas of the Crown, and great Regard is to be had to that; and it is true, at the Judgment of the Case in Style 304. no Mention was made of the Statute of H. 6. and that is rather an Argument it was clearly conceived it would not help them, than that it was not thought of; for there were very learned Men then at the Bar: And the Reason of the late Judgment in Case of Action brought by Assignee of a Copyholder, was founded upon the Rule taken in 3 Co. --- That general Words of Act of Parliament shall extend to Copyhold Estate, where it is for the Benefit of the Tenant, and not to the Prejudice of the Lord. C. J. as to a *Quo warranto* and Indictment. Q. If Tufton. That this is a Case of great Consequence. Ante 280. Case of Assignee of a Copyholder.

The Court having taken Time to consider till the last Day of this Term, now the Attorney General pressing for their Resolution, they argued seriatim thus: After they all declared they could wish for longer Time, not that they were unsettled in their Opinions, but to digest and methodize their Reasons to greater Satisfaction.

Gould, Just. I hold it amendable at Common Law; for otherwise, what mean all the Amendments in Indictments and Informations quoted by Mr. Attorney? For the Purpose, that of 2 Bulst. 35. and the Case there quoted by one of the Judges: Two were indicted for Felony, and found guilty: The Judge that tried them, found the Indictment was in the singular Number, and therefore stay'd Judgment; and after upon Consideration, by the Opinion of the ten Judges, it was amended, and the Men hanged; and, I say, that must have been by the Common Law; Vid. Raymond 440. And I take it, that Faults that do not alter the Issue or Trial, may be amended; and he relied on Sir John Curson's Case in 2 Cro. and Godfrey's Case in Sid. and Sherrot and Talbot's Case: And indeed, if it were not for Bradley and Banke's Case, I should think it well enough, and a good Continuance; for the 23d all Day the Defendant may be in Court, and the very first Minute of the 24th here is Process issues out; and the Case of Bradley v. Bankes, as it is in Cro. Jac. does not at all contradict this Opinion. Arg. *per Gould* Just. That it is amendable by the Common Law.

Powys accord. against the common Notion.

Powys accord. 1. This is an Information perfectly at Common Law, and not upon any Penal Statute: It has obtained, That the Statute of Jeofails extends not to any Crown-Cases, because they have an Exception of all Indictments and Informations upon Penal Statutes; and it is a common Notion, That no Crown Matters shall be amended by any Statute of Amendments; but it seems very odd to make such Interpretation upon the Statute of H. 6. for the Purview of that Statute is as express and general as can be; and the Exception but particular; therefore to extend it to Things of inferiour Nature, is very wonderful to me: In the Lord Bridgwater's Case, my Lord Hale thought the Statute of 8 H. 6. was not to be so restrained; but the Exception was an excellent Key to open the Meaning of it, that is, to amend whatever comes within the Generality of the Purview, and is not excepted by it: And he was of Opinion, That Crown-Causes did want, and in many Cases ought, to have the Help of the Statute of Amendments and Jeofails; but the rest did incline against him: And my Lord Coke saying, That 8 H. 6. extends not to Informations in Crown-Causes, because they are excepted, and we finding upon Perusal of the Statute that they are not excepted, make the Reason run quite another Way; and I believe such Opinions as are against me, have been conceived upon the Credit of that Saying of Coke, without any further Examination; and though the King be not named within the Purview, yet his being named within the Exception, shows the Law-makers understood that without the Exception it would extend even to all Crown-Causes; however, in regard to the Opinions against me upon the Statute, I do not go upon the Statute, but hold it amendable at Common Law. And much I think may be said upon the Reason of the Thing, that it is very well as it is; the Return is on the 23d, and so is the Award, and the Writ issues on the 24th; so that there is no Interval of Time or Chasm between the one and the other, but the Minute the one leaves it, the other takes it up: The Words of the Award are, Præceptum est quod Distringat'; and that regards Futurity, and cannot be on the 23d, because that would be to distrain them before any Default in them; for they have all the 23d to appear, and the next Day without Interruption continues the Process. As to the Case of Bradley *versus* Banks, as it is in 2 Cro. it does not contradict this Opinion, but seems rather to favour it; for there Notice is only taken of the Gap between the Teste of a Capias and the Return of the Original in Appeal, which was seven or eight Days: And though Yelv. says further, That the Exigent bore Teste the Day after the Return of the Capias, which was ill; yet Cro. taking Notice only of the great Distance of Time between the Return of the Original and the Teste of the Capias, seems as if he had conceived that the Court had grounded their Opinion upon that: But that this is amendable at Common Law, and sure there are much bolder Amendments even in capital Matters; and we are to consider that this is but the Misprision of the Clerk in Process, and that in an Offence of an inferiour Nature; and if there have been greater Amendments in Capitals, I think this may be well amended: Vid. 1 Sid. 243, 66. 1 Keb. 191, 215. for Common Law Amend-

Purview of Stat. H. 6. is express, &c.

Opinions conceived upon Lord *Coke's* Saying.

If here there be any Interval of Time, &c.

That there have been greater Amendments in capital Matters in an Information.

Amendments in Information for Perjury, the Ve' fa' was J. S. without Addition, and by Consequence must be J. S. Senior, and Distringas J. S. Junior, quite another Person, and amended; 2 Bul. 35. Pal. 480. that this is Misprision of Clerk, 1 Roll. Abr. 201. Cro. El. 572. So this being an Information at Common Law, and there being Amendments at Common Law, and this being Misprision of the Clerk, the Award of Court being right, I hold it ought to be amended.

Powel Contra. This is a Case of great Consequence: And the first Question is, Whether this be a Fault at all?

2. If it be, whether it be amendable at Common Law, or by the two Statutes of Amendments of 14 Ed. 3. or 8 H 6. for the other Statutes are of Jeofails, and not of Amendments?

Powell contra, That 'tis not amendable.

This is a Discontinuance at Common Law; for all Processes must be continued from the very Time of the Award of the Court, and the Authority of the Case of Bradley and Banks, and Reason of it is so; and the Reason is, because it is a Discontinuance, and not because it is an Appeal, in which there must be fresh Pursuit, as the Judges said; but it must be because it is a Discontinuance, in all Cases at Common Law; a fortiori it will be so in Appeal in which fresh Pursuit is required, and the Saying of the Judges is so to be understood; it is true, the Roll is rightly continued, but the Process to the Jury is discontinued; 21 Ed. 4. 20. Defendant at the Day was essoin'd to Quinden. Pasch. there must be an idem Dies to the other; but that could not be given to the Jury, but they must be continued by Hab' Corp', and that on the very Return of the Ve' fa'; and this Case is not right in Bro. It is true, since the Statute of Jeofails, these Things have not been kept up to; but at Common Law there must be a Chain of Process against the Jury, as well as in case of other Continuances: And to say, that the 24th is a Continunace of the 23d, is what I cannot for my Life comprehend, no more than the 26th can be of the 23d.

That it is a Discontinuance at Common Law as to Process to the Jury.

There must be a Chain of Process.

Then if it can be amended by 8 H. 6. the Words whereof are very general, and the Exception of few Particulars of the highest Nature, and upon full Consideration, I think it cannot; for I cannot imagine that all the Judges and Sages of the Law ever since, would rather in Cases of this Kind rely upon the Common Law, than upon this Statute, except they had taken it clearly that the Statute did not reach to it; and the Reason of that seems to be from the Statute of 14 Ed. 3. the Words whereof are general, but mention the Word Party, which was a good Reason to exclude the King: And of that Opinion is Coke in Blakamore's Case, viz. That the Statute extends not to Pleas of the Crown: It is true, the Statute of Ed. 3. extended only to Process out of the Roll; that is, Writs that issue out of the Record, and not to Proceedings in the Roll it self; and for that 8 H. 6. was made to enlarge the Remedy of 14 Ed. 3. to Process in the Plea-Roll, &c. Which Statute in my Opinion being made in Inlargement of 14 Ed. 3. but not as to the Parties that shall receive the Remedy, but to what Matters more that Remedy

14 Ed. 3.

8 H. 6.

shall extend: And the Words [Challenge of Party] in 14 Ed. 3. shall explain 8 H. 6. and it is no new Thing for one Law to be construed in Pursuance and Imitation of a former Law: And thus I hold the Exception of 8 H. 6. is ex abundanti cautela; and that without, no Plea of the Crown had been within that Statute, and that Reason which reach the Statute of Jeofails, which have, I own, nothing to do with this Matter; the first of them is that of 32 H. 8. The Words are, between Party and Party; and soon after they would not extend it to Proceedings between Demandant and Vouchee, because the Vouchee is not an original Party: The Exception of the subsequent Statute does not extend to Informations at Common Law: And my Lord Hale in my Lord Bridgwater's Case held, That such Informations were within the Purview; but I never knew any principal Judgment of that Kind; and I rather think that the first Statute of Jeofails extending only to Party and Party, shall interpret all the rest to be so too: And so it was upon the Statute relating to Leases by Bishops, and Ecclesiastical Persons; for they are a Chain of Law relating to the same Matter.

If Statute of Jeofails have to do with this Matter. Vide ante 4, 5, and 269.

The Fault is in the *Teste* of a Judicial Writ, &c.

This is a Fault in the Teste of a Writ; the Teste of an Original is so material, that it is not amendable, and that was Gage's Case: And lately in a Case in the House of Lords, between the Lords Pembroke and Jersey, the same was held by all the Judges; but this is the Teste of a Judicial Writ. It has been doubted in Cro. El. 820. whether the Teste of a Ve' fa' or Distringas were amendable, and a Difference taken by the Court between a Teste and Return of those Writs; for there being no Day named in the Award of the Court for the Teste, and there being always a Day certain for the Return, the Variance of the Teste was held the Nescience of the Clerk, and therefore not amendable: But notwithstanding, since, they have amended Testes as out of Term, after the Return, or on Sundays; but this Writ here is good in itself, though not to this Purpose: And yet I think if it were in a civil Cause, it should be amended by the Award on the Roll, especially the Clerk having declared to us upon Examination, that it was the Writ he intended in Pursuance of the Roll: And there be Authorities to amend the Writ even when it is a good Writ, but not to the Purpose, to adapt it to the Matter, Yelv. 64. So though this be not in itself a naughty Writ, yet if upon Examination of the Clerk it appear'd through Mistake in him not to be ad idem, we would amend it by 8 H. 6. in a civil Matter.

That the Writ is good, but not to the Purpose, and in a criminal Matter. Vide ante 263. Post 286, 310.

When the Plea-Rool is a Record.

But whether this be amendable at Common Law? There were Amendments at Common Law: If it be called an Amendment, that the Court could alter their Judgments the same Term, though the Record of it were made up; but there though it be entered on the Roll, yet the Roll in the same Term is not the Record, but it remains in the Breast of the Judges: But in another Term the Plea-Roll is the Record; and my Lord Coke says, that Mistake of Clerk in Process shall not be amended in another Term: But I think that must be understood of Process in the Roll, and not of Process issuing out of the Roll: As the Case of 29 H. 6. Award was with a Distringas, and an Octo Tales, and the Entry of a Distringas generally; and

Difference of Process in the Roll, and Process out of the Roll.

all this being in the same Term, the Court said, This is a Mistake of the Clerks; for we remember'd that she have awarded a Distringas with an Octo Tales, and ordered an Amendment; but the Making out a Process out of the Roll is otherwise, for it never was otherwise in the Breast of the Court, than that they awarded it; and the Clerk's wrong pursuing their Award in making out a Writ with an ill Teste, though in the same Term, is not amendable; nor do I find any Case at Common Law where the Amendments were of Mistakes of Clerk in Issuing of Process, but their Mistakes in Entring the Acts of the Court, or of the Court in Entering Continuances may be amended the same Term, or at any Time after; and so is the Case of Chambers and More now in Levinz.

Clerks Mistakes unamendable, or not. 5 Mod. 398. 3 Lev. 430.

And as to Amendments of criminal Matters at Common Law, I cannot agree with many of them, as Harris's Case for one; so of the Case in Palmer, Plomb's Case, where they supplied ad Com' meum in an Outlawry, for we every Day reverse Outlawries for that Fault; and the Case cited by Yelv. in Bulstrode is so shortly put, that it does not appear in what the singular Number was put for the Plural; but if it were in a material Part of the Indictment, it were hard to amend it: And as to the Case of Sir John Curson, it may be well; for the Issue there was well enter'd in a Docket, but ill on the Plea-Roll, and no more than a Mistake of Entring the Plea-Roll according to the Docket, which did warrant a right Issue: And as to the Case of the King *v.* Reed, as it is in Keeble, the Court were of different Opinions about it: Ve' fa' was against 24, whereof J. S. was one, and a Distringas of J. S. Junior, and the Cause tried by 12, of which J. S. was not one: And Kelynge said, It was amendable: Another would have it only an Explication of the Ven'; and another held it amendable by the Statute of Jeofails, because not within the Exception; but I don't find any Judgment that it was amended; but at last it was looked upon to be no Discontinuance: And he agreed, whatever was amendable in civil Cases at Common Law, would be so in criminal Matter, but that this would not be amended in civil Cases at Common Law; ideo not here.

If what is amendable in civil Causes at Com' Law, will be so in a criminal Matter.

Holt acc'. It is not amendable: 1. This is an Omission in a Point material, viz. in the Teste, which by Law should have been the 23d, and not the 24th, for the 23d is the Day the Defendant has in Court upon the Ve' fa'; and therefore the Writ giving further Day, should have issued on that Day.

Per C. J. 'Tis not amendable.

Object. There is no Interval between the 24th and 23d.

Answ. If one is to appear on the 23d, and does appear, and receives no Direction that Day from the Court when he should come again, upon the Expiration of the 23d he is out of Court; Shall you then give him a Day behind his Back? Here indeed he has a Day on the Roll, but the Writ against the Jury issues at a Day after, when the Party and they are out of Court; so it is a Writ awarded behind the Party's Back, and without Warrant of the Court; for the Warrant of the Court is Die Lunæ post Tres Mich', and

It is a Writ awarded behind the Party's Back, &c.

and then a Precept is awarded to the Sheriff to diſtrain, and this Precept iſſues on the next Day; and is this warranted by the Roll? No ſure; therefore being another Writ than what the Court has awarded, it is no Authority to diſtrain the Jury, and then they had none to try the Cauſe; for here is a material Variance between the Writ awarded, and that by which the Jury were diſtrained; the one is the 23d, the other on the 24th, and the Day of the Writ is always the Day of its Teſte in Judgment of Law; and he quoted the Caſe of Owen *v.* Baily, 17 Car. 2. One recovered Damages in Trover, the Defendant after ſold his Goods bona fide; the Plaintiff takes out a Fi' fa' teſted the firſt Day of Trinity Term, which was before the Sale, but taken out after; and held, that the Goods in the Hands of Vendee were bound by it; And by this Amendment, we would make this quite another Writ; for a Writ iſſuing the 24th, cannot be the Writ awarded the 23d. Suppoſe this were now immediately after the Statute of H. 6. and before any Statute of Jeofails, Why ſhould this be amended (It is a good Writ in it ſelf, and the Meaning of that Statute was to amend bad Writs, and not to alter a good Writ, ſo as to adapt it to a particular Purpoſe: Now to make this a good Trial, you would have us alter this Writ that is very good in its ſelf, and even contrary to Truth make it a Writ of the 23d of October, ſo to alter the very Nature and Subſtance of it: Now this being a Diſcontinuance of Proceſs in a civil Caſe was help'd by the Statute of 23 H. 8. and ſince it is not material whether it be amended or not, becauſe the Fault is cured by that Statute, there is no ſuch Amendment as this between the Time of 8 H. 6, and 32 H. 8. It is true, Teſte of Writs have been amended; but when? When it was on Sunday, out of Term, or after the Return, which is impoſſible to be, and therefore a plain Miſtake of the Clerk; and upon the ſame Reaſon is the Caſe in Yelv. 64. for there the Diſtringas bore Teſte the ſame Day with the Ve' fa'; ſo that the Teſte was directly repugnant to the Purport of the Writ it ſelf, which was to diſtrain the Jury ſummoned on the Ve' fa', when in Truth no Jury could be ſummoned: I always have taken it, that if upon Return of one Writ another be awarded, that that other ſhould bear Teſte of the Return of the firſt Writ: And the Caſe of Bradley and Banks is very ſtrong in that Point, and the common Practice of the Common Pleas is ſo, though it be not ſo much obſerved here in Writs of Inquiry of Damages; the one Proceſs there is always teſted on the Day of the Return of the laſt, whether it be Capias in Outlawry, or Diſtreſs infinite; the one muſt be teſted on the Return of the other, or elſe all is diſcontinued: Ay, but this is a Miſtake of the Clerk; but we are to judge, whether it be not a Miſtake in Point of Skill: Who can tell? Every Clerk does not know; and ſome pretend it need not be teſted on the Day of the Award; Why then ſhall we look upon this to be a Fault in Point of Computation, rather than that he thought it good? And if it be Neſcience in the Clerk, it is not help'd even by the Statute of H. 6. though a civil Caſe before the Statute of Jeofails: And he held a new Ve' muſt go, for a new Diſtringas would not do; for the firſt Ve' fa' is executed; and the Jury have now tried the Defendant,

Vide 1 Cro. 278, 375. 1 Jo. 302. 'Tis another Writ than what the Court awarded.

The Statute meant to amend bad, and not to alter good Writs. Ante 263, 284. Poſt 310.

This Diſcontinuance is help'd by the Statute.

Teſtes of Writs when amendable. See Carth. 76, 172, 367, 506, 520.

Teſtes, how to be made

Where one muſt be teſted on the Return of the other.

Neſcience in the Clerk, not helped. Ante 278. See Skinner 46, 253, 254, 591. Carth. 70. 76, 172, 652. &c.

and that appears on Record here, and the now Ve. fa. is ipſo Facto diſcharged, only an Entry to be made on the Roll, quia apparet Cur. that the Diſtringas did not iſſue till the 24th. Ideo conſideratum eſt quod caſſetur, and Ve. fa. de novo awarded.

Note; Powys recanted inſtanter, and Gould hæſitabat.

The Pariſh of St. Clements *verſus* that of St. Andrew.

S. C. 1 Salk. 606.

ON Appeal by one Pariſh from an Order of Juſtices for the Removal of a poor Perſon from the other Pariſh to them, at the Beginning of the Seſſions the Order was confirm'd; and after the ſame Seſſions, another Order was made for the Reverſal of the original Order.

Order for removing a poor Perſon confirm'd at the Seſſions on an Appeal, &c.

And a Certiorari being now brought, the Order of Confirmation, and alſo the Order of Reverſal, where both returned.

Ante 87, 88, 163.

Et per Cur. 1. The Judgment of the Juſtices is in their Breaſt, and alterable by them all the ſame Seſſions.

Ante 269. 2 Salk. 496, 524, 534, 606.

2. If they make a ſubſequent Order directly contrary to a former of the ſame Seſſions in the ſame Cauſe, the ſubſequent one is an abſolute Repeal of the former, being inconſiſtent with it, tho' there be no expreſs Words of Repeal in the ſecond Order: As if at the Old Baily, &c. one indicted of Felony will not plead, and Judgment of Peine fort & dure be given againſt him, and he is carried away, and the next Day he alters his Mind, he ſhall be admitted to plead; and if he be convicted, he ſhall have Judgment to be hanged, which is a Superſedeas or ſetting aſide of the firſt Judgment.

1 Cro. 341. 1 Jo. 330. 1 Cro. 350, 351.

And Powell ſaid, If there be two Acts of Parliament directly contrary one to another the ſame Seſſions, the laſt ſhould only be taken for Law.

But Holt, Ch. J. If they both ſhould generally refer to the ſame Seſſions, I don't know which to take for Law.

Reſp. That which is moſt conſonant to Common Law.

And he quoted a Caſe of the Town of Colcheſter here ſome Years ago exactly like this, and for that the ſecond Order did not expreſly repeal the firſt Order, and that the Juſtices did return them both as Orders; the ſecond Order was quaſh'd, and the firſt ſet up. And the Chief Juſtice put a Caſe that was in Chancery a Day or two before, which was this: An Appeal from a Decree of the Maſter of the Rolls, and the Queſtion was, Whether new Evidence that had ariſen between the ſaid Hearing and Decree and the Appeal, ſhould be received? And it was held by the Lord Keeper, Juſtice Powell, and the Chief Juſtice, That all the Matter at the Rolls had fallen to the Ground upon the Appeal, and it was now the ſame Thing as if nothing had ever been done in it, and by Conſequence the new Evidence ought to be admitted; but at laſt the Matter here by Conſent was referred to the Three Judges, or any Two of them, to arbitrate.

2 Mod. 72. 10 Co. 101.

Upon Appeal, former Order fails.

Booth

Booth *verſus* Booth.

S. C. 1 Salk. 322.

See the Caſe of Dillon and Brown. Ante 14.

If a *Caſſet Executio* be for a Year, Execution may be within the next Year without *Sci. fa. &c.* Vide 1 Salk. 258. 3 Mod. 187, 189. Poſt 292, 296. Ante 14, 212.

JUdgment, with an Agreement to ſtay Execution for 3 Months, within which Time the Defendant obtained an Injunction in Chancery againſt the Plaintiff, ſo that he could not take out Execution till after a Year, and then he took out an Elegit without a Sci. fa. and had it executed; and the Doubt was, If the Execution were not irregular. Q. N. Lutw. 184.

Serjeant Powys and Cowper: That it was not. If the Ceſſet Executio were for a Year after the Judgment, yet the Plaintiff within the next Year might take Execution without a Sci. fa. Quod fuit conceſſum. So if the Defendant bring Writ of Error, and hangs up the Plaintiff for a Year, and then is nonſuit, he may take out an Execution without a Sci. fa. So here, if before the Time of the Agreement be out the Defendant ties us up by his own Act, ſo as we dare not take out Execution within the Time, Shall he take Advantage of his own Wrong, by putting us in a worſe Condition?

But the Court won't take Notice of *Chancery* Injunctions. Vide ante 14, 130.

But per Cur. This Practice is againſt a manifeſt Rule of Law, to take out Execution after the Year without a Sci. fa. and we cannot take Notice of your Chancery Injunctions. Beſides, it had been no Breach of ſuch Injunction to take out a Writ of Execution within the Time, which might have ſaved the Trouble of a Sci. fa. after the Year, by entring the Continuance down by a Vic' non miſit Breve; but that we cannot ſuffer to be done now, a Writ not being taken out in due Time; and if we ſhould let this Judgment ſtand, it would be an erroneous one, and therefore reverſible by Writ of Error; therefore let a Superſedeas go, Quia improvide eman'.

Note; That there never is a Ceſſet Executio entered on the Roll.

Domina Regina *verſus* Collingwood.

Indictment for inticing an Apprentice to take away his Maſter's Goods. Vide ante 99, 182, and 1 Salk. 380.

IT was an Indictment, and conceived thus: Jurat', &c. præſentant. Quod T. C. nuper, &c. exiſtens Perſona malæ Diſpoſitionis ac non intendens Victum ſuum per Labores honeſtos quærere, ſed machinans & intendens Servientes & Apprenticios honeſtorum Civium & Inhabitant' Civ' London in Moribus & Statu ſuis prægravare & deſtruere, ipſe Præd' T. C. viceſimo Die Martii, Anno, &c. And diverſis aliis Diebus tunc antea, apud London viz. in Paroch' S. B. in Warda de D. London. præd' quendam C. S. Servientem & Apprenticium cujuſdam R. T. de London, Wharehouſe-keeper, illicite, injuſte, & nequiter movit, ſeduxit, & allexit, ſexcent' ſeptuagint' duas Virgatas Panni Lanei, vocat' Callamancoes, Valor' vi l. de Bonis & Catallis præfat' R. T. extra præd' Domum & Shopam ipſius R. illicite, injuſte & nequiter capere & aſportare Et quod præd' T. C. dicto xx Die, &c. Anno, &c. ſupradict' & diverſis

aliis Diebus & Vicibus, Bona & Catalla præd' a præd' C. S. Servient' & Apprenticio præd' R. T. adtunc & ib'm apud dict' Paroch' B. &c. illicite, injuſte & nequiter, cepit, recepit, habuit, & ad Uſum proprium ipſius T. C. convertit, eodem T. C. adtunc & dictis aliis Diebus & Vicibus bene ſcient' præd' C. S. fore Servient' & Apprenticium præfat' R. T. ad grave Damnum ipſius R. T. in malum Exemplum omn' aliorum in conſimili Caſu Delinquentium, contra Pacem D'næ Regin' nunc Coron' & Dignitat' ſuam.

After Conviction, ſeveral Exceptions were taken by Montague:

1. That it was not directly ſaid, that the Apprentice did actually take away the Goods, but only that the Defendant did intice him to take them away, and did receive them from him; which is a ſtrong Argument indeed that they were taken away, but no direct poſitive Charge, as the Fact ought to be laid in an Indictment. And for this he relied on the Caſe of the Queen *verſus* Daniell, hic ante, fol. 99, 101, 182. 2 Rol. Abr. 79. K. Exception, That the Charge is not poſitive, as it ought to be. Keilway 87.

2. Not ſaid where the Houſe and Shop of R. T. is, and by Conſequence no Venue where the ſuppoſed Taking by the Apprentice was.

Per Cur' The Indictment upon the Caſe of the Queen *verſus* Daniell went upon two Points; the one was, for ſeducing an Apprentice from his Maſter; the other, for perſwading him to take away his Goods. As to the firſt, which was the only Point in Judgment, we held the Offence not indictable; and there was no Venue laid for the ſecond. Vide ante 99. 182. 1 Salk. 380. S. C.

And they all were of Opinion the Charge ought to be direct, and not argumentative; and that it was not enough to lay an Inticement, without an Act done in Purſuance of it, And you ſhew here a ſpecial Matter, viz. That the Defendant did receive them, but do not ſhew that they were taken away; and if this were Felony, as you here ſhew it, the Defendant would only be acceſſary, and that could not be without a principal Fact committed. Here indeed you might have charged him as a Principal, for he that perſwades another to commit a Treſpaſs is a Principal, and the Taking of the Apprentice here is the Taking of the Defendant; but you do not ſhew where that was. *Per Cur.* The Charge ought to be direct, and not argumentative. 2 Rol. Abr. 79 K.

And per Omnes. It cannot be maintained, but gave them Time till next Term to ſee to maintain it. *Adjournatur.*

S. C. 1 Salk. 322.

Clerk *verſus* Withers

An Adminiſtrator in C. B. recovers a Judgment by Default againſt *Clerk*, (upon a Bond to his Inteſtate) &c. Vid. poſt 291, 292, &c.

THE Caſe was thus: F. D. as Adminiſtrator of J. D. recovered 303 l. againſt C. upon a Bond to his Inteſtate, upon Judgment by Default in the C. P. and ſued out a Fi. fa. teſted of Trin. 1 Annæ, returnable Tres Mich. directed to the Sheriffs of London, which was delivered to the Sheriff the firſt of Auguſt the ſame Year, who on the ſame firſt of Auguſt ſeized Goods to the Value. F. D. the Adminiſtrator, died the 9th of September following: The Sheriff returns the Seizure to the Value, ſed remanent, &c. pro Defectu Emptorum. The 29th of September the Sheriff is removed, and another put in. The Plaintiff Clerk now ſues Sci. fa. againſt the then Sheriff for Reſtitution of his Goods, and upon Demurrer, Judgment againſt the Plaintiff in the Common Pleas, and Writ of Error.

And now the Caſe having been twice ſolemnly argued at the Bar, the Court ſeriatim affirmed the Judgment.

And at the Bar, Three Points were inſiſted on for the Plaintiff in Error:

1. That in this Caſe the Property remained ſtill in him.
2. That his proper Remedy was a Sci. fa.
3. That the Defendant's Plea (viz. That he was bound to ſell the Goods, and compellable ſo to do by a Diſtringas nup' Vic' Com') was not a good Plea.

And Two Things were ſaid to be conſiderable in the firſt Point, viz. the Death of the Inteſtate's Adminiſtrator before Sale; and likewiſe the Removal of the Sheriff and his Return. It is not to be controverted, but that if a Man has Judgment, and ſues Fi. fa. and Goods are ſeized, and then the Plaintiff dies, the Sheriff is bound to ſell, and give the Money to his Executor or Adminiſtrator; but here, as was urged, there is none that can ſue out Proceſs to compel the Sheriff to ſell, or to perfect this inchoate Execution, becauſe none is privy to the Adminiſtrator; for his own Executor cannot do it, becauſe it was in Auter droit, and the Adminiſtrators de Bonis non are not privy to the Plaintiff, but immediately from the firſt Inteſtate: And for this Reaſon it was, that ſuch an Adminiſtrator could not at Common Law ſue Execution upon a Judgment obtained by the Executor or Adminiſtrator of his Inteſtate. Vide Yelv. 83. 2 Cro. 4. which Miſchief is now remedied by the Statute of 27 Car. 2. c. 8. where Executor or Adminiſtrator have Judgment after Verdict, and die before Execution ſued out, the Adminiſtrator de Bonis non may ſue Execution; which Statute extends not to this Caſe, being by Default: Beſides, that Statute enables them to revive ſuch Judgment by Sci. fa. but takes no Care to perfect Executions commenced only, but not perfected. And the Seizure by the Sheriff does not alter the Nature of the Debt, but that it remains ſtill a Choſe in

Remedy for Adminiſtrator *de Bonis non*, by Stat. 17 *Car.* 2. after a Verdict.

Action, and of the Nature of the Bond on which the first Suit was. And then it is as if no Execution had been sued; in which Case the Administrator de Bonis non could not sue Execution, even by Sci. fa. upon the Statute. Ideo the Property remains in the Plaintiff. And if the Sheriff be not compellable to sell by Process at the Suit of this Administrator, sure he cannot sell at all; for it would be very odd to say, that it should be at the Election of the Sheriff whether he would sell or not.

Obj. That the Sheriff cannot now sell, the Execution not being compleat, &c. Vide 1 Cro. 208, 227. Cro. El. 319, 451, 457, 459, 639. 1 Co. 96. 1 Jo. 248, 386. Cro. Jac. 4, 194. Yel. 33.

And this is not like the Case in 1 Siderfin. 29. where an Executor had Judgment, and after took an Elegit, and died Intestate before the Debt levied; and held the Administrator de Bonis non should have the Benefit of it; for here was a compleat Execution, which ought not to determine by the Death of the Executor intestate: But here there was nothing compleat, nor can the Administrator take these Goods in Satisfaction of his Debt. And none then has Right to them but the Plaintiff. Vide 1 Jo. 385. Cro. Car. 487. Executor sues an Extent upon a Statute Staple, and the Writ is returned served; but the Plaintiff dies intestate before a Liberate sued out. And held per Cur. against Cro. That the Administrator de Bonis non cannot proceed upon this Execution, he being not privy to the Executor that sued out the Extent so in the principal Case; and like Privity is necessary to have a Venditioni exponas as to a Liberate.

That the Property continued in the Defendant, and Sheriff not chargeable.

The general Property of the Goods must continue in the Defendant, for the Sheriff has it not; for by Grant of all his Goods these would not pass, nor would they be forfeited by a Felony or Outlawry of the Sheriff as his own Goods would be: And he only has a Power to sell them, as a Commissioner of Bankruptcy to sell Goods of Bankrupt, and his having them in Possession inlarges not his Property. Dyer 99. That Property is not altered by the Seizure. And if after the Seizure the Defendant had paid the Money, he might have taken his Goods again without any Grant to be made by the Sheriff, and Trover would lie against the Sheriff for detaining the Goods after such Payment. Indeed, the special Property may be in the Sheriff for his Safety. Vide 1 Vent. 52. 2 Saund. 47. He may bring Trover for such Goods against a Stranger, as a Carrier may for Goods given to him to carry; and the Reason in both Cases is the same, viz. for their Safety, they being both answerable over to the general Owners. If Goods in Execution perish without Default of the Sheriff, it is the Loss of the Defendant, which shews the Property to be in him; for if it were not, Why should it be his Loss? And as it was urged, the Party could be sued de novo for this Debt by Administrator de Bonis non; ideo he ought to have his Goods again, that he might not be twice charged. The Party is not discharged by the Sheriff's Return, That he seiz'd Goods to the Value; nor is the Sheriff by such Return chargeable, for the Sheriff had done but his Duty. 2 Saund. 344, 345. And there would be no Inconvenience in restoring those Goods, for here were Laches in the other Side, for they might have taken an Assignment of the Goods immediately upon the Seizure.

1 Sid. 438. 1 Ro. 4. 1 Lev. 282. 2 Keb. 588. 2 Saund. 47, 345. 1 Mod. 12, 30.

And he quoted Yel. 44. Mo. 757. 1 Ro. Ab. 894. That Sheriff after Amoval could not sell. Sed tota Cur. contra. Vide idem 2 Cro. 73.

That a *Sci. fa.* was the preper Remedy.

And this is a very proper Remedy for the Plaintiff, for the Sheriff's Return of Seizure of the Goods, and that Remanent pro Defectu Emptorum is enough to ground a Sci. fa. upon: Quod fuit conceſſum, if the Execution were determined by the Death of the Party Adminiſtrator.

R. That the Defendant was diſcharged by the Seizure, and no Reaſon he ſhould have his Goods again. 1 Salk. 320. 323. Vide Mo. 402. Cro. El. 390. Cro. Car. 459. 487.

Raymond contra. The Defendant is diſcharged by this Seizure to the Value of the Debt, and therefore no Reaſon he ſhould have his Goods again.

At Common Law his Goods were ſo bound by the Teſte of the Fi. fa. that himſelf could not after alter the Property of them. 1 Leon. 304. Cro. El. 174. but now, as to a Stranger, it has not that Operation. Mich. 9 W. 3. Smalcombe *verſus* Croſſe. Two Executions, one teſted before the other; the laſt firſt delivered to the Sheriff: And held the Sheriff ought to execute that which was firſt delivered to him, but if he executes the laſt, the Execution is good, but the Party has his Remedy againſt the Sheriff; but as to the Party himſelf, his Goods are bound by the Teſte. 2 Ro. Rep. 57. If the Sheriff ſeizes to the Value of the Debt, the Defendant is diſcharged, though the Sheriff does not ſatisfy the Plaintiff; and the Plaintiff cannot ſue out a new Execution, for the Sheriff by the Seizure becomes liable to him. 20 H. 6. 24. the ſame. If the Sheriff will not make a Return, it is a Contempt of the Court, for which they will deal with him; and if he returns the Truth, the proper Remedy is a Diſtringas nuper Vicecomitem. 43 H. 36. a. Fitz. Proceſs 89. And by the Caſe of Wilbram and Snow, in 2 Saund. the Sheriff after his Office determined may ſell by a Venditioni exponas, Noy 73. Execution was ſued out, and Goods ſeized, after the Party died, and it was doubted what ſhould be done with the Goods, and ruled it ſhould be brought into Court.

That a *Diſtringas* lies againſt Sheriff. 2 Saund. 47, 345. 1 Sid. 438. 1 Mod. 12, 40. 1 Vent. 52. 1 Lev. 282. 1 Mod. 12, 30. Poſt 298. 1 Ro. 4.

And the Sheriff by Seizure gains a Property, and is anſwerable for Reſcous, and other Caſualties. He may have Treſpaſs againſt the Party himſelf, Cro. El. 638. and Trover, Vide 1 Vent. 52. 1 Sid. 438. and 2 Saund. 47, &c. ubi ſupra.

Ch. J. 'Tis material who ought to have the Goods, ſince Stat. 17 *Car.* 2.

Holt, Ch. J. It is material who ought to have them, for if there be none who can make Title to them by Vertue of this Execution, the firſt Owner ought to have Reſtitution. If this were before 17 Car. 2. he ſhould it ſeems have them back; ſo the Doubt is, Whether he will bring this Caſe within the Equity of that Statute? And the Caſe of 1 Sid. does not come up to this, for the Lands were actually extended and delivered before the Adminiſtrator died, and nothing more remained to be done, but the very having Adminiſtration de Bonis non veſts it in him; but the Queſtion here is, Whether the Adminiſtrator de Bonis non can purſue this inchoate Execution by a Diſtringas nuper Vicec': And if he cannot do that, it will neceſſarily follow that there ought to be Reſtitution. It is true, if Goods

to the Value of the Debt he seiz'd, though the Writ be not return'd, that does discharge the Defendant, unless the Execution be after avoided; so that the Seizure, as long as it continues, is a sufficient Bar. Suppose then it cannot be carried on for Want of Privity, for he might have begun again before the Statute of 17 Car. 2. if there had been a Verdict, it might well be judged within the Reason of that Statute. If the Administrator had died before the Seizure, would not the Writ abate? If the Sheriff had sold, and before Payment Administrator died, should not Administrator de Bonis non have Debt against the Sheriff? Sure he shall; for now here is a new Debt arises to the Administrator, as he is Administrator; it may be he has not Privity enough to sue Process; but he shall have Debt, and compel the Sheriff to make Return in order to bring his Action.

And it seems he may have Debt.

If Goods be taken on a Fi' fa, and Writ of Error is brought, and a Supersedeas come before Sale, yet the Sheriff shall sell, Dyer 99. though 2 Roll. Abr. 291. be contra; after Seizure, and Writ of Error and Supersedeas, a Venditioni exponas shall go: If Sheriff seize Goods to Value, and returns it, he is bound to find Buyers, or else why should a Distringas go against him to sell them to the Value? For a Distringas is a compulsory Writ to sell at the Value, upon Pain of Forfeiture of Issue: And if he be so compellable to sell, Why should not Debt lie against him? And Vid. the Case of Smith. *v.* Martin, in 2 Saund. and if Goods be rescued from him, he is not liable; for it is not the Rescous, but the Return that makes him liable, that is, the Return of seizing Goods to the Value; therefore he ought to seize a convenient Quantity to enable him to return a Seizure to value with Safety: And the Sheriff, by his Return, is charged to the Value at all Events, except the Act of God.

Vide 1 Salk. 12, 318, 320, 322, 323. 2 Keb. 257.

2 Saund. 400.

Powell. It is clear by the Book of 34 H. 6. if Sheriff return that he has Goods in his Hands for Want of Buyers, and is after amoved, a Distringas shall go to the new Sheriff to distrain the old Sheriff to sell the Goods, and give him the Money to bring it into Court; if the Goods were rescued out of his Hands, Debt would lie against him; but if there be no Default against him in not selling of the Goods, it were hard if the Action should lie against him. It is true, by levying the Goods, whether they be sold or not, or a Return be made or not, the Defendant is discharged; for if a new Debt be brought against him, he may plead that it was raised by Fi' fa'. And sure the Property by the Execution is out of the Defendant, whose Goods they were; but if by any Accident the Execution determine, he shall have them again: Who then has the general Property in the Interim? I cannot tell but it may be in Abeyance: And he said, the Return did not make him liable to Debt; if this were after Verdict, the Statute would have clearly helped it.

R. That upon this Return a *Distringas* shall go.

1. Defendant discharged, and Property out of him.

Q. If the Property be not in Abeyance, &c.

In the second Argument for the Plaintiff, three Things were urged:

2. Argument.

1. That Debt after such Return, as here, would not lie by Administrator de Bonis non against the Sheriff.

Administr. de bonis non, Vid. post 300.

2. Not

2. Not in any Case.

3. Though it were a Chose in Action in Right of the first Intestate, yet in this Case it would not be so.

Obj. That the Right never vested in the first Administrator.

If the Action did lie by the Administrator de Bonis non, it must be upon the Seisin and Return of the Sheriff; but before the Return was made, the Administrator died, as appears by the Record, and therefore the Right of Action never vested in the first Administrator; And it never having vested in any under whom he may derive it, it is not such a Chose in Action as he can take the Advantage of.

2. The Sheriff being a publick Officer, the Court will be tender of charging him with Actions without apparent Default in him; for if he return Cepi Corpus & Parrtum habeo, and it appear to the Court, that there is no Default in him in not having him forthcoming, Action will not lie. Vide Cro. Jac. 514. 2 Roll. Rep. 57. And if Sci' fa' would not have lain upon a Judgment by an Administrator of Executor, or Administrator of another, a fortiori Debt will not lie for him for Want of Privity: Vid. 1 Sid. 407. If Sheriff return, that he has levied the Money, he shall not be excused from Debt, because he might have paid it over. 2 Saund. 247. Debt lies not against Sheriff upon his Return, when he does not misbehave himself; it is a Rule, that one shall never have an Action for Damages for a Thing, till he has Right to the Thing it self. Vid. Cro. Car. 176, 177. 1 Jo. 215. Money in Sheriff's Hands was assigned by Commissioner of Bankrupt, and void because it was not the Bankrupt's Money; a fortiori, in this Case.

And that Debt lies not upon this Return. Vide 1 Sid. 29, 79. Hob. 10. 8 Co. 136. 1 Keb. 313. 1 Jo. 345. Rule of Action for Damages. Cro. Car. 149, 150, 187, 200.

That the Statute helps not in the Case upon an equitable Construction.

3. The Statute of 17 Car. 2. does not help this Case: The Rule upon equitable Construction of a Statute is, That whatever is within the Reason and Equity of the Statute, though it be not expressed, shall be adjudged within the Remedy as if actually expressed: As if several Particulars be enumerated, and one of like Reason and Mischief omitted, it shall extend to it as much as if it had been expressed: And 17 Car. 2. is calculated to a particular Purpose, that is, to give Administrator de Bonis non Execution upon a Judgment obtained by an Executor or Administrator, that is, to save him the Benefit of the Judgment, which generally is not obtained without great Charges and Delay; but had no regard to Executions commenced, viz. to save the Benefit of them.

R. That *Fi' fa' &c.* need no Return.

Dee contra. Fi' fa', or Capias, need no Return to make them good, as Elegit does, because an Inquisition is necessary to be taken in that Process, which is not so in the other 1st and 2d. 1 Sid. 99. If Goods be seiz'd upon in the Life of Administrator, who dies before Sale, Administrator de Bonis non shall have Advantage of that Execution, but the Book does not say how: Mo. 402. Cro. El. 319. and Yelv.-- The Sheriff may and ought to sell the Goods without a Venditioni exponas; besides, there is no Body in Court to inform them that the Party is dead; and if so, the Court ex Officio ought to award a Venditioni exponas upon the Return here made; that is, when the Sheriff informs the Court that he has commenced, but not perfected the Execution,

That the Sheriff may sell without *a Venditioni exponas.*

whether the Court will not command him to perfect it? And an Administrator de Bonis non would have an Action of False Return against the Sheriff; a fortiori will it be in such Case where the Sheriff charges himself with a Duty to the first Testator; and that this general Return does charge with a Duty to the first Testator, appears from this; That after such Return, he cannot upon Venditioni exponas return that he sold for less: If indeed he had returned a special Seizure, and mentioned the Goods in particular, and they appear to be bona peritura, he may return upon the Venditioni exponas, that he sold for less than the Debt. And though the Words [after Verdict] be in the Statute of 17 Car. 2. yet sure the Statute shall extend to other Cases than such as are after Verdict; as if the Judgment be by Confession, and this is such a Mischief as the Makers of that Statute meant to avoid, as appears by the Title and Preamble thereof: And for equitable Constructions, he quoted 2 Inst. 429. Bro. Bar. 50. Hale's placitorum 23. Dyer 186. Besides, this Writ is Wrong in it self, for the Sheriff may and ought to sell the Goods without a Venditioni exponas; and all the Writ suggests is, that he took the Goods, but does not say he had them at the Time of the Writ purchased; whereas it should suggest, that they still remain in his Custody.

That the Sheriff has charged himself, and how.

That the Statute shall extend to other Cases.

Fault in the *Sci' fa'*.

2. They don't tell what the Goods are, that in case there be Judgment, Execution may be thereupon.

Holt, Ch. Just. As to that Fault in the Writ, in not suggesting that the Goods remained in his Hands, it might be fatal, if it were not helped by your Plea, viz. That you are compellable to sell them by a Distringas, &c. which admits you have them; the great Question is, Whether the Sheriff by actual Seizure has not vested such actual Right in the Administrator, that in case he had died, the other might have Action? If he had sold the Goods, and before Payment the Administrator dies, yet by that there is such a Right in the Administrator as Administrator, and that Right goes to the second Administrator, who represents the Intestate in whose Right the first Administrator had it: And the Sheriff out of Office may sell without a Venditioni exponas, otherwise why should a Distringas go to the new Sheriff to command the old Sheriff to sell? There are two Sorts of these Distringas's nup' Vic', the one according to 34 H. 6. Rast. 164. Thesaur' Brevium 90. the one to command the old Sheriff to sell, and bring the Money into Court; the other to command him to sell, and to deliver the Money to the new Sheriff. Now this Distringas does not give him an Authority to sell, but is compulsive upon him to sell; and if he don't, he forfeits Issues toties quoties: And when the Sheriff returns Seizure ad Valentiam, and remanent pro defectu Emptorum, that is, only that the Law gives him a convenient Time to sell; And if he continues in his Office, a Venditioni exponas shall go; and if he be out of his Office, a Distringas nuper Vicecom' goes to the new Sheriff to distrain the old Sheriff to sell, &c. as is said before. Now then when he has returned a Seizure to Value, and that

C. J. Fault of the Writ is help'd by the Plea.

What the great Question is.

That Sheriff may sell without a *Venditioni exponas*, and when.

And a *Distringas* is compulsive upon him.

that he is compellable to ſell under Penalty of forfeiting Iſſues, it is an immediate Charge upon him even to the Value of the Goods: It is true, it is a good Return for him to the Firſt Fi' fa', that he has ſeiz'd to Value, and that they remain in his Hands for want of Buyers, for he has convenient Time to ſell, but he ſhall not always keep them in his Hands for Want of Buyers; for he cannot return upon a Diſtringas, that the Goods remain in his Hands for Want of Buyers: If they be periſhable Goods, or that the Act of God intervene, he may plead that as a Reaſon for ſelling them at an under Rate, and for leſs than the Value of the Debt.

He ſhall not always keep the Goods for Want of Buyers.

2 Sand. 343. 2 Keb. 789, 821. Vide 1 Cro. 539. 2 Cro. 514. 555, 566. Mo. 468. Godb. 276. Debt lies againſt him upon Seizure return'd. - Of Equity by the Statute.

Sci' fa' againſt the Sheriff upon Return of Goods ſeized to Value of Debt; and he pleaded a Reſcous, and not good: And he quoted the Caſe of Mildmay and Smith, that Debt lies againſt him upon ſuch Seiſin returned, after the Goods are reſcued from him: And what is the Giſt of the Action? Not the Reſcous, but the Sheriff's having Goods to the Value: Then it is hard to ſay, that the Sheriff is not liable to the Adminiſtrator; and if ſo, there is no Colour for this Sci' fa'. But to the Equity of the Statute of 27 Car. 2. where the Statute does make the Diſtinction of a Verdict, it is hard to carry it farther; but this does not appear on the Sci' fa' not to have been after Verdict; for it is only ſaid, that Action was brought by the Adminiſtrator, in which taliter Proceſſum fuit, that he obtained Judgment. And if this had appear'd to have been after Verdict, without all Doubt the Statute would have reach'd to it, ſince Adminiſtrator de Bonis non may thereby commence an Execution upon a Judgment by a prior Executor, &c. a fortiori he may perfect an Execution commenced by him: And though you ſay, That the Writ is bad in not mentioning the Goods in particular, of which Reſtitution is demanded; ſure that is not ſo; for if Goods be taken in Execution, and before Sale Judgment is revers'd, there ſhall be a Writ of Reſtitution without particularizing.

Adminiſtrator *de Bonis non* may perfect the Execution, &c. 5 Mod. 384. Poſt 298.

And as to the Statute of W. 2. de Religioſis, being taken by Equity, there the Word Default is a Default in Court; not only by not appearing, but alſo in not pleading, or plead faintly, &c. by Colluſion. Suppoſe Tenant in Tail ſuffers a Recovery, and dies, the Iſſue may falſify this, that is, he ſhall not falſify the very Point tried; but he ſhall ſay, That his Anceſtor might have given ſuch and ſuch Evidence in Maintenance of his Title, and omitted to do it: And if a Writ of Entry in the Poſt be brought, and Iſſue is, whether J. S. died ſeiſed or not, and it is found againſt Tenant in Tail, his Iſſue after him ſhall not come and ſay, that he did not die ſeiſed; but he may come and ſay, that ſuch Evidence might have been given in Maintenance of the Title: And if the Goods could be reſtored here, the Sci' fa' would be very proper, and need not be more ſpecial than the Sheriff's Return is on which it is grounded: And no Doubt, if the Goods had been ſold, the Adminiſtrator might have an Action for the Money; but whether it will lie upon his having Goods to the Value, is conſiderable.

Where and how Iſſue in Tail may falſify a Recovery, &c.

Whether Action will lie for Adminiſtrator, upon Sheriff's having Goods to the Value, &c.

Powell

Powell. This is a new Case; but if this Writ be proper and reasonable, its Novelty is no Exception to it, for there is a Time for every Thing to begin; if none has Right to challenge the Sheriff in Right of the original Plaintiff, the Defendant ought to have the Goods again: If this had been Detinue, the Goods must have been particularly mentioned; but it may well be, that this Sci' fa' ought not to vary from the Return: If it be not after Verdict, it cannot be within the Equity of 17 Car. 2. nor is it like the Cases upon the Statute of Religiosis; for there the Fraud is the Thing design'd to be prevented: And the Case quoted out of Hale's Pleas of the Crown, is not by an equitable Construction of the Stat. of 25 Ed. 3. Petit Treason, but is within the Letter of it; for Mrs. is a Master: So it seems to turn much upon the Judgment in Stiles and Finch's Case, where the Sheriff return'd a Rescous, and the Action was maintained against him; but I cannot tell whether the having the Goods in his Hands, or the suffering them through his Default to be carried from him by Force, be the Gist of the Action: He agreed, the Venditioni exponas, or Distringas, were not as Powers or Authorities to sell, but a Command to do that which he had Power, and ought to do before; for the Sheriff is bound to sell, but that must be in convenient Time; But what sticks with me is, that if such Action would lie upon such a Return as here, and the Sheriff sells as soon as he can, and by Casuality cannot sell to the Value, whether he cannot plead this Matter?

Per Powell, This is a new Case; and if it is not after Verdict, not within 17 Car. 2. &c.

Stat. *de Religiosis.*

Case of a *Rescous* return'd.

Vend' expon', or *Distring'*, but a Command, &c.

What if Sheriff cannot sell to the Value.

Now per totam Cur' Jud' affirm'. Gould: It is plain the Plaintiff's Clerk is discharged of the Debt by the Seizure of Goods to the Value, and may plead that Matter in his Discharge; if the Money had been levied by Sale, he might do it. 1 Lutw. 588. Langdrew *v.* Wallace. And if the Money be not levied, but Goods to the Value seized, he may plead that his Goods, ad Valentiam, &c. were seiz'd by Virtue of a Writ. 3 Cro. 237, 208, 390. Dilk's Case, Trin'. 36 Car. 2. Rot. 504.

Cur' Per Gould, Clerk is discharged of the Debt.

1 Cro. 328. 1 Jo. 326. Ibid. 430. 1 Cro. 539.

Debt upon Bond, in which two were jointly and severally bound against one of the Obligors, who pleaded a Judgment had against his Co-obligor, and a Fi' fa' thereupon, and Goods seized to Value, but no Return made; and it was adjudged, That if the former Action were against himself, it had been a good Plea, but the Doubt was, because it was against another: And that the Sheriff may sell the Goods, though out of his Office, by Virtue of the Fi' fa', Vid. 2 Cro. 73. and then he may bring the Money into Court, and then it is to remain here till the Administrator de Bonis non shall come and take it, Noy 72, 73. If Fi' fa' be sued out, and the Plaintiff dies, and then Sheriff levies the Money, and brings it into Court, it shall there remain till Administration sued out, and then Administrator shall have it: So if Fi' fa' be sued out, and the Goods are seized, and the Plaintiff dies before Sale, and then the Goods are sold, Administrator shall have the Money; and it is no good Return to say, That the Plaintiff is dead, for that does not abate the Writ, Vid. 1 Cro. Clere's Case; in which it is agreed, that if there be Extendi Facias by Administrator, and upon the Return thereof a Liberate issues in his Life-time, and he dies before

The Sheriff may sell, tho' out of his Office, by Virtue of the *Fi' fa' &c.* 1 Salk. 323.

An Administrator *de Bonis non* shall have the Money. See Skinner 143, 232, 650. Vide 1 Vent. 41. Simile.

1 Sid. 29. Yel. 33. 1 Cro. 208, 227, 451, 457, &c. Sheriff by Seizure gains a ſpecial Property. Mo. 757. Cro. 73. 3 Cro. 639. Vide 1 Vent. 52. 1 Lev. 282. 1 Sid. 438. 1 Mod. 12, 30. 2 Keb. 588. 2 Saund. 47, 345. Ante 292. Where Adminiſtrator *de Bonis non* may have Debt againſt Sheriff.

foꝛe Execution of the Liberate; yet the Adminiſtratoꝛ de Bonis non ſhall have Benefit of it, 1 Jo. 386. ſimile 1 Sid. Harriſon and Bowden's Caſe: So here Execution is executed in the Life of Adminiſtratoꝛ; the Sale, viz. the foꝛmal Part, may be done by Vertue of the ſame Writ: Then the Sheriff by levying of Goods by Fi' fa', as he ſeizes the Goods, gets a Pꝛoperty in them againſt all Perſons, and may have Treſpaſs againſt the true Owner if he ſhould retake them, 3 Cro. 639. and ſo he may have Trover, as appears in Wilbraham and Snow's Caſe, where Kelynge held, That he gains a general Pꝛoperty; but all the reſt ſay, It was only a ſpecial Pꝛoperty ſo as to ſell, &c.

If the Sheriff had return'd, That he levied to the Value of 100 l. he thereby charges himſelf with ſo much Money; that Debt foꝛ ſo much would lie foꝛ the Adminiſtratoꝛ de Bonis non: And this is not like the Caſe put befoꝛe of an Extent; foꝛ in that Caſe there muſt be a Liberate, which is by Award of the Court.

That this Execution veſts a Property, &c. Vide Dyer 76. b. 3 Cro. 181. 5 Mod. 384. Ante 296.

Powys accord. Executions are favour'd in Law; and this Execution is ſo far compleated, that it is a veſting of a Pꝛoperty in the Sheriff, and the ſelling is but a foꝛmal Part of the Execution, and by the Seizure and Writ he has Authoꝛity to ſell; and the Venditioni exponas adds not to his Authoꝛity, but is to ſpur him on to ſell; and the Goods by the Seizure are in cuſtodia Legis, and the Caſe in 1 Sid. 29. is ſtronger than this, where the very Taking out of a Writ of Fi' fa' is ſaid to be veſting of the Goods in the Adminiſtratoꝛ, as Adminiſtratoꝛ de Bonis non may take Advantage of: And he relied on Noy 73.

Juſt. *Powell* acc', and that Plaintiff ſhall not have his Goods again.

Powel accord. The Plaintiff in this Sci' fa' ſhall not have the Goods again, becauſe the Execution was executed in the foꝛmer Adminiſtratoꝛ's Life-time, and his Death ſhall not abate the Writ: How it would have been if it were not executed in the Party's Life-time, I ſhall not ſay: Execution is an intire Thing, and theꝛefoꝛe where Sheriff levies Goods, and while they remain in his Hands foꝛ Sale, a new Sheriff is choſe, he that begun the Execution ſhall go on with it, and ſell the Goods, and not deliver them over to the new Sheriff, who is the Officer of the Court; and the Reaſon is, that Execution is one entire Thing, 34 H. 6. 36. and theꝛefoꝛe where it begun it ſhall end; and that is the Reaſon that a Superſedeas, after Execution begun, ſhall not ſuperſede it upon a Writ of Exꝛoꝛ, becauſe it is an Execution from the firſt levying of the Goods; and not like the Caſe of an Extendi Facias, becauſe the Extent is only a Seizure into the King's Hands, and there muſt be another Award of the Court, viz. a Liberate to deliver over to the Plaintiff; and held foꝛ that Reaſon, that Adminiſtratoꝛ de Bonis non ſhould not have the Liberate; foꝛ there was ſomething further to be done by the Court in that which was not done in the Adminiſtratoꝛ's Life-time, but here nothing is to be done: And Venditioni exponas is not of Neceſſity, noꝛ does it give to the Sheriff Authoꝛity to ſell, but ſerves only to quicken the Sheriff to do his Duty.

Vide 1 Vent. 41, 42.

Object. What shall become of the Money? For he is commanded to have the Money in Court, and yet here is none to receive it: True, the Money must be brought into Court, and remain there as Money recover'd by the dead Person, and to be delivered out to such as the Court shall be appris'd to be intitled to it. The Money must be brought into Court.

Holt, Ch. Just. acc', 1. After Seizure of Goods, there is nothing more to be done by the Sheriff to the Plaintiff, though he could sell the Goods, and deliver the Money to the Plaintiff, and that would be well; yet the Words of the Writ are so, that he levy Money, and bring it into Court; and that may be done notwithstanding the Plaintiff's Death; therefore he having nothing further to do with the Plaintiff, but to execute the Writ, he may, notwithstanding his Death, do it. C. J. accord: and Sheriff out of Office may be compelled, &c. 1 Salk. 323. 5 Mod. 377. 3 Keb. 397. Vide ante 291, 292.

In the next Place, it is true, after he has seiz'd Goods to the Value of the Debt, though he be out of Office, yet he is bound to make Sale of the Goods, and to make a Return; and when he has made a Return of a Seizure of the Goods, and that they remain in his Hands for Want of Buyers; that is not a Discharge of the Command of the Writ, but only an Excuse that he has not the Money, and he is compellable by Law to bring it in: And though a Venditioni exponas does lie, yet a Distringas is the proper Remedy. And there are two Sorts of Distringas nuper Vicecom', Vid. 34 H. 6. 36. before mentioned; for Distringas to new Sheriff to distrain the old One to sell the Goods, and bring the Money into Court; the other to distrain him to sell, & denar' inde provenientes, to deliver to the new Sheriff to bring into Court: Now if a Distringas does lie for the new Sheriff to compel the old Sheriff to sell, that shews the old Sheriff has an Authority to sell by Vertue of the former Writ; Vid. Rast. Entr. 164. Thes. Brev. 90. and the Book called Brevia Judicialia; and that which commands the new Sheriff to distrain the old one to sell, and bring in the Money, is the most usual: Now then since the Sheriff is compellable to sell, having seiz'd the Goods, what should hinder in this Case, that he should not sell notwithstanding the Plaintiff's Death; for the Writ is as forcible and compellable upon them to levy and bring in the Money, as if the Plaintiff had lived; the Sheriff after Seizure is bound to the Value of the Goods: It is not to be supposed that he cannot sell, he is bound to sell at all Events: If the Goods be worth the Money that they are appraised at, and that he returns them of, it is not to be supposed he can want Buyers; and he is not charged to the Value that they shall happen to be sold for, but to that Value that he has return'd; for if he returns Goods to Value, and that they are rescued from him, he shall answer to Value return'd? So here he shall answer for the Value return'd, and not to the Value that they were sold for. That the proper Remedy is by *Distringas, &c.* The most usual is to the new to distrain the old Sheriff. Sheriff after Seizure is bound to sell to the Value return'd.

And when he seiz'd the Goods by Vertue of the Writ, the Defendant is actually discharged, though they are not sold; for the Plaintiff must depend upon his Execution, and rely upon that; and he has no farther Remedy against the Defendant, but altogether against the Sheriff; and the Defendant having lost his Goods upon an Execution, Defendant actually discharged after Seizure.

which the Plaintiff himself has chose, the Goods are in Custody of Law, and the Defendant discharged, 3 Cro. 390. 1 Cro. 459. and the same in 1 Jo. not like this: Plaintiff after a Writ of Extendi Facias dies, the Sheriff takes an Inquisition of the Seizure into the King's Hand, and then Administrator de Bonis non comes into Chancery, and prays a Liberate: This came in question upon an Ejectment brought by Administrator de Bonis non, and held, That the Extent was void; for the Writ was abated, and no matter whether the Plaintiff died before the Return or Seizure, or after; because no Property is vested in him by the Seizure, but that only is in order to gain a Property by a Liberate; and there could be no Liberate to him that sued the Writ, because he is dead; and no more Reason for Administrator de Bonis non to have it, than if Executor had sued Sci' fa' to have Execution of a Judgment, and before the Return of the Writ, died, and Administrator de Bonis non should come for Execution, which he could not have: But in this Case, there is no Necessity for the Plaintiff in the original Action to come to the Sheriff for Execution; but in case there be no Act of the Court to be done, but an Elegit sued out, which commands the Sheriff to deliver the Lands extended to the Party; if there the Executor or Administrator died after the Inquisition, and before the Delivery, in that Case the Death of the Plaintiff shall not avoid the Execution, and that appears by 1 Sid. 29. though not so very plain.

1 Vent. 53.

Plaintiff after an *Extendi fa'* died, and the Writ abated. Vide 2 Keb. 257. 1 Salk. 264, 322. 1 Mod. 5, 6. Carth. 149, 200, 246.

Secus upon an *Elegit* sued out.

So the Sheriff seiz'd the Goods in the Plaintiff's Right as Administrator, and by Vertue thereof becomes responsible to him as Administrator for the Value which he himself has returned; and that Right which he had now, comes to the Administrator de Bonis non; and therefore when the Execution is compleatly executed, and the Money brought into Court, Administrator de Bonis non may produce his Administration, and the Court will thereupon let him take the Money out of the Court; and that is not by way of Judgment.

Plaintiff's Right comes to the Administrator *de Bonis non*, and he may have the Money out of Court.

She Sheriff by the Writ is to take Goods, and sell them in convenient Time: Indeed the not selling is not such a Fault for which he may be amerced; but if a Distringas upon his Return go against him to the Coroners, if he continue Sheriff, and he don't sell between the Teste and Return of the Distringas, he shall forfeit Issues: And after Goods once seiz'd, no Writ of Error, or Supersedeas, shall stay the Sale.

When the Sheriff shall forfeit Issues, &c.

Et sic Jud' affirmatur per tot' Cur'.

Judgment affirmed.

Of Administrators de Bonis non, see Skinner 143, 232. ante 297. 2 Brownl. 132. Hob. 246. Latch 140. Palm. 443. Styl. 225. 2 Vent. 362. 1 Chan. Rep. 224. 1 Vern. 473. 2 Vern. 249.

Cragger *verſus* Glover.

Vide ante 22. 2 Salk. 521.

ONE who had been in Priſon the 8th of November before for a Debt under 100 l. and after, in Purſuance of the late Act of Parliament, upon Summons to the Creditor, at whoſe Suit he was in, is diſcharged by the Juſtices of Peace, and after is arreſted for a Sum above 800 l. And the Doubt was upon the Conſtruction of the Statute, Whether he ſhould be held to ſpecial Bail, or diſcharged upon common Bail? And upon a Conference of all the other Judges, it was reſolved he ſhould be held to ſpecial Bail.

A Priſoner for Debt under 100 *l.* was diſcharged purſuant to the late Act, and afterwards was taken again for above 100 *l.*

The Doubt aroſe upon the Words [any Debt]. But then the Proviſo is, That no Perſon ſhall be diſcharged out of Priſon by Vertue of this Act who ſhall ſtand charged and indebted in above 100 l. to any Perſon. Now ſome would have this applied to the firſt Diſcharge, that is, the Diſcharge by the Juſtices of Peace. But why not rather to the 2d Diſcharge, or equally to both Diſcharges? For he that is diſcharged upon an Appearance is diſcharged, and by this Act, Power is given to diſcharge them, if they be taken again; and then the Proviſo is, That he ſhall not be diſcharged if the Debt be above 100 l. So no Man is to be diſcharged by Vertue of this Act, that is charged with a Debt of above 100 l. at the Suit of one Perſon.

He muſt find ſpecial Bail, Vide 1 Salk. 345.

And he that is now arreſted at the Suit of one Perſon, is charged for Debt above 100 l. therefore ſhall not be diſcharged by Vertue of the Act.

And as to the Diſcharge upon common Bail by Vertue of the Act, the Judges may do it as well as the Juſtices of Peace.

The Judges Authority.

Domina Regina *verſus* Macarty *& al'.*

S. C. 1 Salk. 286.

INdictment was againſt them for an Impoſition put upon the Proſecutor, and cheating him in a Parcel of pretended Port Wine. Upon Evidence the Fact was, That one of the Defendants pretending himſelf to be a Broker, and the other a Portugueſe Wine-Merchant, did come to the Proſecutor being a Hatter, and would bargain with him for a Parcel of Hats, and proffer him a Parcel of Portugueſe Wine in Exchange, and upon this prevailed with him to come and taſt of the ſaid Wine, which in Truth was but Stale Beer mix'd with Vinegar, which notwithſtanding the Defendants affirm'd to be Portugueſe Wine; and hereupon a Bargain was ſtruck, and Hats to the Value of 118 l. delivered for ſo many Pipes of the ſaid pretended Wine. And here the Proſecutor was the only Witneſs, and he was allowed for good Evidence by Holt, Ch. J. becauſe it was a Cheat put upon his Perſon; and he compared it to Paris's Caſe in 1 Sid. where if the Recognizance had been forged, the Party himſelf could not be a Witneſs, but may for a Cheat put upon himſelf.

Indictment for cheating Proſecutor in a Parcel of pretended *Port* Wine. Ante 42, 61, 105, 147. Poſt 311.

1 Sid. 431. 2 Keb. 572. Hard. 331. 1 Vent 49, 78.

Several

Several Exceptions were taken to the Indictment:

Exceptions to the Indictment of *Vini prætenſi.*

1. That it was laid that he ſold ſeveral Hogſheads Vini prætenſi, whereas it was all other Liquor; when it ſhould be ſo many Hogsheads of ſuch Liquor for Wine, or pretending it to be Wine.

2. That it is laid Super ſe aſſumpſit eſſe a Merchant of London, atſi eſſet, inſtead of acſi eſſet.

Vid. 1 Lutw. 465, 466.

3. It is laid, Magnam Quantitat' Vini, without ſhewing what Quantity, or of what Price; for which, Vide 2 Lev. 38. that the very Sum taken in Uſury ought to be ſet down, and that it is not enough to ſay that he took above the lawful Uſe.

4th Exception. Not ſaid that the Defendants knew it not to be real Wine. Vid. 9 H. 6. 9. Cro. Car. 283. Trin. 11 W. 3. K. *verſus* Foſter.

Per C. J. Here is a falſe Token and Combination. Ante 42, 61, 105.

Holt, Ch. J. The Crime is not the ſelling one Thing for another, but here is a Falſe Token, the one pretending to be a Broker, and the other a Merchant, and a Combination to cheat; but the Exceptions ſeem weighty, Et adjourn'.

1 Salk. 125. 2 Salk. 445.

And being moved again in Hillary Term, it was held, That ſuper ſe aſſumpſit eſſe Mercatorem was well enough, and the Atſi eſſet only Surpluſage.

But Holt, Ch. J. thought the firſt Exception fatal, for Vinum prætenſum may be verum Vinum, and prætenſum is not the contrary of verum, but falſum. And where Powell thought prætenſum and falſum to be the ſame, and quoted the Statute of Maintenance of pretens'd Titles to prove his Opinion, Holt, Ch. J. ſaid, in that very Caſe the Title of the Diſſeiſſee, which without Doubt is the true one, is called prætenſus Titulus, which ſhews prætenſus and verus not to be contrary.

Et adjournat'. Et adjournat'.

Scrimſhaw *verſus* Weſtby.

Error of Judgment for Plaintiff upon a Promiſe to buy, &c. as many Prunes as Plaintiff could.

ERror of a Judgment in the Common Pleas, where it was declared, That in Conſideration that the Plaintiff, at the Inſtance of the Defendant, would buy for the Defendant tanta Pruna quant' in ea Parte poſſet, and bring them to Billingſgate Wharf in London, he the Defendant agreed to pay him 8 Shillings a Buſhel for blue Prunes, and 6 for Damſons; that hereupon he bought ſuch and ſuch Quantities of each, and brought them to the Place ready to be delivered to the Defendant, and tendered them, and that Defendant did not receive them. Jud. pro Quer. in Common Pleas. And the Error aſſigned was, That it was not averr'd that this was all he had, or could have bought.

But per Cur. That need not have been ſaid, for Fruit are Bona peritura, and to be ſold immediately; and it was never the Intent of the Agreement he ſhould ſtay the Delivery until he could have got together

gether all he could have bought. Besides, if this was not all he had bought or might have bought, that might be insisted on at the Trial as he had bought any for others.

And upon Non assumpsit the Plaintiff must have proved his Declaration; and Judgment affirmed, especially it being after Verdict. Judgment affirm'd.

Villars *versus* Cary.

1 Salk 3.

ERror of Judgment in the Palace Court of Westminster. The Plaintiff did declare, that the now Plaintiff did become indebted to him by Bond in the Sum of 107 l. per Nomen J. V. Vicecom' Purbeck & D'ni Buckinghamiæ. Defendant, without craving Oyer, pleads that he was truly indebted to the Plaintiff in 92 l. 5 s. 9 d. and that by Way of corrupt Agreement for the Forbearance of that Sum for a Year, this Bond was given, &c. Plaintiff replies, That it was pro vero & justo Debito, and traverses the corrupt Agreement. To which Defendant demurred specially, for the Replication did not shew how much the just Debt was. Sed non allocatur. For there is enough to induce the Traverse, and if it had been alledged, you could not have travers'd the Inducement; and the Declaration sufficiently shews the Debt. Vide 1 Cro. 609. Jo. 627. Error upon a Judgment in the Palace Court, &c. Vide ante 223.

And if there be a just Debt due, and a Bond is given for the Payment of it with unlawful Interest, it is Usury.

Then it was objected, That the Declaration was nought to say, that the Defendant became bound per Nomen & Cognomen J. V. Vicecom' P. & D'ni B. the Vicecom' P. & D'ni B. being Titles, and no Names, nor can they be understood to be his Surname, for then they ought not to be put in Latin: And if one will become bound in such Manner, the Way to declare is by an [Alias dict.] Quod Cur. said to be the best Way. Vide 2 Salk. 451.

But as to the Objection in the Declaration, if you would take Advantage of it, you should have craved Oyer. 2 Salk. 658. Vid. ante 233.

3d Objection was, That he declared ad Damnum of 200 l. and concludes, Unde petit Judicium & Damna sua præd. when it should be Damna Occasione Detentionis Debiti sui; and we are upon special Demurrer.

But per Cur. It is no Fault of Form.

And let the Debt be contracted where it will, and Bond given for it within the Jurisdiction of an Inferior Court, that gives them Jurisdiction.

And Judicium affirm'. Judgment affirm'd.

Slater

S. C. 1 Salk. 42.

Slater *versus* May.

Debt by Administrator *durante Absentia* of *A.* the Executor.

DEBT by Administrator durante Absentia of A. who is an Executor, shewing, That Administration was committed to him debita legis Forma, without shewing that at the Time of Administration committed he was absent beyound Sea, or that the Absence continued. Executors durante minoritat. 1 Mod. 62, 174. 2 Saund 148. 2 Lev. 37. Cro. Car. 240. God. 104. Yelv. 130. 5 Co. 29. 5 Mod. 395. Comberb. 475.

Vide N. Lut. 102, 103. 1 Rol. Abr. 888. Goldsb. 136. 2 Brown. 83. Vide 1 Cro. 244. Cro. El. 602.

And Per Cur'. It is reasonable the Ordinary should have Power to commit Administration during Absentia of an Executor beyond Sea, and such Administrator to be accountable to the Executor; and when they say, that it is debita Legis Forma durante Absentia, we must understand it an Absence beyond the Sea. Vide 1 Lutw. 342. Clare *versus* Hodges. But the same in 4 Mod. 14. is not Law, nor agreeable to the Roll. But sure it ought to be averred that the Absence continues, according to Pigot's Case, 5 Co. and so in case of Administrator pendente Lite. Vide 3 Keb. 212. and so in all like Cases.

Jud. pro. Def.

And Judicium pro Def'.

Vide 2 Salk. 599, 600, 602,

Cholmley *versus* Veal.

Sci. fa. against Bail, who plead no *Capias* sued within the Year, &c. Ante 256. Hob. 195. Aleyn 12. 2 Lev. 19. 1 Saund. 299.

SCi. Fa. against the Bail, who plead no Cap. against the Principal. In Replication a Capias is set forth, and Non est invent' return'd upon it, which appeared to be tested a Year after the Judgment.

And Per Pengelly. To charge the Bail, there ought to be a Capias legally sued out, and this appearing to have been sued out after the Year, and no Sci. fa. appearing, must be looked upon as illegal. Ideo, &c. Vide Lutwyche's Rep. 1283. Redman *versus* Idle, &c. and 3 Keb. 671.

1 Jo. 239.

Holt, Ch. J. The Plaintiff intitles himself to recover against the Bail upon Breach of the Recognizance, which is, that he should answer the Condemnation, or render the Principal at the proper Time. And the Breach is assigned, and a Capias set forth to have been taken out and returned, and what need he take Notice of a Sci. fa. for the Bail are Strangers to the Record, and cannot take Advantage of Error in it. So the not being of a Sci. fa. previous to the Cap. taken out after the Year is but Error at the best, of which Bail cannot take Advantage. So if it had actually appeared to us that there was no Sci. fa. I question whether it be any Thing more than Error, and so not available to the Bail; but if it were actually void, still it ought to come of the Bail's Side. And the Plaintiff in intitling himself against Bail never mentions any Thing of the Capias. And you come and admit all that intitles him to his Sci. fa. against you, viz. the Non-payment of the Condemnation, and Non-rendering the Principal,

cipal; but ſay, that there was no Capias, which is to ſay, that his Time to render was not yet come: And what has the Plaintiff to do but to ſhew that there was a Capias, and the Capias which they ſhew may be irregular? And if it may be ſo, we ſhall not intend it ill till you ſhew it ſo: And there is full Title made for the Plaintiff, and your Plea is only an Excuſe that there was no Capias; and the Reaſon of it is, that I am not bound to render the Principal till I know what Execution the Plaintiff will chuſe; whether he will chuſe to have his Body, which he makes appear by ſuing a Capias; for he might have ſued an Elegit, or Fi' fa'.

Vide antea 257. 1 Jo. 139.

Jud' pro' Quer' per totam Cur. If the Defendant dies after Capias, and before Return of it, Bail is Diſcharged; per Jones, 1 Jo. 136.

Thornborough *verſus* Whitacre.

ASſumpſit, That in Conſideration of Half a Crown by the Plaintiff in Hand paid to the Defendant, he promiſed to pay two Grains of Rye upon Monday the 29th of March in ſuch a Year, four Grains the next Monday after, and ſo on by progreſſional Arithmetick every Monday for a Year, and non Aſſumpſit pleaded.

Aſſumpſit upon Defendant's inconſiderately promiſing to pay 2 Grains of Rye *per* Week, &c. 1 Jo. 138. 1 Vent. 267. Vide 1 Keb. 569. 1 Lev. 111. Matheſin Walliſii, ff. 1. cap. 31.

Per Cur', upon Motion: Let them go to Trial; and though this would amount to a vaſt Quantity, yet the Jury will conſider of the Folly of the Defendant, and give but reaſonable Damages againſt him.

Phips *verſus* Jackſon.

Vide 2 Salk. 543, 544.

IT was pleaded in Abatement, That tempore quo memoria non extat, all the Clerks of the Queen's Court of Exchequer were privileged from being ſued elſewhere than in that Court; and that the Defendant was Clerk to R. P. un' Baron' de Scaccario noſtro præd'.

Two Ways of Pleading Privilege of a Court. Ante 26, 106, 114, &c.

And upon Demurrer; Per Cur', There are two Ways of Pleading of a Privilege.

One is to go to Iſſue, and at the Trial if the Party be an Officer of Record, to ſhew it by producing the Record; if he be not an Officer of Record, but is Attendant to one of the Barons, that muſt of Neceſſity be tried by a Jury, becauſe the Court of Exchequer, as a Court, cannot take Notice of it no more than we.

1. To go to Iſſue. 1 Jo. 289. 1 Vent. 264.

The other Way is, if he be an Officer on Record, to produce a Writ of Privilege at the Time of the Plea pleaded, and then no Iſſue can be joined upon it: And here the Cuſtom is ill pleaded, for tempore quo non extat memoria is Nonſenſe, and ſhould be cujus contrarii memoria non, &c.

2. By producing his Writ at the Time of the Plea Vide 1 Inſt. 115. b.

But he having ſhewed, that he is one of the Clerks of a Baron, and inſiſting upon Privilege; ought not we to take Notice that he ought to have Privilege?

Plea here ill for Want of Averment, &c. Ante 105. Vide 3 Mod. 216. 2 Lev. 50, 88, Vide ante 3, 223.

To which it was answer'd, That he did not aver that he was Clerk to one of the Barons of the Queen's Chequer, but de Scaccario n'ro: And for that, a Respond' Ouster was awarded. Of Averments, see Carthew 300, 412. Skinner 17, 569, 570, &c.

Michell *versus* Waldron.

Error upon Award of a Writ of Inquiry in C. B.

WRIT of Error of a Judgment in Common Pleas, and Error assigned was, That the Award of the Writ of Inquiry was, Ideo Præceptum est Vic' London quod Inquirat, in the singular Number, and so all along in the singular Number: And the Question was made, Whether this be amendable in this Court, so as to save the Defendant the Costs which he must pay upon an Amendment in the Common Pleas? And 3 Cro. 677, 709, 185, were quoted for such Amendments here, 2 Vent. 171. was allowed per Cur'. But they seemed to incline they could not amend, this being the Award of the Court, but would consider.

Amended here, and the Roll ordered to be brought in, &c.

Vide ante 270, 272, &c.

And in Hillary Term the Court said, It was only a Mistake of the Clerk; for the Courts of Westminster do take Notice, that there are two Sheriffs in London; but because the Court cannot amend without having something to amend by, Ch. Just. ordered the Officer of Com' Banc' to attend with the Roll in order to an Amendment.

Woodcock *versus* Morgan.

Nar' in Debt upon Bond, with Omission of *quas ei debet*, &c. and ill.

DEBT upon a Bond, shewing, That such a Day the Defendant became indebted to the Plaintiff per Scriptum suum Obligatorium, without shewing the Date of the Bond, or saying, that it was sealed and deliver'd.

1 Lev. 130, 224. 1 Sid. 342.

But per Cur', Becoming indebted per Scriptum Obligatorium, is enough; but the Plaint being W. queritur de Mo. &c. de placito quod reddat ei, without saying quas ei debet & injuste detinet, it was held ill.

Domina Regina *versus* Buck & Hale.

1 Salk. 380. Two Collectors and Assessors of publick Taxes indicted, &c. for their Injustice, &c.

THEY were found guilty upon an Indictment for a Misdemeanour; For that being Collectors and Assessors of the publick Taxes in such a Parish, they assessed and rated some at too high a Rate, and omitted to tax some others in their Books, and yet levied the Taxes upon them, and put the Money in their own Pockets.

And now coming to receive Judgment, it was urged by Mountague, That it being no Offence of an infamous Nature, as Perjury or Forgery, nor against the Publick, there ought not to be any corporal Punishment, as Pillory.

But

But per Cur', It is an Offence of dangerous Consequence, and very pernicious to the Government, and of very ill Example, too much practised of late; for what greater Discouragement can there be to the People to pay their Taxes freely, than to have Injustice and Inequality of Rates for the private Advantage of some? And therefore this Offence deserves an exemplary Punishment; and they were adjudged to the Pillory in the County where the Fact was committed: And ordered the Marshal to carry them down, and that a Writ should go to the Sheriff of the County to assist him in the Execution.

Vide ante 234. 1 Cro 332. Cro. Jac. 65. Noy 102. Mo. 781. 3 Inst. 145. 1 Leon. 295.

Domina Regina *versus* Inhabitantes de Com' Wilts.

S. C. 1 Salk. 359. Ante 191. Motion for a new Trial concerning the Repairing of a Bridge, &c.

UPON Debate on Motion for a new Trial, where the Issue was, Whether the County of Wilts at large, or the Town of L. within the County, were obliged to repair the Bridge of L. in that County; an Order of Sessions formerly made upon the Inhabitants of L. to repair, being offered in Evidence for the County at the former Trial, and rejected upon this Reason, That the Justices of Peace have no Jurisdiction over Highways but upon a Presentment, and none had been to warrant this Order: It was declared by the Court;

1. That it is a good Cause to grant a new Trial, that the Judge who tried the Cause over-ruled good, or admitted that which was no Evidence, and that though the other Party has a Remedy by Bill of Exception.

What is a good Cause for new Trial, vide ante 18, 22.

2. That the Inhabitants of the whole County cannot of their own Authority change the Bridge or Highway from one Place to another; for it cannot be without Act of Parliament.

Inhabitants cannot change a Bridge, &c.

3. The County of common Right are bound to repair publick Bridges; but a particular Person, Town, &c. may for a special Cause be bound to repair them, as by Tenure, Prescription, &c.

1 Salk. 12. Vaugh 341. Cro. Car. 266, 267.

4. If a private Person build a private Bridge, which after becomes of publick Convenience, the whole County is bound to repair it: Vide 2 Inst. 701.

When the County is bound to repair. 1 Salk. 358. Where a private Bridge becomes a publick Convenience.

5. This Matter concerning the whole County, Suggestion may be of any other County's being next adjacent; and the Venue shall come from thence for the Necessity of an indifferent Trial.

Venue.

6. One of the County is a good Witness in the Case, though not a good Juror: And at last, a Rule by Consent was made.

Witness.

And per Holt, Ch. Just. If it be not obeyed, an Attachment may go against the Inhabitants of the whole County, and catch as many as one can of them.

Attachment.

Treil *verſus* Edwards.

Executor, when eſtop'd in his Evidence of Want of Aſſets. Vid. 1. Jo. 87.

PER Cur', If Executor ſuffer Judgment to go againſt him by Default upon executing Writ of Inquiry, he ſhall not give Evidence of Want of Aſſets, for he is eſtopp'd, as if it had been the Caſe of an Heir; for he ſhould have pleaded Plene Adminiſtravit, or ſpecially what Aſſets he has.

A Citation was in the Conſiſtory Court of——— and a Prohibition was moved for upon three ſeveral Points:

Grounds on Suggeſtion for a Prohibition to a Conſiſtory Court. Vide 1 Salk. 190, 377. Fareſt. 10.

1. That they refuſed a Copy of the Libel.

2. That the Citation was, Profanatione Cœmiterii of ſuch a Church; and that the ſuppoſed Profanation was by the Party, as Coroner, in the Duty of his Office in digging a Corps for a View.

3. That the ſaid Church was within ſuch a Peculiar, and conſequently not within the Juriſdiction of the Conſiſtory Court, not even by Letters of Requeſt: And for Authority for Prohibitions upon the third Point, were quoted Latch 180. Noy 89.

Per C. J. That it contains 2 Matters for Prohibitions of different Natures, &c. Vide 1 Vent 252. 1 Ro. R. 337. 2 Salk. 553.

Holt, Ch. Juſt. Your Suggeſtion contains two Matters that ought not to go together: The one, the Denial of the Copy of the Libel; and the other upon the Merits, for they are Grounds for Prohibitions of different Natures: The firſt, for a Prohibition only quouſque, which is ipſo Facto diſcharged by granting a Copy of the Libel without Writ of Conſultation: The other, a peremptory Prohibition, which ties them up till a Conſultation; and upon ſuch a Suggeſtion we ought not to grant a Prohibition: Indeed, a Prohibition quouſque, they give Copy of the Libel, if it be granted before any Libel exhibited, does not bind them from exhibiting a Libel, and after they ſhall not proceed till they give a Copy of it; and then to have a Prohibition upon the Merits, you muſt make a new Suggeſtion. And as to the 3d Point, all Peculiars are not inferiour to the Ordinary of the Dioceſe in which they are; and ſuch as are not, cannot tranſmit any Cauſe to the Ordinary, and ſuch tranſmitting muſt always be to the immediate Superiour: The Dean and Chapter of Salisbury have a large Peculiar within the Limits of the Dioceſe; but as much out of the Juriſdiction of the Dioceſe of S. as the Dioceſe of London is: The peculiar Juriſdiction of an Archdeacon is not properly a Peculiar, but rather a ſubordinate Juriſdiction; Vid. Hob. 185, 186. and the Remiſſion of the Cauſe muſt be to that Juriſdiction to which the Appeal would lie, in caſe the Cauſe had not been remitted: And a Peculiar primâ facie is to be underſtood of him that has co-ordinate Juriſdiction with the Biſhop: And therefore to determine what Sort of Peculiar this is, would be improper to determine upon Motion; and if your Suggeſtion were right, it were fit for a Prohibition, and the Matter to come in Debate on a Declaration therein.

Vide 1 Cro. 340. 3 Cro. 102. 1 Salk. 40, 41. 3 Lev. 193.

Prohibition might be, if the Suggeſtion were right.

I

Domina

Domina Regina *verſus* Major' de Hereford.

S. C. 2 Salk. 701.

MAndamus to him to ſwear ſuch a one into the Place of Town-Clerk of H. and Return was, That upon Election B. had eighteen Voices, and the Party who ſued the Mandamus but ſeventeen, and that they ſwore in B.

An argumentative Return upon a *Mandamus*, is ill. Vide 2 Salk. 430, 432, 434, 436.

Per Cur', It is a bad Return, becauſe it is argumentative, when it ſhould be expreſs and direct, that he was not choſe: And the Caſe in Sir Thomas Jones was ſaid by Holt, Ch. Juſt. to be a ſtrange Caſe, and contrary to ſubſequent Reſolutions; but if the Mayor had return'd an Election de Facto, and that the Party had given a Bribe to get himſelf choſe, it had been ſomething.

Vide 2 Jo. 177, 178.

Bernardiſton *verſus* Vic' Middleſex.

PLaintiff took out a Writ againſt J. S. and delivered it to the Defendant to be executed: Upon the Arreſt, the Bail-Bond by the Officer was to appear at the Suit of Bernadiſtant, and Bail was put in by that Name, and after a Reddidit ſe by the ſame Name; and the Plaintiff ſued the Sheriff for Eſcape.

Miſnomer, Bail-Bond, and *Reddidit ſe*, variant from the firſt Writ, refuſed Amendment.

And it was moved by Montague, That the Bail-piece and Reddidit ſe, might be made according to the Writ.

But per Cur', It cannot be; for the Bail muſt be according to the Bail-Bond, and not according to the Writ, or the Return of it; and though it be Vitium Scriptoris in the Bond, yet we cannot help it.

Per Cur', It is a great Abuſe in Ejectment, that People make nominal Leſſees Perſons not in rerum naturâ, or at beſt not known to the Defendant; ſo that he thereby may loſe his Coſts. And per omnes, The Attorney that does ſo, ought to pay Coſts; and in this Caſe an Attorney was put to anſwer Interrogatories for ſuch a Practice.

Abuſes in Ejectment as to nominate Leſſees. Vide ante 130, 222. Carth. 3, 204. 277, 288, 391.

Dean *verſus* Crane.

S. C. 1 Salk. 28.

A Note had been made by the Defendant to the Plaintiff's Teſtator above ſix Years before the Action brought for Payment of Money; and upon Non Aſſump' infra ſex Annos, at the Trial before Holt, Ch. Juſt. the Plaintiff gave Evidence of a Promiſe made to himſelf after the Arreſt, and before the Bill exhibited; and whether this Evidence maintained the Declaration was the Queſtion: And the Caſe of Heylin and Haſtings was remember'd, wherein upon Conference with all the Judges of England, it was held, That a Promiſe

Executor declares of a Promiſe to his Teſtator, &c. *Limitation.* Vide ante 25, 240.

Promiſe after the ſix Years brings the Matter out of the Statute of Limitations; that owning the Debt does not go ſo far, but is Evidence of a Promiſe.

Note; Here the Declaration was of a Promiſe to the Teſtator, and the Promiſe in Evidence was to the Executor.

Held that the Evidence did not maintain the Declaration.

And the Court ſaid, Here the Executor might declare of a Promiſe to himſelf: But adjournatur. And in Hillary Term, upon Conference with all the Judges it was held, the Evidence did not maintain the Declaration.

Of filling up a Writ after it is ſealed.

Per Holt, Ch. Juſt. It is illegal to fill up a Writ, after it is ſealed; and whoever is arreſted by Virtue of ſuch a Writ, has an Advantage: But Quære per me, if it be falſe Impriſonment, or to be relieved on Motion.

Peat's *Caſe*.

S. C. 2 Salk. 572.
Ante 228.

Mandamus to admit, &c. teaching Diſſenter to qualify himſelf.

KING moved for a Mandamus to the Juſtices of the Seſſions of the County of Warwick, to admit Peat to take the Oath of Allegiance, and to ſubſcribe according to the Act of Toleration, in order to be qualified to teach a Diſſenting Congregation; and it was granted.

And per Holt, Ch. Juſt. The Party ought to ſuggeſt whatever is neceſſary to entitle him to be admitted; and if that be not done, or if it be done, and the Fact be falſe, that will be good Matter to return.

Williams *verſus* Hoskins.

Vide 1 Salk. 52.

Ante 263.

Sci' fa' upon a Judgment in Ejectment denied to be amended.

See Carth. 70, 76, 367, 570.

JUdgment in Ejectment was for two Meſſuages, and after a Year a Sci' fac' upon it recited a Judgment of one Meſſuage only; and to this Nul tiel Record was pleaded; and it was moved to amend it.

But per Cur', It cannot be; for this is a good Writ for any Thing that does appear on the Face of it; and for that, if there were a Judgment for one Meſſuage, this Writ would be a good Writ to revive: So being good in it ſelf, though not oppoſite to this Purpoſe, to amend would be to make a new Writ, or to alter a good Writ, and fit it to another Purpoſe; and to amend this Writ, would falſify the Defendant's Plea, which was good at the Time when it was pleaded; and for that this ought not to be, the Caſe of Napiere and Sir John Germaine was quoted, where after Miſnomer pleaded, the Court refuſed to amend, becauſe it would falſify the Plea: But if the Fault had appear'd in the very Writ, it might be amended; and tandem the Plaintiff for his Expedition took another Writ.

Ante 263, 284, 286.

So Plaintiff took out a new Writ.

And Per Cur' That he might do without getting this quaſh'd; for if this Writ abates, then it is not the ſame Cauſe. Vid. antea.

Linch *verſus* Hooke.

S. C. 1 Salk. 7.

SHE was arreſted by the Name of Minors, and gave Bail-Bond by that Name, and now would plead Miſnomer.

Vide ante 225. A Feme, after Bail-Bond given, may plead Miſnomer, &c. Vid. 154, 225.

And per Cur', If one be arreſted by a wrong Name, and brought into Court, he may plead Miſnomer: And if Feme Covert be arreſted by a wrong Name, and give Bail-Bond, yet ſhe may plead Miſnomer; for her Bond being that of Feme Covert, ſhe may plead non eſt Factum to it; ideo it will not eſtop her. 1 Vent. 13. Cro. El. 198, 249, 583.

Domina Regina *verſus* Hannon.

Vide 1 Salk. 379. Ante 42, 61, 182, 301. In an Indictment *Communis Decept'*, &c. is too general 1 Lev. 299. 1 Vent. 97, 104. 1 Mod. 71, 288. 2 Keb. 687. 1 Salk. 382. Fareſt. 52. 1 Hawk. 243, 244. 1 Sid. 282. Indictment quaſh'd.

HE was indicted, for that being a communis Deceptor of the Queen's People, he came to the Wife of B. and made her believe he had ſold Part of a Ship to her Husband, and upon that account got ſeveral Sums of Money from her.

Per Cur', Communis Deceptor is too general, and ſo is communis Oppreſſor, Perturbator, &c. and ſo of all other (except Barretor and Scold) without adding of particular Inſtances; and the particular Inſtance alledged here, is of a private Nature: If he had made uſe of any Falſe Token, it would be otherwiſe.

Et caſſetur per Cur'.

Tenant *verſus* Goldwin.

S. C. 1 Salk. 21, 360.

Caſe, for not repairing the Wall of his Vault, &c. Vide ante 244, 245.

IN Caſe, the Plaintiff declared, That ſuch a Day and Year he was poſſeſſed, and yet is poſſeſſed of a Meſſuage ſituate in ſuch a Place for a certain Number of Years yet not ended, and alſo of a Cellar Parcel thereof: Which ſaid Cellar lies, and all the aforeſaid Meſſuage did lie, contiguous to the Meſſuage of the Defendant in the Pariſh aforeſaid; and from a Vault, Parcel of the Defendant's Meſſuage, was wont to be ſeparated by a ſtrong thick Wall, which to the Meſſuage of the Defendant did belong, and by the Defendant for all the Time aforeſaid ought to be repaired: But that the Defendant, Machinans, &c. though often requeſted to repair the ſaid Wall, ſo negligently kept it in Repair, that for Default of Care in him, and repairing of the ſame, the Filth of the ſaid Vault, by the Decay and Breach of the ſaid Wall, in the ſaid Cellar did flow, and fill the ſame for ſuch a Time, by which the Plaintiff loſt the Uſe of his Cellar, &c. And the whole Queſtion was, Whether the Declaration was good to entitle the Plaintiff to this Action? Becauſe, as was objected, it was to put a Charge upon the Defendant, which could not be but by Preſcription; and none was laid here, nor was it ſaid the Meſſuage was

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Vide Show. 64. 3 Lev. 133. 3 Mod. 51. 52, 132, 294. Pal. 290. Cro. Car. 499.

an ancient Meſſuage capable of a Preſcription: But in Maintenance of the Declaration, and that it was well, being for a Tort to his Poſſeſſion, was quoted 1 Cro. 575. 3 Lev. 266. it was for ſtopping a Way which the Plaintiff habere frui & uti debuit over the Defendant's Meadow, without making any Title to the Way, but merely upon the Poſſeſſion; and held it would be good upon Demurrer.

A Difference between charging a Wrong-doer, and the Tenant of the Land.

And per quoſdam, Upon a ſpecial Demurrer; and is ſo much the ſtronger, for that it was a Charge againſt common Right; and there is Difference between charging a Wrong-doer, and the Tenant of the Land in which one would lay the Charge; beſides, the Law has Reſpect to the Nature of the Charge, as whether it ariſes by the Act of the Party, or by Act in Law: As in Aſſize for a Rent-charge againſt the Tenant of the Land, the Plaintiff muſt ſhew his Title; otherwiſe it is in Caſe of Aſſize for Rent-Service; and the Reaſon of the Difference is, becauſe one is of common Right, and the other not. 35 H. 6. 7. 27 H. 6. 15. a. So in Aſſize of Common in Groſs, there muſt be a Title made to the Plaintiff; ſecus it is of Common appendant, becauſe it is by Act in Law; and though it may be by Preſcription, yet that is but ſubſequent Evidence, and not the Cauſe and Foundation of it.

For not Repairing the Highways. Carth. 212, 451.

If the Hundred be indicted for not keeping the Highway in Repair, it need not be ſaid how it is chargeable; but if it were againſt a particular Perſon, it is otherwiſe: So here, if this Action were for not Repairing another Man's Houſe, or ſuch a Highway, there would be Reaſon that the Plaintiff muſt ſhew a Title, and a ſpecial Reaſon of the Charge, becauſe it would be to impoſe a Charge upon him againſt common Right: But here it is to repair his own Houſe, which of common Right he is bound to do; and every Body by Law is ſo far bound to repair his Houſe, that through want thereof another be not prejudiced.

Writ *de Domo reparanda, &c.*

At Common Law, if there be two Jointenants of a Houſe, and it wants Repairs, a Writ De Reparatione faciendâ will lie for the one againſt the other; ſo if the Houſe of one be likely to fall to the Prejudice of another Man's Houſe, a Writ De Domo reparanda will lie, and it is no Matter whether it be an ancient Houſe, or a new one: But if the one were an old ruinous Houſe, and a new Houſe be built near, it will not lie; becauſe the Word Debet in the Writ would exclude him, and the Word Solet in the Writ may be left out: Reg. 153. b. 2 Inſt. 404. Moore 374. 11 Co. 82. Weſtm. 2. c. 24.

Waſte by Leſſee.

If Leſſee for Years build a Houſe, it is Waſte; and to let it fall is a new Waſte; Keilw. 98.

Tenants of Rooms.

Held on Debate, that if one Man has the upper Rooms of a Houſe, and another has the Foundation and lower Rooms, and the upper Rooms be out of Repair, the Owner of the lower Rooms has an Action againſt him that has the upper Rooms; and ſo it ſhall be vice verſa, for Non-repair of the Foundation: And we ſay, the Wall

Solebat reparari.

Solebat reparari, which Word is as ſtrong as Conſuevit, and takes away all Intendment or Doubt that it was a new Houſe: So is the Caſe in 3 Mod.------ and the Caſe of Roſwell and Pryor was after

Vide ante 20.

Verdict, and would otherwiſe have been ill. Vid. 6 Ed. 4. Fitz. Treſp. 110,

One was cutting down his Hedge, and it fell upon the Plaintiff's Ground; it is no Good Plea to say, that it fell against his Will; but the Defendant ought to shew that he did what he could to hinder it, and that he removed it with all Speed.

Against this were quoted the Cases of St. John *v.* Moody, 1 Vent. 274. If Assize be for Rent against Tertenant, the Plaintiff is compellable to make a Title; otherwise if it be brought against the Person of the Rent: If one nail Boards to my Window, I need not in an Action for the same shew my Title; but if a Man, who has Ground close to my House, in asserting his Right, build in my Light, there I must shew my Right to have an Action against him for it; upon which Reason is Cro. Jac. 43. Dent *v.* Oliver's Case, for hindering the Plaintiff from taking Toll in his Fair, without shewing any Title to it; good because against a Wrong-doer.

Obj. That Plaintiff ought to shew his Right, &c. Ante 116. Vide 2 Lev. 148. 3 Keb 528, 531. 1 Vent. 214. 319. 2 Vent. 138, 185, 288, 292.

Holt, Ch. Just. The Case of Sands and Trefusis is not like this; for there the Solebat goes to the Currere, which is the Thing complain'd of; and Solebat is of an incertain Signification, and properly goes to repeated Acts; and it is said the Wall Solebat reparari, and yet it is a permanent Thing, and therefore it is very improper to say a permanent Thing Solebat. And he allowed, that formerly and still there is a Difference between charging a Wrong-doer, and the Tenant of the Land; for to charge a Tertenant, one must make Title by Grant or Prescription, but none need be made against a Wrong-doer: And formerly it was thought necessary to maintain Case against Tertenant for stopping a Way, to shew Title; but the contrary has been holden since; Vid. Brit and Stroud,----- and that as well on Demurrer, as after Verdict; but I know no Case where one puts a Charge upon another, except it be of common Right, but he ought to shew Title, as in case of repairing one's House: But if I have a House of Office in my Ground walled, and no Cellar is contiguous to it, and another digs a Cellar close to my Wall, which stands well till you have dug your Cellar, it seems hard to bring a greater Charge upon me, by his digging his Cellar contiguous to my Wall, whereby my Wall is in its Nature become weaker: Suppose one Man has a House, and Cellar contiguous to it, and one Wall serves for both, and he sells the Cellar; Who shall repair the Wall? Or suppose this Cellar was made after the Vault, and the Wall thereof; for the one Party's making a Wall, shall not take away the Owner of the contiguous Soil's Liberty of digging a Cellar; but such digging ought not to bring a greater Charge upon the other.

Vide 2 Show. 243. 2 Cro. 43, 123. 3 Cro. 325, 499, 575. 2 Vent. 186, 187, 350. *Per* C. J. *Solebat* is of an incertain Signification, and here improper. 4 Mod. 418. Vide ante 19. Cases put.

Gould Just. Most certain there are a great many Cases, that if a Man declares that he ought to have Common, &c. if it be against the Tertenant, or Owner of the Soil, there ought to be a Title made, 1 Vent. 319, 356. but latter Cases have gone otherwise; Vid. Matthew's and Baker's Case, and Plottney and Slaughter, Hill. 4 W. & M. Roll. 1771. And here it is said, He ought to repair; and that Word, ought, will bring the Matter in Evidence, and the Difference is between a Declaration, and a Plea in Bar. 2 Vent. 185.

Per Gould Just. as to making it a Title. That the Word [*ought*] will bring the Matter in Evidence.

Per Cur', Declaration good, but not upon the Word *Solebat*.

And at another Day, per tot' Cur', The Declaration is good; for there is a sufficient Cause of Action appearing in it, but not upon the Word Solebat; but if the Defendant has a House of Office inclosed with a Wall which is his, he is of common Right bound to use it so as not to annoy another; and there is a great Diversity between a Prescription to put a Charge upon a Man to repair his Fence, and to excuse one from a Trespass, for such Charge must be by Prescription But the Reason here is, that one must use his own so as thereby not to hurt another; and as of common Right one is bound to keep his Cattle from trespassing on his Neighbour, so he is bound to use any Thing that is his, so as not to hurt another by such User. If a Man has two Houses, one of which has a House of Office that is kept in by the Wall of the same House from a Cellar in the other, and he sells the House to which the House of Office does belong, the Buyer is to keep it in good Repair, so as not to prejudice the Vendor's House; for he is so to use it as not to hurt another.

Vide 1 Salk. 22, 360. Cases between Buyer and Vendor of Houses, &c. Ante 245.

Suppose one sells a Piece of Pasture lying open to another Piece of Pasture, which the Vendor has; Vendee is bound to keep his Cattle from running into the Vendor's Piece; so of Dung, or any Thing else.

When Vendee must defend his Cellar.

If a Man erects a House of Office, to which there is contiguous a vacant Piece of Ground which is his, and by which the House of Office is kept in; there if he sells the vacant Ground, and Vendee digs a Cellar in it, as he may do, there he must defend his Cellar against the House of Office.

1 Lev. 122, 239, 248. 2 Lev. 194. 1 Mod. 55. 2 Sal. 459. Carth. 454, 455. Poph. 170. 1 Sid. 167. Raym. 87. Hob. 131. Ante 116. Hutt. 136. 1 Bulst. 116. 2 Keb. 825. 1 Cro. 419. Where Vendor reserves not the Benefit of Lights, &c. Carthew 454, 455. Plaintiff might have declared better.

If a Man builds next to a vacant Piece of Ground of his own, and then sells the new House, keeping the Ground in his own Hands, he cannot build upon the waste Ground so as to stop the Lights of the House; for by Sale of the House, all the Lights and all Necessaries to make them useful, pass; for by Sale of the House, all the Convenience it has will pass; and as he himself cannot build to the Prejudice of the new House so sold, so cannot the Vendee of the vacant Ground do it: But if in that Case he had sold the vacant Ground, without reserving the Benefit of the Lights, the Court doubted in that Case that Vendee might build so as to stop the Lights of the Vendor, because he parted with the Ground without reserving the Benefit of the Lights; for that Case differs from that of Palmer and Flechier: And they said they doubted in the Case in Keilw. 98. where it is held, that the Owner of the lower Rooms in a House is bound to repair the Foundation: There is indeed a Writ in Nat. Brevium 127. to a Mayor, to command him that has the lower Rooms to repair the Foundation, and him that has a Garret to repair the Roof; but that is grounded upon a Custom: And the Declaration would be better to say only, That the Wall, and House of Office, are the Defendant's; and that through Default of him, the Filth ran into your Cellar.

Sed Jud' pro Quer'.

Et Jud' pro' Quer' per totam & plen' Cur'.

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